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SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

APPENDIX 12(a)

Published Writings

Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*

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If you were looking for a talk tonight about the maddening maze of our civil justice system—its exuberant procedures that price so many out of court and force those in it to wade wearily through years and fortunes to win a judgment—you came to the right place. Almost.

When Professor Adler kindly asked me to share a few words with you tonight, that was my intended topic. I'd just finished penning opinions in two cases. One was older than my law clerks and had outlived many of the plaintiffs. The other had bounced up and down the federal court system for so long it was nearly as ancient as Cleveland's championship drought. You know you're in trouble when the Roman numeral you use to distinguish your opinion from all the others of the same name draws closer to X than I. Needless to say, I was eager to talk about civil justice reform.

But that was then and this is now. Since Professor Adler extended his invitation, the legal world suffered a shock with the loss of Justice Scalia. A few weeks ago, I was taking a breather in the middle of a ski run with little on my mind but the next mogul field when my phone rang with the news. I immediately lost what breath I had left, and I am not embarrassed to admit that I couldn't see the rest of the way down the mountain for the tears. From that moment it seemed clear to me there was no way I could give a speech about the law at this time without reference to that news.

So tonight I want to say something about Justice Scalia's legacy. Sometimes people are described as lions of their profession and I have difficulty understanding exactly what that's supposed to mean. Not so with Justice Scalia. He really was a lion of the law: docile in private life but a ferocious fighter when at work, with a roar that could echo for miles. Volumes rightly will be written about his contributions to American law, on the bench and off. Indeed, I have a hard time thinking of another Justice who has penned so many influential articles and books about the law even while busy deciding cases. Books like *A Matter of*

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Interpretation[1] and *Reading Law*[2] that are sure to find wide audiences for years to come.

But tonight I want to touch on a more thematic point and suggest that perhaps the great project of Justice Scalia's career was to remind us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best. As Justice Scalia put it, "[i]f you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."[3]

It seems to me there can be little doubt about the success of this great project. We live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret texts—whether constitutional, statutory, regulatory, or contractual.[4] And as Justice Kagan acknowledged in her Scalia Lecture at Harvard Law School last year, "we're all textualists now."[5] Capturing the spirit of law school back when she and I attended, Justice Kagan went on to relate how professors and students often used to approach reading a statute with the question "[G]osh, what should this statute be," rather than "[W]hat do the words on the paper say?"[6]—in the process wholly conflating the role of the judge with the role of the legislator. Happily, that much has changed, giving way to a return to a much more traditional view of the judicial function, one in which judges seek to interpret texts as reasonable affected parties might have done rather than rewrite texts to suit their own policy preferences. And, as Justice Kagan said, "Justice Scalia had more to do with this [change] than anybody"

1. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).
2. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).
3. Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005).
4. *See* SCALIA, *supra* note 1, at 13.
5. Justice Elena Kagan, The Scalia Lecture at Harvard Law School (Nov. 18, 2015).
6. *Id.*

because he "taught" (or really reminded) "everybody how to do statutory interpretation differently."[7] And one might add: correctly.

I don't think there is any better illustration of Justice Kagan's point than the very first opinion the Supreme Court issued after Justice Scalia's passing. That case—*Lockhart v. United States*[8]—involved the question how best to interpret a statute imposing heightened penalties for three types of offenses—"[1] aggravated sexual abuse, [2] sexual abuse," and "[3] abusive sexual conduct involving a minor or ward."[9] The majority opinion by Justice Sotomayor relied on the rule of the last antecedent and held that the phrase at the end of the sentence—"involving a minor or ward"—modifies only the last offense listed. So that the statute's penalties apply whenever there is aggravated sexual abuse, or sexual abuse, or whenever there is abusive sexual conduct involving a minor or ward.[10] In dissent, Justice Kagan noted that, in "ordinary" English usage, the rule of the last antecedent bears exceptions and that sometimes a modifying phrase at the end of a sentence reaches further back to earlier antecedents too.[11] And, in Justice Kagan's estimation, an ordinary and average reader of the language at issue here would have thought the phrase "involving a minor or ward" does just that, modifying not just its immediate but all three of its antecedents. So for the statutory penalties to apply, Justice Kagan argued, the government must always prove some kind of sexual abuse involving a minor.[12] In support of her suggestion that an exception rather than the rule should apply to this particular statutory language, Justice Kagan offered this gem of an analogy: "Imagine a friend told you that she hoped to meet 'an actor, director, or producer involved with the new Star Wars movie.' You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander."[13] So too here, the Justice reasoned.

As you can see, the two sides in *Lockhart* disagreed pretty avidly and even colorfully. But notice, too, neither appealed to its views of optimal social policy or what the statute "should be." Their dispute focused instead on grammar, language, and statutory structure and on what a reasonable reader in the past would have taken the statute to

7. *Id.*

8. 136 S. Ct. 958 (2016).

9. *Id.* at 961 (quoting 18 U.S.C. § 2252(b)(2)).

10. *Id.* at 963.

11. *Id.* at 969 (Kagan, J., dissenting). For another example of what I thought was an interesting encounter with the rule of last antecedent, its exceptions, and a misplaced modifier, see *Payless Shoesource, Inc. v. Travelers Cos.*, 585 F.3d 1366, 1369 73 (10th Cir. 2009).

12. *Lockhart*, 136 S. Ct. at 969 (Kagan, J., dissenting).

13. *Id.*

mean—on what "the words on the paper say." In fact, I have no doubt several Justices found themselves voting for an outcome they would have rejected as legislators. Now, one thing we know about Justice Scalia is that he loved a good fight—and it might be that he loved best of all a fight like this one, over the grammatical effect of a participial phrase. If the Justices were in the business of offering homages instead of judgments, it would be hard to imagine a more fitting tribute to their colleague than this. Surely when the Court handed down its dueling textualist opinions the Justice sat smiling from some happy place.

But of course every worthwhile endeavor attracts its critics. And Justice Scalia's project is no exception. The critics come from different directions and with different agendas. Professor Ronald Dworkin, for example, once called the idea that judges should faithfully apply the law as written an "empty statement" because many legal documents like the Constitution cannot be applied "without making controversial judgments of political morality in the light of [the judge's] own political principles."[14] My admirable colleague, Judge Richard Posner, has also proven a skeptic. He has said it's "naive" to think judges actually believe everything they say in their own opinions; for they often deny the legislative dimension of their work, yet the truth is judges must and should consult their own moral convictions or consequentialist assessments when resolving hard cases.[15] Immediately after Justice Scalia's death, too, it seemed so many more added their voices to the choir. Professor Laurence Tribe, for one, wrote admiringly of the Justice's contributions to the law.[16] But he tempered his admiration by seemingly chastising the Justice for having focused too much on the means by which judicial decisions should be made and not enough on results, writing that "interpretive methods" don't "determine, much less eclipse, outcome[s]."[17]

Well, I'm afraid you'll have to mark me down as naive, a believer that empty statements can bear content, and an adherent to the view that outcomes (ends) do not justify methods (means). Respectfully, it

14. Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37.

15. Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)). *See generally* RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013); RICHARD A. POSNER, HOW JUDGES THINK (2008); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983); Richard A. Posner, *Statutory Interpretation In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

16. Laurence H. Tribe, *The Scalia Myth*, N.Y. REV. BOOKS DAILY (Feb. 27, 2016, 11:01 AM), http://www.nybooks.com/daily/2016/02/27/the-scalia-myth/ [https://perma.cc/3VYM-DLAN].

17. *Id.*

seems to me an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function. That, yes, judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome, and engaged perhaps in some Benthamite calculation of pleasures and pains along the way. Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure. Let me offer you tonight three reasons for my faith on this score.

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First, consider the Constitution. Judges, after all, must do more than merely consider it. They take an oath to uphold it. So any theory of judging (in this country at least) must be measured against that foundational duty. Yet it seems to me those who would have judges behave like legislators, imposing their moral convictions and utility calculi on others, face an uphill battle when it comes to reconciling their judicial philosophy with our founding document.

Consider what happened at the constitutional convention. There the framers expressly debated a proposal that would have incorporated the judiciary into a "council of revision" with sweeping powers to review and veto congressional legislation. A proposal that would have afforded judges the very sorts of legislative powers that some of Justice Scalia's critics would have them assume now. But that proposal went down to defeat at the hands of those who took the traditional view that judges should expound upon the law only as it comes before them, free from the bias of having participated in its creation and from the burden of having to decide "the policy of public measures."[18] In place of a system that mixed legislative and judicial powers, the framers quite deliberately chose one that carefully separated them.

The Constitution itself reflects this choice in its very design, devoting distinct articles to the "legislative Power[]"[19] and the "judicial Power,"[20] creating separate institutions for each, and treating those powers in contradistinction. Neither were these separate categories empty ones to the founding generation. Informed by a hard earned intellectual inheritance—one perhaps equal parts English common law experience and Enlightenment philosophy—the founders understood the legislative power as the power to prescribe new rules of general applicability for the future. A power properly guided by the will of the

18. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 10 11 (7th ed. 2015).

19. *See* U.S. CONST. art. I.

20. *See id.* art. III.

people acting through their representatives, a task avowedly political in nature, and one unbound by the past except to the extent that any piece of legislation must of course conform to the higher law of the Constitution itself.[21]

Meanwhile, the founders understood the judicial power as a very different kind of power. Not a forward-looking but a backward-looking authority. Not a way for making new rules of general applicability but a means for resolving disputes about what existing law is and how it applies to discrete cases and controversies. A necessary incident to civil society to be sure but a distinct one.[22] One that calls for neutral arbiters, not elected representatives. One that employs not utility calculi but analogies to past precedents to resolve current disputes.[23] And a power constrained by its dependence on the adversarial system to identify the issues and arguments for decision—a feature of the judicial power that generally means the scope of any rule of decision will be informed and bounded by the parties' presentations rather than only by the outer limits of the judicial imagination.[24] As the founders understood it, the task of the judge is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have done when engaged in the activity underlying the case or controversy—not to amend or revise the law in some novel way.[25] As Blackstone explained, the job of the judge in a government of separated powers is not to "make" or "new-model" the law.[26] Or as Hamilton later echoed, it is for the judiciary to exercise

21. *See generally* THE FEDERALIST NO. 44 (James Madison); THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

22. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 24 (1995); THE FEDERALIST NO. 81 (Alexander Hamilton).

23. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles . . . ."); THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . .").

24. *See* THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 78 (Alexander Hamilton).

25. *See* John Finnis, Judicial Power: Past, Present and Future, Address Before the Policy Exchange (Oct. 20, 2015), http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/ [https://perma.cc/R9P3-SLSV]; Michael H. McGinley, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).

26. 3 WILLIAM BLACKSTONE, COMMENTARIES *327.

"neither FORCE nor WILL, but merely judgment."[27] Or again, as Marshall put it, it is for the judiciary to say (only) "what the law is."[28]

So many specific features of the Constitution confirm what its larger structure suggests. For example, if the founders really thought legislators free to judge and judges free to legislate, why would they have gone to such trouble to limit the sweep of legislative authority—to insist that it pass through the arduous process of bicameralism and presentment—only to entrust judges to perform the same essential function without similar safeguards? And why would they have insisted on legislators responsive to the people but then allowed judges to act as legislators without similar accountability? Why, too, would they have devised a system that permits equally unrepresentative litigants to define the scope of debate over new legislation based on their narrow self-interest? And if judges were free to legislate new rules of general applicability for the future, why would the founders have considered precedent as among the primary tools of the judicial trade rather than more forward-looking instruments like empirical data? And why would they have entrusted such decisions to a single judge, or even a few judges, aided only by the latest crop of evanescent law clerks, rather than to a larger body with more collective expertise?

In response to observations like these, Judge Posner has replied that "American appellate courts are councils of wise elders and it is not *completely insane* to entrust them with responsibility for deciding cases in a way that will produce the best results" for society.[29] But, respectfully, even that's not exactly a ringing endorsement of judges as social utility optimizers, is it? I can think of a lot of things that aren't *completely* insane but still distinctly ill-advised (or so I try to convince my teenage daughters). And, respectfully too, wouldn't we have to be at least a little crazy to recognize the Constitution's separation of judicial and legislative powers, and the duty of judges to uphold it, but then applaud when judges ignore all that to pursue what they have divined to be the best policy outcomes? And crazy not to worry that if judges consider themselves free to disregard the Constitution's separation of powers they might soon find other bothersome parts of the Constitution equally unworthy of their fidelity?

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This first point leads to a second. It seems to me that the separation of legislative and judicial powers isn't just a formality dictated by the Constitution. Neither is it just about ensuring that two institutions with basically identical functions are balanced one against the other.

27. THE FEDERALIST NO. 78 (Alexander Hamilton).

28. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

29. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 11 12 (1996) (emphasis added).

To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights later enumerated in the Constitution and its amendments.[30] Though much could be said on this subject, tonight permit me to suggest a few reasons why recognizing, defending, and yes policing, the legislative-judicial divide is critical to preserving other constitutional values like due process, equal protection, and the guarantee of a republican form of government.

Consider if we allowed the legislator to judge. If legislatures were free to act as courts and impose their decisions retroactively, they would be free to punish individuals for completed conduct they're unable to alter. And to do so without affording affected individuals any of the procedural protections that normally attend the judicial process. Raising along the way serious due process questions: after all, how would a citizen ever have fair notice of the law or be able to order his or her affairs around it if the lawmaker could go back in time and outlaw retroactively what was reasonably thought lawful at the time?[31] With due process concerns like these would come equal protection problems, too. If legislators could routinely act retroactively, what would happen to disfavored groups and individuals? With their past actions known and unalterable, they would seem easy targets for discrimination. No doubt worries like these are exactly why the founders were so emphatic that legislation should generally bear only prospective effect—proscribing bills of attainder and ex post facto laws criminalizing completed conduct[32]—and why baked into the "legislative Power" there's a presumption as old as the common law that *all* legislation, whether criminal or civil, touches only future, not past, conduct.[33]

30. *See* THE FEDERALIST NO. 47 (James Madison); THE FEDERALIST NOS. 79, 81 (Alexander Hamilton); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990 91, 1031 34 (2006); Kevin Mooney, *Supreme Court Justice Scalia: Constitution, Not Bill of Rights, Makes Us Free*, THE DAILY SIGNAL (May 11, 2015), http://dailysignal.com/2015/05/11/supreme-court-justice-scalia-constitution-not-bill-of-rights-makes-us-free/ [https://perma.cc/UN6Q-LNVS] ("'Every tin horn dictator in the world today, every president for life, has a Bill of Rights,' said Scalia . . . . 'That's not what makes us free; if it did, you would rather live in Zimbabwe. But you wouldn't want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word 'constitution;' it means structure.' . . . 'The genius of the American constitutional system is the dispersal of power,' he said. 'Once power is centralized in one person, or one part [of government], a Bill of Rights is just words on paper.'").

31. *See* Barkow, *supra* note 30, at 1033.

32. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; *see also* Barkow, *supra* note 30, at 1012 14; THE FEDERALIST NO. 84 (Alexander Hamilton).

33. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and

Now consider the converse situation, if we allowed the judge to act like a legislator. Unconstrained by the bicameralism and presentment hurdles of Article I, the judge would need only his own vote, or those of just a few colleagues, to revise the law willy-nilly in accordance with his preferences and the task of legislating would become a relatively simple thing.[34] Notice, too, how hard it would be to revise this so-easily-made judicial legislation to account for changes in the world or to fix mistakes. Unable to throw judges out of office in regular elections, you'd have to wait for them to die before you'd have any chance of change. And even then you'd find change difficult, for courts cannot so easily undo their errors given the weight they afford precedent.[35] Notice finally how little voice the people would be left in a government where life-appointed judges are free to legislate alongside elected representatives. The very idea of self-government would seem to wither to the point of pointlessness. Indeed, it seems that for reasons just like these Hamilton explained that "liberty can have nothing to fear from the judiciary alone," but that it "ha[s] every thing to fear from [the] union" of the judicial and legislative powers.[36] Blackstone painted an even grimmer

embodies a legal doctrine centuries older than our Republic."); De Niz Robles v. Lynch, 803 F.3d 1165, 1169 70 (10th Cir. 2015); *see also* 3 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 530 31 (Travers Twiss ed. & trans., 1880) (1257); 1 WILLIAM BLACKSTONE, COMMENTARIES *46 ("All laws should be therefore made to commence in futuro, and be notified before their commencement."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (Melville M. Bigelow ed., 1994) (1833) ("[R]etrospective laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact."); Adrian Vermeule, Essay, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 408 (2001).

34. *See generally* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191 (2007).

35. *See, e.g.*, Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam) (declining to overrule *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), due to the reliance interests built up around that decision); *see also Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1149 51 (10th Cir. 2016) (Gorsuch, J., concurring); BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (forthcoming).

36. THE FEDERALIST NO. 78 (Alexander Hamilton); *see also id.* ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.").

picture of a world in which judges were free to legislate, suggesting that there "men would be[come] slaves to their magistrates."[37]

In case you think the founders' faith in the liberty-protecting qualities of the separation of powers is too ancient to be taken seriously, let me share with you the story of Alfonzo De Niz Robles.[38] Mr. De Niz Robles is a Mexican citizen, married to a U.S. citizen, and the father of four U.S. citizens. In 1999, he agreed to depart the country after being apprehended by immigration authorities. For two years his wife tried without luck to secure him a spousal visa. At that point, Mr. De Niz Robles decided to return to the United States and try his own luck at applying for lawful residency. In doing so, though, he faced two competing statutory provisions that confused his path. One appeared to require him to stay outside the country for at least a decade before applying for admission because of his previous unlawful entry.[39] Another seemed to suggest the Attorney General could overlook this past transgression and adjust his residency status immediately.[40] In 2005, my colleagues took up the question how to reconcile these two apparently competing directions. In the end, the Tenth Circuit held that the latter provision controlled and the Attorney General's adjustment authority remained intact.[41] And it was precisely in reliance on this favorable judicial interpretation that Mr. De Niz Robles filed his application for relief.

But then a curious thing happened. The Board of Immigration Appeals (BIA) issued a ruling that purported to disagree with and maybe even overrule our 2005 decision, one holding that immigrants like Mr. De Niz Robles cannot apply for an immediate adjustment of status and must instead always satisfy the ten-year waiting period.[42] In support of its view on this score, the BIA argued that the statutory scheme was ambiguous, that under *Chevron* step 2 it enjoyed the right to

37. 4 WILLIAM BLACKSTONE, COMMENTARIES *371; *see also* 1 CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 174 (Thomas Nugent trans., M. D'Alembert rev. ed. 1873) (1748) ("Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.").

38. *See generally De Niz Robles*, 803 F.3d 1165. For another encounter with similar issues but along the executive-legislative rather than the legislative-judicial divide, see *United States v. Nichols*, 784 F.3d 666, 667 77 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

39. 8 U.S.C. § 1182(a)(9)(C).

40. *Id.* § 1255(i)(2)(A).

41. Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1300 01 (10th Cir. 2005), *amended and superseded on reh'g*, 453 F.3d 1237, 1244 (10th Cir. 2005), *disapproved by* Padilla-Caldera v. Holder, 637 F.3d 1140, 1153 (10th Cir. 2011).

42. *In re* Briones, 24 I. & N. Dec. 355, 370 71 (B.I.A. 2007).

exercise its own "delegated legislative judgment," that as a matter of policy it preferred a different approach, and that it could enforce its new policy retroactively to individuals like Mr. De Niz Robles.[43] So that, quite literally, an *executive* agency acting in a faux-*judicial* proceeding and exercising delegated *legislative* authority purported to overrule an existing *judicial* declaration about the meaning of existing law and apply its new *legislative* rule retroactively to already completed conduct. Just describing what happened here might be enough to make James Madison's head spin.

What did all this mixing of what should be separated powers mean for due process and equal protection values? After our decision in 2005, Mr. De Niz Robles thought the law gave him a choice: begin a ten-year waiting period outside the country or apply for relief immediately. In reliance on a judicial declaration of the law as it was, he unsurprisingly chose the latter option. Then when it turned to his case in 2014, the BIA ruled that that option was no option at all.[44] Telling him, in essence, that he'd have to start the decade-long clock now—even though if he'd known back in 2005 that this was his only option, his wait would be almost over. So it is that, after a man relied on a judicial declaration of what the law was, an agency in an adjudicatory proceeding sought to make a legislative policy decision with retroactive effect, in full view of and able to single out winners and losers, penalizing an individual for conduct he couldn't alter, and denying him any chance to conform his conduct to a legal rule knowable in advance.

What does this story suggest? That combining what are by design supposed to be separate and distinct legislative and judicial powers poses a grave threat to our values of personal liberty, fair notice, and equal protection. And that the problem isn't just one of King George's time but one that persists even today, during the reign of King James (Lebron, that is).[45]

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At this point I can imagine the critic replying this way. Sure, judges should look to the traditional tools of text, structure, history, and precedent. But in hard cases those materials will prove indeterminate. So *some* tiebreaker is needed, and that's where the judge's political convictions, a consequentialist calculus, or something else must and should come into play.

Respectfully, though, I'd suggest to you the critics' conclusion doesn't follow from their premise. If anything, replies along these lines

43. *See* Padilla-Caldera v. Holder, 637 F.3d at 1147 52.

44. *See In re* De Niz Robles, No. A074 577 772, 2014 WL 3889484, at *4 (B.I.A. July 11, 2014).

45. Jamie Jackson, *Court of King James*, THE GUARDIAN (Apr. 19, 2008, 8:01 PM), http://www.theguardian.com/sport/2008/apr/20/ussport.news [https://perma.cc/WB87-Z26V].

seem to me to wind up supplying a third and independent reason for embracing the traditional view of judging: it compares favorably to the offered alternatives.

Now, I do not mean to suggest that traditional legal tools will yield a single definitive right answer in every case. Of course Ronald Dworkin famously thought otherwise, contending that a Herculean judge could always land on the right answer.[46] But at least in my experience most of us judges don't much resemble Hercules—there's a reason we wear loose-fitting robes—and I accept the possibility that some hard cases won't lend themselves to a clear right answer.

At the same time, though, I'd suggest to you that the amount of indeterminacy in the law is often (wildly) exaggerated. Law students are fed a steady diet of hard cases in overlarge and overcostly casebooks stuffed with the most vexing and difficult appellate opinions ever issued. Hard cases are, as well, the daily bread of the professoriate and a source of riches for the more perfumed advocates in our profession.[47] But I wonder: somewhere along the way did anyone ever share with you the fact that only 5.6% of federal lawsuits make it all the way to decision in an appellate court?[48] Or that, even among the small sliver of cases that make it so far, over 95% are resolved unanimously by the courts of appeals?[49] Or that, even when it comes to the very hardest cases that remain, the cases where circuit judges do disagree and the Supreme Court grants certiorari, all nine Justices are able to resolve them unanimously about 40% of the time?[50] The fact is, over 360,000 cases are filed every year in our federal courts.[51] Yet in the Supreme Court,

46. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

47. "First year law students understand within a month that many areas of the law are open textured and indeterminate that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments." *The Sotomayor Nomination, Part II*, The Federalist Soc'y Online Debate Series (July 13, 2009) (remarks of Professor Louis M. Seidman), http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-ii [https://perma.cc/B245-DBXS].

48. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 tbl.1 (2004).

49. JONATHAN M. COHEN, INSIDE APPELLATE COURTS 102 (2002).

50. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 817 & fig.A-1 (2015).

51. United States Courts, Federal Judicial Caseload Statistics 2015 (last visited May 20, 2015), http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015 [https://perma.cc/F3D9-YDKP].

a Justice voices dissent in only about 50 cases per year.[52] My law clerks reliably inform me that's about 0.014% of all cases. Focusing on the hard cases may be fun, but doesn't it risk missing the forest for the trees?

And doesn't it also risk missing the *reason* why such a remarkable percentage of cases *are* determined by existing legal rules? The truth is that the traditional tools of legal analysis do a remarkable job of eliminating or reducing indeterminacy. Yes, lawyers and judges may sometimes disagree about which canons of construction are most helpful in the art of ascertaining Congress's meaning in a complicated statute. We may sometimes disagree over the order of priority we should assign to competing canons. And sometimes we may even disagree over the results they yield in particular cases. But when judges pull from the same toolbox and look to the same materials to answer the same narrow question—what might a reasonable person have thought the law was at the time—we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow. And even when a hard case does arise, once it's decided it takes on the force of precedent, becomes an easy case in the future, and contributes further to the determinacy of our law. Truly the system is a wonder and it is little wonder so many throughout the world seek to emulate it.[53]

Besides, it seems to me that even accepting some hard cases remain—maybe something like that 0.014%—it just doesn't follow that we must or should resort to our own political convictions, consequentialist calculi, or any other extra-legal rule of decision to resolve them. Just as Justices Sotomayor and Kagan did in *Lockhart*, we can make our decisions based on a comparative assessment of the various legal clues—choosing whether the rule of the last antecedent or one of its exceptions best fits the case in light of the particular language at hand. At the end of the day, we may not be able to claim confidence that there's a certain and single right answer to every case, but there's no reason why we cannot make our best judgment depending on (and only on) conventional legal materials, relying on a sort of closed record if you will, without peeking to outside evidence. No reason, too, why we cannot conclude for ourselves that one side has the better of it, even if by a nose, and even while admitting that a disagreeing colleague could see it the other way. As Justice Scalia once explained, "[e]very canon is

52. Ryan J. Owens & David A. Simon, *Explaining the Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012) (noting the Court now decides an average of 80 cases per Term); Sunstein, *supra* note 50, at 780 (noting dissents now appear in approximately 60.5% of the Court's decisions).

53. *See generally* SCALIA, *supra* note 1, at 45 46; David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1800 01 (2009) (reviewing RICHARD A. POSNER, HOW JUDGES THINK (2008)).

simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud—not, at least, unless the judge wishes to make it so."[54]

Neither do I see the critics as offering a better alternative. Consider a story Justice Scalia loved to tell. Imagine two men walking in the woods who happen upon an angry bear. They start running for their lives. But the bear is quickly gaining on them. One man yells to the other, "We'll never be able to outrun this bear!" The other replies calmly, "I don't have to outrun the bear, I just have to outrun you."[55] As Justice Scalia explained, just because the traditional view of judging may not yield a single right answer in all hard cases doesn't mean we should or must abandon it. The real question is whether the critics can offer anything better.

About that, I have my doubts. Take the model of the judge as pragmatic social-welfare maximizer. In that model, judges purport to weigh the costs and benefits associated with the various possible outcomes of the case at hand and pick the outcome best calculated to maximize our collective social welfare. But in hard cases don't *both* sides usually have a pretty persuasive story about how deciding in their favor would advance the social good? In criminal cases, for example, we often hear arguments from the government that its view would promote public security or finality. Meanwhile, the defense often tells us that its view would promote personal liberty or procedural fairness. How is a judge supposed to weigh or rank these radically different social goods? The fact is the pragmatic model of judging offers us no *value* or *rule* for determining which costs and benefits are to be preferred and we are left only with a radically underdetermined choice to make. It's sort of like being asked to decide which is better, the arrival of Hue Jackson or the return of LeBron James? Both may seem like pretty good things to the Cleveland sports fan, but they are incommensurate goods, and unless you introduce some special rule or metric there's no way to say for certain which is to be preferred.[56] In just this way, it seems to me that

54. SCALIA, *supra* note 1, at 27; *see also Interview with James Boyd White*, 105 MICH. L. REV. 1403, 1418 (2007) ("[A]s every law student learns, one finds in a very wide range of cases indeed, that arguments rational, persuasive, decent arguments can be made on both sides of the question. The law thus requires real choices from both judges and lawyers, but it informs those choices, which should not be merely a matter of preference or calculation, but should rather express the result of the mind's engagement with the materials of the law . . . .").

55. *See* Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1034 & n.59 (2011).

56. *See generally* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 111 18, 422 23 (2d ed. 2011) (discussing the incommensurability of social goods); JOSEPH RAZ, THE MORALITY OF FREEDOM 321 66 (1986) (same).

at the end of the day the critics who would have us trade in the traditional account of judging for one that focuses on social utility optimization would only have us trade in one sort of indeterminacy problem for another. And the indeterminacy problem invited by the critics may well be a good deal more problematic given the challenges of trying to square their model of judging with our constitutional design and its underlying values. So before we throw overboard our traditional views about the separation of the judicial and legislative roles, it seems to me we might all do well to remember The Bear.[57]

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With the three points I've briefly sketched here tonight, I hope I've given you some sense why I believe Justice Scalia's vision of the "good and faithful judge" is a worthy one. But so far I've discussed mostly principle, not experience. And I run the risk of an objection from those who might suggest that there's more in heaven and earth than is dreamt of in my philosophy.[58] So, as I close, I want to make plain that the traditional account of law and judging not only makes the most sense to me as an intellectual matter, it also makes the most sense of my own lived experience in the law.

My days and years in our shared professional trenches have taught me that the law bears its own distinctive structure, language, coherence, and integrity. When I was a lawyer and my young daughter asked me what lawyers do, the best I could come up with was to say that lawyers help people solve their problems. As simple as it is, I still think that's about right. Lawyers take on their clients' problems as their own; they worry and lose sleep over them; they struggle mightily to solve them. They do so with a respect for and in light of the law as it is, seeking to make judgments about the future based on a set of reasonably stable existing rules. That is not politics by another name: that is the ancient and honorable practice of law.

Now as I judge I see too that donning a black robe means something—and not just that I can hide the coffee stains on my shirts. We wear robes—honest, unadorned, black polyester robes that we (yes) are expected to buy for ourselves at the local uniform supply store—as a reminder of what's expected of us when we go about our business: what

57. And isn't it easier, too, to assess whether a judge does or doesn't offer a persuasive textualist analysis whether Justice Kagan or Justice Sotomayor have the better account of the statutory language in *Lockhart* than to assess a judge's success using some ends-based or efficiency-based methodology, when those methods often rest on contested political or moral convictions or disputed social science data?

58. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5.

Burke called the "cold neutrality of an impartial judge."[59] Throughout my decade on the bench, I have watched my colleagues strive day in and day out to do just as Socrates said we should—to hear courteously, answer wisely, consider soberly, and decide impartially. Men and women who do not thrust themselves into the limelight but who tend patiently and usually quite obscurely to the great promise of our legal system—the promise that all litigants, rich or poor, mighty or meek, will receive equal protection under the law and due process for their grievances.[60] Judges who assiduously seek to avoid the temptation to secure results they prefer. And who do, in fact, regularly issue judgments with which they disagree as a matter of policy—all because they think that's what the law fairly demands.

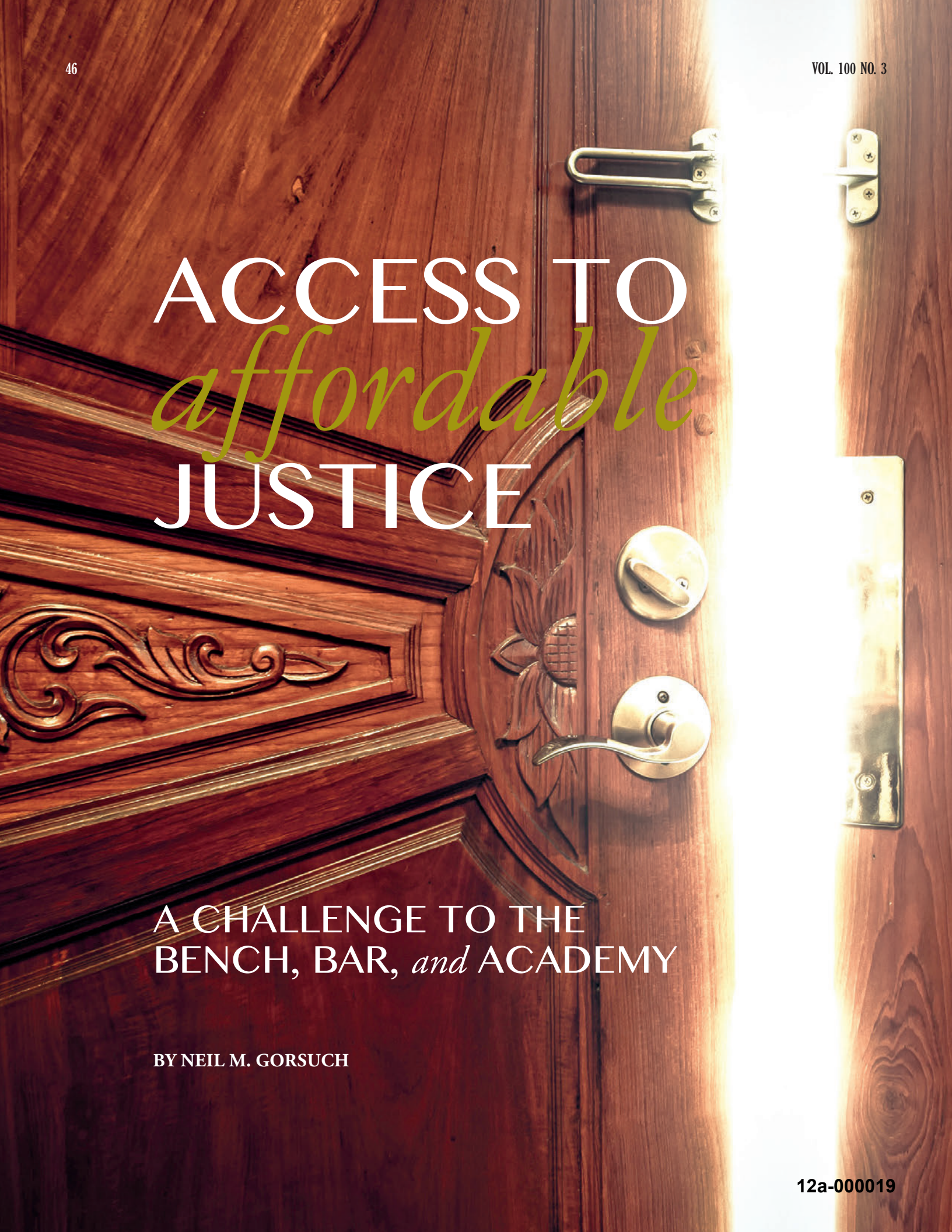
Justice Scalia's defense of this traditional understanding of our professional calling is a legacy every person in this room has now inherited. And it is one you students will be asked to carry on and pass down soon enough. I remember as if it were yesterday sitting in a law school audience like this one. Listening to a newly-minted Justice Scalia offer his Oliver Wendell Holmes lecture titled "The Rule of Law as a Law of Rules."[61] He offered that particular salvo in his defense of the traditional view of judging and the law almost thirty years ago now. It all comes so quickly. But it was and remains, I think, a most worthy way to spend a life.

May he rest in peace.

59. Edmund Burke, *Preface to the Address of M. Brissot to His Constituents*, *in* 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801).

60. *See* 28 U.S.C. § 453 ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.'").

61. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).



ACCESS TO *affordable* JUSTICE

A CHALLENGE TO THE BENCH, BAR, *and* ACADEMY

BY NEIL M. GORSUCH

Most everyone agrees that in the American civil justice system many important legal rights go unvindicated, serious losses remain uncompensated, and those called on to defend their conduct are often forced to spend altogether too much. Eighty percent of the members of the American College of Trial Lawyers report that pretrial costs and delays keep injured parties from bringing valid claims to court.[1] Seventy percent also say attorneys use the threat of discovery and other pretrial costs as a means to force settlements that aren't based on the merits.[2]

The upshot? Legal services in this country are so expensive that the United States ranks near the bottom of developed nations when it comes to access to counsel in civil cases.[3]

The real question is what to do about it.

This paper explores three possible avenues for reform. All three lie within the power of the legal profession to effect. They include revisions to our ethical codes, civil justice rules, and legal education accreditation requirements — possibilities that in turn challenge each of the main elements of our profession: bar, bench, and academy. Each of these avenues of reform holds the promise of either reducing the cost or increasing the output of legal services — in that way making access to justice more affordable. And for that reason, you might think of them as (sort of) market-based solutions.

Now, you might wonder why this paper doesn't address some other angles at change — perhaps most obviously the possibility of increased public financing for legal aid. One reason is that, whatever challenges may be associated with asking a self-regulating profession to reconsider its self-imposed barriers to entry and output restrictions, entering that political and fiscal thicket appears likely to pose even more. Maybe even more importantly, though, on the road to change perhaps we should begin by asking first what we can do on our own and without expense to the public fisc, and whether and to what degree our own self-imposed rules increase the cost of legal services and decrease access to justice in unwarranted ways?

THE REGULATION OF LAWYERS

We lawyers enjoy a rare privilege. We are largely left to regulate our own market, often through rules of our own creation and sometimes through statutes effectively of our own devise.[4] Of course and no matter the industry, even the most well-intentioned regulations can bear negative unintended consequences. Sometimes even the intended consequences of regulations can only be described as rent-seeking. And it seems hard to think our profession might be immune from these risks. Surely many of our self-imposed regulations represent well-intentioned efforts to prevent and police misconduct that risks harm to clients. But you might also wonder if a profession entrusted with the privilege of self-regulation is at least as (or maybe more) susceptible than other lines of commerce to regulations that impose too many social costs compared to their attendant benefits. Consider two examples.

Unauthorized Practice of Law. Marcus Arnold presented himself as a legal expert on AskMe.com, a website that allows anyone to volunteer answers to posted questions.[5] Users of the site rate those who offer advice, and in time they came to rank Arnold as the third most helpful volunteer of legal answers out of about 150 self-identified legal experts. When Arnold later revealed that he was but a high school student, howls emerged from many quarters and his ranking dropped precipitously. Still, his answers apparently continued to satisfy the website's users because soon enough he went on to attain the number one ranking for legal advice, ahead of scores of lawyers. Like a Rorschach test, both supporters and opponents of unauthorized practice of law (UPL) regulations see in this case support for their positions.

When approaching questions about the unauthorized practice of law, you might think it's a natural place to begin by asking what exactly constitutes the practice of law. But that turns out to be a pretty vexing little question. While the ABA offers a set of model rules of professional conduct governing those who engage in the practice of law, it is surely a curiosity that those rules don't attempt to define what constitutes the practice of law in the first place. After all, it's no easy thing to regulate an activity without first defining what that activity is.

The fact is the job of defining what does and doesn't constitute the practice of law has largely been left to state statutes. And history reveals that the definitions states have adopted, usually at the behest of local bar associations, are often breathtakingly broad and opaque — describing the practice of law as, and prohibiting nonlawyers from participating in, the "represent[ation]" of others, or (even more circularly) any "activity which has traditionally been performed exclusively by persons authorized to practice law."[6] More than a few thoughtful people have wondered if these sorts of sweeping and opaque restrictions may be subject to constitutional challenge on vagueness,[7] First Amendment,[8] or due process grounds.[9]

But however that may be, about one thing there can be little doubt. In recent years, lawyers have used the expansive UPL rules they've sought and won to combat competition from outsiders seeking to provide routine but arguably "legal" services at low or no cost to consumers. Indeed, by far and away most UPL complaints come from lawyers rather than clients and involve no specific claims of injury.[10] Take recent cases involving Quicken Family Lawyer and LegalZoom. Those firms sell software with forms for wills, leases, premarital agreements, and dozens of other common situations.[11] When Quicken entered the Texas market, an "unauthorized practice of law committee" appointed by the Texas Supreme Court quickly brought suit, a fight that eventually yielded a federal court decision holding that Quicken

THIS PAPER WAS ORIGINALLY PRESENTED at the United Kingdom-United States Legal Exchange in London, England, in September 2015. The Exchange, sponsored by the American College of Trial Lawyers, originated in 1971, when Chief Justice Burger suggested that the College provide a forum for discussion about matters of common interest to judges in the United Kingdom and the United States. Since then, there have been ten exchanges, involving members of the highest courts of both countries, as well as leading appellate and trial judges. A small number of practitioners from each country are invited to present the views of the Bar.

As a result of the exchanges, participants have implemented improvements in their respective legal systems. For example, past participants have credited the exchanges with a significant role in the establishment of the Inns of Court movement in the United States and the first use of written briefs in the appellate courts of Great Britain. Lord Harry Woolf, the former Chief Justice of England and Wales, publicly acknowledged the influence of the Exchanges in a 1998 report, Access to Justice, which formed the basis for sweeping procedural changes in the British legal system.

had violated Texas UPL regulations (though, happily, a result the legislature later effectively undid).[12] Similarly, when LegalZoom entered the market in North Carolina, the state bar declared its operations illegal,[13] a declaration that eventually induced the company to settle and promise to revise some of its business practices.[14] Neither are challenges of this sort aimed only at for-profit firms. The federal Individuals with Disabilities Education Act (IDEA) affords parents the right to be "accompanied and advised" in agency proceedings by nonlawyers who have special training or knowledge "with respect to the problems of children with disabilities."[15] Yet even here, where (supreme?) federal law seems clear, state authorities have sought (sometimes successfully) to use UPL laws to forbid lay advocacy by nonprofit firms with expertise in IDEA procedures.[16] To be sure, efforts like these to thwart competition from commercial and nonprofit advocates have proven only partially successful — LegalZoom and companies like it continue to expand. But surely, too, the threat and costs of litigation deter entry by others and raise costs for those who do enter, costs the consumer must ultimately bear.

It seems well past time to reconsider our sweeping UPL prohibitions.[17] The fact is nonlawyers already perform — and have long performed — many kinds of work traditionally and simultaneously performed by lawyers.[18] Nonlawyers prepare tax returns and give tax advice.[19] They regularly negotiate with and argue cases before the Internal Revenue Service.[20] They prepare patent applications and otherwise advocate on behalf of inventors before the Patent & Trademark Office.[21] And it is entirely unclear why exceptions should exist to help these sort of niche (and some might say, financially capable) populations but not be expanded in ways more consciously aimed at serving larger numbers of lower- and middle-class clients.

Some states are currently experimenting with intriguing possibilities. California now licenses "legal document assistants" who may help consumers before certain tribunals.[22] Colorado permits nonlawyers to represent claimants in unemployment proceedings.[23] And Washington allows legal technicians to assist clients in domestic relations cases provided they meet certain requirements — like obtaining an associate's degree, passing an exam, completing 3,000 hours of supervised paralegal work, and taking certain legal courses.[24] The ABA itself recently partnered with one of LegalZoom's competitors, Rocket Lawyer, to help the association's members connect with potential clients online, in the process seemingly granting its imprimatur to a company that some argue engages in the unauthorized practice of law.[25]

Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction.[26] And, in fact, studies suggest that lay specialists who provide representation in bankruptcy and administrative proceedings often perform as well as or even better than attorneys and generate greater consumer satisfaction.[27] The American Law Institute has noted, too, that "experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers."[28] And the Federal Trade Commission has observed that it is "not aware of any evidence of consumer harm arising from [the provision of legal services by nonlawyers] that would justify foreclosing competition."[29] In the United Kingdom, where nonlawyers can win government contracts to provide legal advice and appear before some administrative tribunals, nonlawyers significantly outperform lawyers in terms of results and satisfaction when dealing with low-income clients.[30] Indeed, studies there show that the best predictor of quality appears to be "specialization, not professional status."[31]

Of course, the potential for abuse cannot be disregarded. Many thoughtful commentators suggest that UPL restrictions are necessary to protect the public from fraudulent or unqualified practitioners.[32] And surely many lay persons, and perhaps most especially the most underserved, are not well equipped to judge legal expertise. But do these entirely valid concerns justify the absolute UPL bans found today in so many states? That seems an increasingly hard case to make in light of an increasing amount of evidence suggesting that, at least in specified practice areas, a more nuanced approach might adequately preserve (or even enhance) quality while simultaneously increasing access to competent and affordable legal services.

CONSISTENT WITH THE LAW OF SUPPLY AND DEMAND, INCREASING THE SUPPLY OF LEGAL SERVICES CAN BE EXPECTED TO LOWER PRICES, DRIVE EFFICIENCY, AND IMPROVE CONSUMER SATISFACTION.

Capital Investment. All else equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local "superstores."[33] Yet Rule 5.4 of the ABA's Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining "any interest" in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can't secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels, for as Prof. Stephen Gillers has put it, "lay

IN RECENT YEARS, AT LEAST 30 STATES AND FEDERAL DISTRICT COURTS HAVE IMPLEMENTED PILOT PROJECTS TESTING VARIOUS AMENDMENTS TO OUR LONG-IN-THE-TOOTH RULES, ALL WITH AN EYE ON INCREASING THE EFFICIENCY AND FAIRNESS OF CIVIL JUSTICE ADMINISTRATION.

investors might be willing to accept a lower return on their money" than lawyers shielded by Rule 5.4.[34]

Rule 5.4 bears a curious history. After thoroughly studying the issue, the commission that created the first draft of the model rules back in 1982 suggested that lawyers should be allowed to work in firms owned or managed by nonlawyers.[35] But this suggestion was defeated in the ABA House of Delegates and replaced by the present rule effectively preventing nonlawyers from aquiring "any interest" in a law firm.[36] Since then, ABA committees have repeatedly proposed changes to Rule 5.4 but every proposal has, like the first, gone down to defeat in the House of Delegates.[37] Most recently, in 2009 an ABA commission supported serious consideration of three alternatives to the rule.[38] The most modest option would have (1) required a firm to engage only in the practice of law, (2) prohibited nonlawyers from owning more than a certain percentage (e.g., 25 percent) of a firm, and (3) demanded that nonlawyer owners pass a "fit to own" test.[39] Another approach would have allowed lawyers to engage in partnerships of this sort without the cap on nonlawyer ownership or the fit to own test.[40] And the third and final option would have done away with all three requirements and permitted firms to offer both legal and nonlegal services.[41]

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007.[42] In the first two years of the program, 386 so-called "alternative business structures" (ABSs) were established.[43] Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms,[44] again suggesting an increased focus on reaching individual consumers. Given the success of this program, it's no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.[45]

Of course, supporters of the current ABA ban contend that allowing nonlawyers to participate in legal practice might influence lawyers' professional judgment.[46] But it is again worth asking whether these entirely legitimate concerns justify a total ban on the practice. After all, we routinely address similar independence concerns in the model rules without resort to total bans. So, for example, we permit third parties (e.g., insurance companies) to pay for an insured's legal services but restrict their ability to interfere with the attorney-client relationship.[47] We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals.[48] And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client.[49] Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden. But surely it shouldn't be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when we stand to gain.

CIVIL PROCEDURE REFORMS

The Federal Rules of Civil Procedure aim to shepherd parties toward "the just, speedy, and inexpensive determination of every action and proceeding."[50] But as the American College of Trial Lawyers' survey suggests, it seems the rules sometimes yield more nearly the opposite of their intended result: expensive and painfully slow litigation that is itself a form of injustice.[51] After years of study, the federal rules committees recently advanced a package of amendments (the "Duke Package") seeking to address the problem.[52] The Duke Package made three important changes. It emphasized proportionality as the governing principle for discovery. It tightened discovery deadlines and so shortened the opportunities for delay. And it sought to reduce costs by increasing certainty about parties' obligations to preserve electronically stored information.[53]

While these changes are no doubt a start, it's hard to imagine they'll finish the job of realizing the promise of Rule 1 in the 21st century. After all, our so-called "modern" rules of civil procedure are now almost 80 years old, written for an age in which discovery involved the exchange of mimeographs, not metadata. Neither do you have to look far to see promising models of change. In recent years, at least 30 states and federal district courts have implemented pilot projects testing various amendments to our long-in-the-tooth rules, all with an eye on increasing the efficiency and fairness of civil justice administration.[54] Not every project has proven a resounding success, but the results suggest at least two other possible avenues for reform, and the federal rules commit-

tees are contemplating pilot projects to test both in the federal system.

Early and Firm Trial Dates. A RAND study of the federal judicial system in the 1990s found (perhaps to no litigator's surprise) that setting a firm and early trial date is the single "most important" thing a court can do to reduce time to disposition.[55] A more recent IAALS study found the same thing: a strong positive correlation between time to resolution and the elapsed time between the filing of a case and the court's setting of a trial date.[56] Studies of recent experiments in Oregon, Colorado, and other state court systems have shown, as well, that firm and early trial dates contribute to reducing litigation costs and increasing client and lawyer satisfaction.[57] And in light of so much data like this, IAALS, the College, and the National Conference of Chief Justices have all recently endorsed the setting of an early and firm trial date as a best practice in civil litigation.[58] Yet, despite this mounting evidence, and while some federal districts today adhere to the practice of setting a firm and early trial date in every case (e.g., the Eastern District of Virginia), system-wide in our federal courts over 92 percent of motions to continue trial dates are granted and fewer than 45 percent of cases that go to trial do so on the date originally set by the court.[59]

Naturally, the possibility of mandating the practice of setting early and firm trial dates will raise some legitimate concerns.[60] Like the worry that reducing time for trial preparation may not afford complicated cases the time and attention they require. Or the worry that deadlines set early in a case may prove too rigid to account for developments that arise only later. No doubt concerns like these suggest the importance of accounting for a case's complexity when setting a trial date (perhaps examining empirical data regarding how long certain classes of cases take to prepare would be helpful here, data the federal courts now collect and share with judges routinely). Concerns like these may suggest as well the need to preserve a measure of flexibility to respond to new developments — perhaps by permitting continuances in "extraordinary circumstances." But just as important is what concerns like these don't suggest: reason to ignore the proven empirical benefits of setting an (appropriately) early and (normally quite) firm trial date in every single case.

Mandatory Disclosures. In 1993, the federal rules committees experimented with a rule requiring parties to disclose evidence and documents both helpful and harmful to their respective causes at the outset of discovery.[61] As the committees reasoned, lawyers and parties are rightly expected to fight over the merits but that doesn't necessarily mean they should be permitted to fight (sometimes seemingly endless) collateral battles over what facts they must share with the other side. Just as a prosecutor must reveal exculpatory *Brady* material before proceeding to a vigorous fight on the merits, so too civil parties should have to disclose the good and the bad of their evidence before proceeding to litigate its significance.[62]

The proposal met with swift criticism. Some argued that requiring lawyers to produce discovery harmful to their clients asks them to violate their clients' trust. Others questioned whether a lawyer for one side is well positioned to know what might be helpful to the other.[63] In response to criticisms like these, the rules committees permitted districts to opt out of the initial disclosure requirement, and a number did so, resulting in a patchwork of practices nationwide. And then, responding to complaints about *this* development, the committees in 2000 narrowed the mandatory-disclosure rule to require only the production of helpful evidence.[64]

That might have seemed the end of it. Except that since 2000 a number of states have returned to the idea of mandating early and broad disclosures. And in that time a good deal of evidence has emerged suggesting these disclosures allow parties to focus more quickly and cheaply on the merits of their litigation. For example, Arizona requires parties to disclose all documents they believe to be "relevant to the subject matter of the action" within 40 days after a responsive pleading is filed.[65] In 2009, an IAALS survey found Arizona litigators preferred state to federal court practice on this score by a 2-to-1 margin. Respondents confirmed that Arizona's rule "reveal[s] the pertinent facts early in the case" (76 percent), "help[s] narrow the issues early" on (70 percent), and facilitates agreement on the scope and timing of discovery (54 percent). Similarly, respondents disagreed with the notion that the disclosure rule either adds to the cost of litigation (58 percent) or unduly front-loads investment in a case (71 percent). Importantly, too, counsel for plaintiffs and defendants responded in largely the same way on all these issues.

Other states and even a recent experiment in the federal system have reported similar results. A pilot project in Colorado requiring robust early disclosures in business disputes appears to have resulted in cases with fewer discovery motions and costs more proportionate to case type and the amount in controversy.[66] Meanwhile in Utah, broad initial disclosure rules have seemingly led to quicker case dispositions, fewer discovery disputes in most types of cases, and, according to most attorneys, lower costs.[67] Now years removed from the backlash against the 1993 amendments, many federal district courts have begun experimenting with requiring parties in certain employment disputes to provide certain disclosures automatically and early.[68] And a study by the Federal Judicial Center shows that motions practice in these cases has fallen by over 40 percent.

Given all this evidence, it's hard not to wonder if the real problem with the 1993 experiment was simply that it was ahead of its time. Maybe we just needed to wallow a little longer in collateral discovery disputes and watch them become ever more complicated and exasperating with the exponential growth of electronically stored information before we could appreciate this potential lifeline out. At the least, it would seem churlish to ignore all that's happened since 1993 and not bother with a pilot project to test in the federal system more broadly what seems to be working so well in so many states and in a discrete set of cases in federal court.

LEGAL EDUCATION

The skyrocketing costs of legal education are no secret. Since the 1980s, private law school tuition in the United States has increased by 155.8 percent and public law school tuition by 428.2 percent (yes,

IS IT TRULY THE CASE THAT THE LEGAL TRAINING OF A MAIN STREET FAMILY LAWYER NEEDS TO FOLLOW THE SAME BASIC TRAJECTORY AS A WALL STREET SECURITIES LAWYER, ESPECIALLY WHEN DEMAND FOR THE FORMER'S SERVICES IS OFTEN ACUTE AND ROUTINELY UNMET?

in real, inflation-adjusted terms).[69] Today, many students pay over $200,000 for a legal education — that on top of an equally swollen sum for an undergraduate degree. And with rising tuition costs come other costs too. Increased debt loads reduce students' incentives and ability to take on lower-paying public service or "main street" legal jobs. No doubt, as well, some of these increased costs are ultimately borne by consumers, as lawyers pass along as much of their "overhead" expenses (student loans) as they can. Which raises the question: Why is a legal education so expensive?

It's hard to ignore the possibility that our legal education accreditation requirements are at least partly to blame. Take California's suggestive experience. In deference to the ABA, most states require anyone sitting for the bar to graduate first from an ABA-accredited law school. But in California it's possible for graduates of state-accredited or unaccredited law schools to take the bar exam.[70] And the cost differential is notable: average tuition runs $7,230 at unaccredited schools, $19,779 at California-accredited schools, and $44,170 at ABA-accredited schools in the state.[71] No doubt the increased marketability of an ABA-accredited degree is responsible for some of the difference here. But isn't it worth asking whether at least some of our often well-intended accreditation requirements are actually worth the costs they impose?

Consider first and perhaps most ambitiously the mandate that most everyone must attend three years of law school after the completion of a college degree. We've come a long way from Abraham Lincoln's insistence that "[i]f you wish to be a lawyer, attach no consequence to the *place* you are in, or the *person* you are with; but get books, sit down anywhere, and go to reading for yourself. That will make a lawyer of you quicker than any other way."[72] For much of our nation's history, President Lincoln's advice held true: The only requirement to become a lawyer in most states was to pass the bar exam.[73] Even some of the law's luminaries as late as the mid-20th century didn't attend three years of law school, greats like Justices Robert Jackson and Benjamin Cardozo and Harvard Law School Dean Roscoe Pound.

Where did the idea of three years of graduate education come from? It appears most states adopted the requirement at the behest of the ABA.[74] In pushing states to adopt this requirement, the ABA emphasized that legal education must develop in students a mind attuned to the common law[75] — an argument arguably not specific to three years as opposed, say, to two or four. The ABA also invoked the fact the American Medical Association had proposed a four-year standard for physicians and reasoned that, because law, like medicine, is a complex field, legal studies should last for a comparable period[76] — an argument that seems to have stemmed more from professional pride than empirical proof.

Even if these doubtful rationales once seemed sufficient to persuade states to mandate a monolithic three-year graduate course of study, do they really remain persuasive today? Competitive and consumer-friendly markets are usually characterized by a diversity of goods, specialized to fit consumer needs and preferences — and markets with just one good of uniform character are often the product of a producer-friendly monopoly or some similar competitive failure. And while it would be wrong to suggest that all law school educations are identical, it might be worth asking whether three years (with a largely prescribed first year) is necessary for each and every law student. Is it truly the case that the legal training of a Main Street family lawyer needs to follow the same basic trajectory as a Wall Street securities lawyer, especially when demand for the former's services is often acute and routinely unmet? Recently, the ABA acknowledged the need for greater heterogeneity in legal education.[77] And one starting place might be to permit students to sit for the bar after only two years of study, allowing students and employers alike to determine the value of an optional third year of law school.[78] President Obama, himself a Harvard-trained lawyer, has promoted this concept.[79]

Consider that in the United Kingdom the legal education market is a good deal more heterogeneous than ours.[80] To qualify for practice, a student may either take a three-year *undergraduate* course or a *one-year* graduate conversion course. Meanwhile, further graduate educational options are available in a variety of fields (e.g., criminal justice, intellectual property, and human rights) for those seeking specialized skills. But none of this is essential. After the basic academic instruction, a student may decide to become a barrister or solicitor. Depending on his or her choice, the student will then have to undertake additional training, often a one-year specialized educational course followed by a hands-on apprenticeship during which he or she will usually receive only modest compensation. But even the minimum wage presents a substantial swing from expending $50,000 or more on a year of formal legal education in the United States. This diversity of legal education options does not appear to be a threat to the rule of law in the United Kingdom — and it is difficult to see how it might be here.

Beyond that, we might also ask about

the value of some of the more discrete accreditation requirements we impose on law schools today. In our zeal for high educational standards, we have developed a long and dreary bill of particulars every law school must satisfy to win ABA accreditation and it's often unclear whether these many and various requirements can be justified on the basis of evidence of improved outcomes.[81]

Here are just a few illustrations. Law schools must employ a full-time library director (dare not a part-timer) with the job security of a faculty position.[82] And maybe that's necessary after all because of some of the many other requirements that the ABA imposes on law school libraries — like the requirement they furnish a device to print microform documents.[83] (Does anyone still use those? Or is there just one microfiche printer left, passed between law schools one step ahead of the accreditation committee?) Schools must extend extensive tenure guarantees to faculty,[84] and full-time faculty must teach "substantially all" of a student's first-year courses, even if adjuncts would prove just as good.[85] Schools must also generally maintain student-faculty ratios of 30:1 or less (about the same ratio found in many public schools), though adjuncts (full disclosure: like me) count as only one-fifth of a professor for this purpose.[86] Meanwhile, if professors have any sort of ongoing relationship with a law firm or business, a presumption arises that they are not full-time.[87] And if an American law school wants to offer something other than a traditional JD program, like the sort of diverse degree programs found in English universities, it must receive a special dispensation from the ABA council responsible for legal education.[88] Then, too, there are the restrictions on the number of credits a student may take at any given time,[89] and the rule that no more than a third of credit hours can be earned for study or activity outside the United States.[90] And beyond even that don't forget that while students usually may receive credit for unpaid internships, they generally may not earn credit for the very same internship if it offers pay and helps reduce their debt load.[91]

Of course, any revisions to our rules governing law schools would raise complicated cost-quality tradeoffs. Some believe that the current American legal education regime is necessary to permit future lawyers to develop sufficient knowledge of legal doctrine and capacity for legal analysis.[92] Justice Antonin Scalia, for example, once argued that "the law-school-in-two-years proposal rests on the premise that law school is — or ought to be — a trade school," a premise he believed erroneous.[93] Others defend the current system by citing familiar consumer-protection concerns.[94] And others still point out that the third year offers opportunities to take elective courses in specialty areas of the law.[95]

Admittedly, these seem good enough arguments to persuade a reasonable mind that at least *some* lawyers should undertake three years of graduate education. These also may be good enough arguments to justify imposing some significant restrictions on those who opt out of a third year (e.g., requiring on-the-job training for a period of years under the tutelage of a supervisor as in the English system). But it's far less clear whether these are sufficient grounds for concluding that *everyone* needs three years of graduate legal training, or legal training shaped by so many and such detailed accreditation requirements. Commendably, a 2014 ABA whitepaper explored some of these questions and concluded that many current accreditation requirements do indeed increase cost without conferring commensurate educational benefits. As a result, the paper encouraged a shift from a regulatory scheme controlling so many detailed aspects of the educational process to a scheme focused more on outcomes and empirical cost-benefit analyses.[96] And true to its word, the ABA's section on legal education has begun relaxing at least some of its more extraordinary accreditation requirements.[97] First steps, maybe, but steps in the right direction.

CONCLUSION

Lowering barriers to entry, ensuring judicial resolutions come more quickly and at less cost, and making legal education more affordable share the common aim of increasing the supply and lowering the price of legal services. All of these potential changes, too, are uniquely within our profession's power to effect. Of course, meaningful change rarely comes easily, let alone when it requires a self-regulating profession to undertake self-sacrifice. But estimates suggest that inefficient policies and our professional regulations result in a roughly $10 billion annual "self-subsidy," in the form of higher prices lawyers may charge their clients compared to what they could charge in a more competitive marketplace.[98] Might not our willingness to confront candidly just how much of that self-subsidy is warranted prove a good test of our commitment to civil justice reform — and whether we as a profession wish to do good or merely do well?

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2 *Id.*

3 Luz E. Herrera, *Educating Main Street Lawyers*, 63 J. Legal Educ. 189, 193 (2013) (listing the United States as the fiftieth out of 66 nations in an individual's ability to obtain legal counsel).

4 *See, e.g.*, John Leubsdorf, *Legal Ethics Falls Apart*, 57 Buff. L. Rev. 959, 963–71 (2009); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 Pepp. L. Rev. 485, 503 (1995).

5 Deborah Rhode, Access to Justice 87–88 (2004); *see also* Michael Lewis, *Faking It: The Internet Revolution Has Nothing to Do with the Nasdaq*, N.Y. Times (July 15, 2001), http://www.nytimes.com/2001/07/15/magazine/15INTERNET.html.

6 *See, e.g.*, Ga. Code Ann. § 15-19-50 (defining the practice of law as "representing litigants in court"); Office of Disciplinary Counsel, *Rules of the Bd. on the Unauthorized Practice of Law*, Del. courts, http://courts.delaware.gov/odc/uplr.aspx (last visited May 20, 2016) (prohibiting nonlawyers from "engag-

ing in an activity which has traditionally been performed exclusively by persons authorized to practice law").

[7] *See, e.g.*, Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergency of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 Geo. J. Legal Ethics 719, 722 n.35 (2007).

[8] *See, e.g.*, *Great W. Cities, Inc. v. Binstein*, 476 F. Supp. 827, 834–35 (N.D. Ill. 1979) (extending constitutional protections to lay advice and assistance); *Hopper v. City of Madison*, 256 N.W.2d 139, 144–45 (Wis. 1977) (same).

[9] *Ky. State Bar Ass'n v. Tussey*, 476 S.W.2d 177, 180–81 (Ky. 1972).

[10] Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 Fordham Urb. L.J. 1227, 1234 (2014).

[11] *See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A 3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999).

[12] *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (per curiam).

[13] *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *2 (N.C. Super. Ct. Aug. 27, 2012).

[14] *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. Oct. 22, 2015).

[15] 20 U.S.C. § 1415(h)(1).

[16] *See In re Arons*, 756 A.2d 867, 873 (Del. 2000).

[17] *See generally* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1981).

[18] *See generally* Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 Ariz. L. Rev. 917 (2002); Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 St. Mary's L.J. 891 (2009).

[19] Indeed, the practice is so well recognized that Congress has codified an accountant-client evidentiary privilege. *See* 26 U.S.C. § 7525(a).

[20] 31 C.F.R. § 10.3 (governing practice before the Internal Revenue Service); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 Okla. City U. L. Rev. 559, 570–71 (2005).

[21] 37 C.F.R. §§ 11.5-.6 (governing patent agent registration and practice).

[22] Cal. Bus. & Prof. Code § 6400(c)-(d).

[23] *Unauthorized Practice of Law Comm. v. Emp'rs Unity, Inc.*, 716 P.2d 460 (Colo. 1986); Rhode, *supra* note 10, at 1244.

[24] *See* Debra Cassens Weiss, *Seven People Pass Test to Become Nation's First Legal Technicians*, ABA J. (June 2, 2015, 5:45 AM), http://www.abajournal.com/news/article/seven_people_pass_test_to_become_nations_first_legal_technicians; *Legal Technician Program FAQs*, Wash. St. Bar Association, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-FAQs (last visited May 20, 2016).

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[27] Rhode, *supra* note 10, at 1235.

[28] Rhode, *supra* note 5, at 89.

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[32] *See, e.g.*, Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 Fordham L. Rev. 2761, 2764–65 (2014).

[33] Deirdre Fernandes, *More Relying on Walmart for Financial Services*, Bos. Globe (July 10, 2014), https://www.bostonglobe.com/business/2014/07/09/walmart-isn-bank-but-consumers-are-choosing-its-financial-services/0oJtrqVKl8OXTuQ3SBtrSI/story.html; *see also* Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. Rev. 179, 197 (2014).

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[37] *See id.* at 5–7; Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 Hastings L.J. 577, 584–96 (1989).

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[49] *See* ABA Model Rules of Professional Conduct, Rule 1.10(a)(2) (adopted 2009).

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[62] *See Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 431 (1993).

[63] *Id.* at 510–12 (Scalia, J., dissenting).

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[82] ABA Standards for Law Schools 2015-2016, *supra* note 81, at 40.

[83] *Id.* at 136.

[84] *Id.* at 29–30.

[85] *Id.* at 121.

[86] *Id.* at 119–21.

[87] *Id.* at 121.

[88] *Id.* at 23.

[89] *Id.* at 21.

[90] *Id.* at 20.

[91] *Id.* at 18–19.

[92] *See, e.g.*, American bar association, Task Force on the Future of Legal Education, Report and Recommendations (2014), http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html.

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[97] *See generally* Memorandum from Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Am. Bar Ass'n to Deans of ABA-Approved Law Sch. et al. (Aug. 12, 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/july2015councilopensessionmaterials/2015_august_notice_of_revisions_to_standards.pdf; Memorandum from The Hon. Rebecca White Berch, Council Chairperson & Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Am. Bar Ass'n to Interested Persons and Entities (Dec. 11, 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20151211_notice_and_comment.pdf.

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LAW'S IRONY

NEIL M. GORSUCH*

Thank you for the kind introduction. It is an honor to be with you and a pleasure to be part of a lecture series dedicated to the memory of Barbara Olson and to some of the causes she held dear—the rule of law, limited government, and human liberty.

Let me begin by asking if you've ever suffered through a case that sounds like this one:

> [I]n [the] course of time, [this suit has] become so complicated, that no man alive knows what it means . . . . [A] long procession of [judges] has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality . . . [but still it] drags its dreary length before the Court, perennially hopeless.[1]

How familiar does that sound? Could it be a line lifted from a speaker at an electronic discovery conference? From a brief in your last case? Or maybe from a recent judicial performance complaint?

Of course, the line comes from Dickens, *Bleak House*, published 1853. It still resonates today, though, because the law's promise of deliberation and due process sometimes—ironically—invites the injustices of delay and irresolution. Like any human enterprise, the law's crooked timber occasionally produces the opposite of its intended effect. We turn to the law earnestly to promote a worthy idea and sometimes wind up with a host of unwelcome side effects and find ourselves ultimately doing more harm than good. In fact, the whole business is something of an irony: we depend on the rule of law to guar-

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* Judge, United States Court of Appeals for the Tenth Circuit. What follows is a speech—originally given as the annual Barbara Olson Memorial Lecture—and more than that it does not pretend to be. Just because what follows lacks a footnote after every dependent clause, do not assume anything here is original: nearly everything is borrowed, and from too many sources, some too long ingrained and too dimly remembered, to capture faithfully—but borrowed gratefully all the same. What citations exist here are thanks to the work of my excellent law clerk, Michael Kenneally.

1. CHARLES DICKENS, BLEAK HOUSE 4 (Wordsworth Editions 1993) (1853).

antee freedom but we have to give up freedom to live under the law's rules.[2]

In a roundabout way, that leads me to the topic I'd like to discuss with you tonight: law's irony. Dickens had a keen eye for it. But even he was only reworking long familiar themes. Hamlet rued "the law's delay."[3] Goethe left the practice of law in disgust after witnessing thousands of aging cases waiting vainly for resolution in the courts of his time.[4] Demosthenes plied similar complaints 2000 years ago.[5] Truth is, I fully expect lawyers and judges to carry on similar conversations about the law's ironies 2000 years from now.

But just because unwelcome ironies may be as endemic to law as they are to life, Dickens would remind us that's hardly reason to let them go unremarked and unaddressed. So it is I would like to begin by discussing a few of the law's ironies that I imagine he would consider worthy of attention in our time.

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Consider first today's version of the *Bleak House* irony. Yes, I am referring to civil discovery.

The adoption of the "modern" rules of civil procedure in 1938 marked the start of a self-proclaimed "experiment" with expansive pre-trial discovery—something previously unknown to the federal courts.[6] More than seventy years later, we still call them the "new" and the "modern" rules of civil procedure.

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2. *See* CICERO, *The Speech of M.T. Cicero in Defence of Aulus Cluentius Avitus* § 53, *in* 2 THE ORATIONS OF MARCUS TULLIUS CICERO 104, 164 (C.D. Yonge trans., 2008) ("[W]e are all servants of the laws, for the very purpose of being able to be freemen."). Timothy Endicott has recently made the point eloquently, and I am indebted to him for the title of this talk. *See* Timothy Endicott, *The Irony of Law*, *in* REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 327, 327 (John Keown & Robert P. George eds., 2013).

3. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

4. 2 JOHANN WOLFGANG VON GOETHE, THE AUTOBIOGRAPHY OF GOETHE 119 (John Oxenford trans., Boston, S.E. Cassino 1882) ("Twenty thousand cases had been heaped up: sixty could be settled every year, and double that number was brought forward.").

5. *See* DEMOSTHENES, *The Oration Against Midias*, *in* THE ORATIONS OF DEMOSTHENES AGAINST LEPTINES, MIDIAS, ANDROTION, AND ARISTOCRATES 59, 103–04 (Charles Rann Kennedy trans., London, George Bell & Sons 1877).

6. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 & n.4 (1998).

Now, that's a pretty odd thing, when you think about it. Maybe the only thing that really sounds new or modern after seventy years is Keith Richards of the Rolling Stones. Some might say he looks like he's done some experimenting too.

In any event, our 1938 forefathers expressly rested their "modern" discovery "experiment" on the assumption that with ready access to an opponent's information parties to civil disputes would achieve fairer and cheaper merits-based resolutions.[7]

Now, how is *that* working out for you?

Does modern discovery practice *really* lead to fairer and more efficient resolutions based on the merits? I don't doubt it does in many cases. Probably even most. But should we be concerned when eighty percent of the American College of Trial Lawyers say that discovery costs and delays keep injured parties from bringing valid claims to court?[8] Or concerned when seventy percent also say attorneys use discovery costs as a threat to force settlements that *aren't* based on the merits?[9] Have we maybe gone so far down the road of civil discovery that—ironically enough—we've begun undermining the purposes that animated our journey in the first place?

What we have today isn't your father's discovery. Producing discovery anymore doesn't mean rolling a stack of bankers' boxes across the street. We live in an age when every bit and byte of information is stored seemingly forever and is always retrievable—if sometimes only at a steep price. Today, the world sends fifty trillion emails a *year*.[10] An average employee sends or receives over one hundred every day.[11] That doesn't begin to account for the billions of instant messages shooting

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7. *See* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737–39 (1939).

8. *See* INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM at A-6 (2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf, [http://perma.cc/6VD6-7Y93].

9. *Id.* at A-4.

10. RADICATI GROUP, EMAIL STATISTICS REPORT, 2012-2016, at 3 (2012), http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf, [http://perma.cc/WG3V-KETX].

11. RADICATI GROUP, EMAIL STATISTICS REPORT, 2011-2015, at 3 (2011), http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf, [http://perma.cc/9CX9-2A27].

around the globe.[12] This isn't a world the writers of the discovery rules could have imagined in 1938—no matter how "modern" they were.[13]

No surprise, then, that many people now simply opt out of the civil justice system. Private alternative dispute resolution (ADR) abounds. Even the federal government has begun avoiding its own courts. Recently, for example, it opted to employ ADR to handle claims arising from the BP oil spill.[14] These may be understandable developments given the costs and delays inherent in modern civil practice. But they raise questions, too, about the transparency and independence of decisionmaking, the lack of development of precedent, and the future role of courts in our civic life. For a society aspiring to live under the rule of law, does this represent an advance or perhaps something else?

We might even ask what part the rise of discovery has played in the demise of the trial.[15] Surely other factors are at play here, given the disappearance of criminal trials as well. But we've now trained generations of attorneys as discovery artists rather than trial lawyers. They are skilled in the game of imposing and evading costs and delays, they are poets of the

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12. CTIA-THE WIRELESS ASSOC., CTIA'S WIRELESS INDUSTRY INDICES: SEMI-ANNUAL DATA SURVEY RESULTS, A COMPREHENSIVE REPORT FROM CTIA ANALYZING THE U.S. WIRELESS INDUSTRY, YEAR-END 2012 RESULTS (2013), http://www.ctia.org/resource-library/facts-and-infographics/archive/us-text-messages-sms, [http://perma.cc/5V6F-GRNM].

13. To be fair to the drafters of the 1938 rules, they're not entirely responsible for the current state of affairs. While providing new and more liberal access to depositions, the 1938 rules didn't make document discovery a matter of right. In fact, at that time, and for a good while after, documents could be discovered only by agreement among the parties or on a showing of good cause before the district court. 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2205 (3d ed. 2010). The federal rules took the question of document discovery away from the district courts and codified its expansive view of document discovery only in 1970. *See id.*; FED. R. CIV. P. 34 Advisory Committee's Note (1970). About the same time photocopies became relatively inexpensive. *See* DAVID OWEN, COPIES IN SECONDS 9–10 (2004). One can't help but wonder if the timing was merely coincidental.

14. *See* Sheryl Gay Stolberg, *Administering Fund, a Master Mediator*, N.Y. TIMES, (June 16, 2010), *available at* http://www.nytimes.com/2010/06/17/us/17feinberg.html, [http://perma.cc/BB3L-VCYV].

15. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) ("The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline.").

nasty gram, able to write interrogatories in iambic pentameter. Yet terrified of trial.

The founders thought trials were a bulwark of the rule of law. As Hamilton saw it, the only room for debate was over whether jury trials were (in his words) "a valuable safeguard to liberty" or "the very palladium of free government."[16] But is that still common ground today? No doubt, our modern discovery experiment is well-intentioned. Yet one of its effects has been to contribute to the death of an institution once thought essential to the rule of law.

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What about our criminal justice system, you might ask? It surely bears its share of ironies too. Consider just this one.

Without question, the discipline of writing the law down, codifying it, advances the rule of law's interest in fair notice. But today we have about 5000 federal criminal statutes on the books,[17] most added in the last few decades.[18] And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years.[19] Neither does that begin to count the thousands of additional *regulatory* crimes buried in the federal register. There are so many crimes cowled in the numbing fine print of those pages that scholars actually debate their number.[20]

When he led the Senate Judiciary Committee, Joe Biden worried that we have assumed a tendency to "federalize everything that walks, talks, and moves."[21] Maybe we should say hoots, too, because it's now a federal crime to misuse the likeness of Woodsy the Owl or his immortal words, "Give a Hoot, Don't Pollute."[22] Businessmen who import lobster tails in plas-

16. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. LEGAL MEMORANDUM (June 16, 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes, [http://perma.cc/TS2X-SEK2] (explaining that there were at least 4450 federal crimes as of 2007).

18. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7–8 (1998).

19. *See* Baker, *supra* note 17, at 1.

20. *See id.* at 2, 4.

21. Dan Freedman, *FBI Criticizes Trend Toward "Federalizing": Agents Don't Want to Be Street Cops*, HOUS. CHRON., Dec. 19, 1993, at A2.

22. 18 U.S.C. § 711a (2006).

tic bags rather than cardboard boxes can be brought up on charges.[23] Mattress sellers who remove that little tag: yes, they're probably federal criminals too.[24] Whether because of public choice problems or otherwise, there appears to be a ratchet clicking away relentlessly, always in the direction of more—never fewer—federal criminal laws.

Some reply that the growing number of federal crimes isn't out of proportion to our growing population. Others suggest the recent proliferation of federal criminal laws might be mitigated by allowing the mistake of law defense to be more widely asserted.[25] Others still suggest prosecutorial discretion can help with the problem.[26]

But however that may be, isn't there still a troubling irony lurking here? Without written laws, we lack fair notice of the rules we must obey. But with too many written laws, don't we invite a new kind of fair notice problem? And what happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?[27]

The sort of excesses of executive authority invited by too few written laws helped lead to the rebellion against King John and the sealing of the Magna Carta—one of the great advances in the rule of law. But history bears warnings that too much and too much inaccessible law can lead to executive excess as well. Caligula sought to protect his authority by publishing the law in a hand so small and posted so high no one could be sure what was and wasn't forbidden. (No doubt, all the better to keep everyone on their toes. Sorry . . . .) In *Federalist 62*, Madison warned that when laws become just a paper blizzard citizens are left unable to know what the law is and cannot con-

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23. *See* United States v. McNab, 331 F.3d 1228, 1232 (11th Cir. 2003); *see also* Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 48 (Timothy Lynch ed., 2009).

24. Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 & n.264 (1997).

25. *E.g.*, Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 783–84 (2012).

26. *See* Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 791 (2012).

27. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2–5 (2011).

form their conduct to it.[28] It is an irony of the law that either too much or too little can impair liberty. Our aim here has to be for a golden mean. And it may be worth asking how far we might have strayed from it.

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Beyond the law itself, there are the ironies emanating from our law schools. A target rich environment, you say? Well, let's be kind and consider but one example.

In our zeal for high standards, we have developed a dreary bill of particulars every law school must satisfy to win ABA accreditation. Law schools must employ a full time librarian (dare not a part timer).[29] Their libraries must include microform printing equipment.[30] They must provide extensive tenure guarantees.[31] They invite trouble if their student-faculty ratio reaches 30:1,[32] about the same ratio found in many public schools. Keep in mind, too, under ABA standards adjunct professors with practice experience (like me) count as only one-fifth of an instructor (maybe they're onto something here after all).[33]

Might it be worth pausing to ask whether commands like these contribute enough to learning to justify the barriers to entry—and the limits on access to justice—they impose? A legal education can cost students $200,000 today. That's on top of an equally swollen sum for an undergraduate degree—yet another ABA requirement.[34] In England, students are allowed to earn a law degree in three years as undergraduates or in one year of study after college, all of which must be followed by

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28. THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) ("It will be of little avail to the people, that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.").

29. *See* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2013–2014, at 46, *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf, [http://perma.cc/ET6G-HYEU].

30. *See id.* at 48.

31. *See id.* at 34–35.

32. *See id.* at 33.

33. *See id.* at 32.

34. *See id.* at 38.

extensive on-the-job training.[35] None of this is thought a threat to the rule of law there. One might wonder whether the sort of expensive and extensive homogeneity we demand is essential to the rule of law here.[36]

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So far, we've briefly visited ironies where the law aims at one virtue and risks a corresponding vice. But it seems to me that maybe the law's most remarkable irony today comes from the opposite direction—a vice that hints at virtues in the rule of law.

These days our culture buzzes with cynicism about the law. So many see law as the work of robed hacks and shiny suited shills. Judges who rule by personal policy preferences. Lawyers who seek to razzle dazzle them. On this view, the only rule of law is the will to power. Maybe in a dark moment you've fallen prey to doubts along these lines.

But I wonder whether the law's greatest irony might just be the hope obscured by the cynic's shadow. I wonder whether cynicism about the law flourishes so freely only because—for all its blemishes—the rule of law in our society is so successful that sometimes it's hard to see.

I wonder if we're like David Foster Wallace's fish: surrounded by water, yet somehow unable to appreciate its existence.[37] Or like Chesterton's man on the street who is asked out of the blue why he prefers civilization to barbarism and has a hard time stammering out a reply because the "very multiplicity of proof which [should] make reply overwhelming makes [it] impossible."[38]

Now the cynicism surrounding law is easy enough to see. When Supreme Court Justices try to defend law as a professional discipline, when they explain their jobs as interpreting

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35. *See* Adam Beach, *How to qualify as a lawyer in England and Wales*, INT'L BAR ASS'N, http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_EnglandWales.aspx, [http://perma.cc/E7F2-5UV7] (last visited Mar. 18, 2014).

36. As the American Bar Association has recently started to do, at least to some degree. *See* TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, AM. BAR ASS'N, DRAFT REPORT AND RECOMMENDATIONS 22–23 (2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf, [http://perma.cc/HE9X-S574].

37. *See* DAVID FOSTER WALLACE, THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION, ABOUT LIVING A COMPASSIONATE LIFE 3–8 (2009).

38. GILBERT K. CHESTERTON, ORTHODOXY 152–53 (1908).

legal texts, when they echo the traditional *Federalist 78* conception of judging, they are mocked, often viciously. Leading media voices call them "deceiving."[39] Warn that behind their "benign beige facade[s]" lurk "crimson partisan[s]."[40] Even law professors venture to the microphones to express "complete[] disgust[]" and accuse them of "perjur[y]" and "intellectual vacuity."[41] Actual quotes all.

If this bleak picture I've sketched were an accurate one, if I believed judges and lawyers regularly acted as shills and hacks, I'd hang up the robe and hand in my license. But even accounting for my native optimism, I just don't think that's what a life in the law is about. At heart, I doubt you do either.

As a working lawyer, I saw time and again that creativity, intelligence, and hard work applied to a legal problem could make a profound difference in a client's life. I saw judges and juries that, while human and imperfect, strove to hear earnestly and decide impartially. I never felt my arguments to courts were political ones, but ones based on rules of procedure and evidence, precedent, and standard interpretive techniques. The prosaic but vital stuff of a life in the law.

As a judge now, I see colleagues striving every day to enforce the Constitution, the statutes passed by Congress, the precedents that bind us, the contracts adopted by the parties. Sometimes with quiet misgivings about the wisdom of the regulation at issue. Sometimes with concern about their complicity in enforcing a doubtful statute. But enforcing the law all the same, believers that ours is an essentially just legal order.

This is not to suggest that we lawyers and judges bear no blame for our age's cynicism about the law. Take our self-adopted model rules of professional conduct. They explain that the duty of diligence we lawyers owe our clients doesn't "*require* the use of offensive tactics or *preclude* . . . *treating* [people] with courtesy and respect."[42] Now, how's that for a profession-

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39. Maureen Dowd, *Men in Black*, N.Y. TIMES, April 3, 2012, http://www.nytimes.com/2012/04/04/opinion/dowd-men-in-black.html, [http://perma.cc/9NXA-ZLV6].

40. *Id.*

41. Louis Michael Seidman & Wendy Long, The Sotomayor Nomination, Part II (July 13, 2009), *available at* http://www.fed-soc.org/debates/dbtid.30/default.asp, [http://perma.cc/9ZSG-HQFD].

42. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1983) (emphasis added).

al promise? A sort of ethical commandment that, as a lawyer, you should do unto others before they can do unto you. No doubt we have reason to look hard in the mirror when our profession's reflected image in popular culture is no longer Atticus Finch but Saul Goodman.

Of course, too, we make our share of mistakes. As my daughters remind me, donning a robe doesn't make me any smarter. But the robe does mean something—and not just that I can hide coffee stains on my shirt. It serves as a reminder of what's expected of us—what Burke called the "cold neutrality of an impartial judge."[43] It serves, too, as a reminder of the relatively modest station we're meant to occupy in a democratic society. In other places, judges wear scarlet and ermine. Here, we're told to buy our own plain black robes—and I can attest the standard choir outfit at the local uniform supply store is a good deal. Ours is a judiciary of honest black polyester.

In defending law as a coherent discipline, I don't mean to suggest that every hard legal question has a single right answer. That some Platonic form or Absolute Truth exists for every knotty statute or roiled regulation—if only you possess the superhuman power to discern it. I don't know about you, but I haven't met many judges who resemble Hercules. Well, maybe my old boss Byron White. But how many of us will lead the NFL in rushing?[44] When a lawyer claims Absolute Metaphysical Certainty about the meaning of some chain of ungrammatical prepositional phrases tacked onto the end of a run-on sentence buried in some sprawling statutory subsection, I start worrying. For questions like these, my gospel is skepticism—though I try not to make a dogma out of it.[45]

But to admit that disagreements do and will always exist over hard and fine questions of law doesn't mean those disagreements are the products of personal will or politics rather

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43. EDMUND BURKE, *Preface to the Address of M. Brissot to His Constituents, in* 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801).

44. EDWARD J. RIELLY, *Byron Raymond White (Whizzer) (1917-2002), in* FOOTBALL: AN ENCYCLOPEDIA OF POPULAR CULTURE 389, 390 (2009) (Byron White was the NFL's rushing leader twice—as a Pittsburgh Pirate in 1938 and then as a Detroit Lion in 1940—though his football career was interrupted by Rhodes Scholarship studies at Oxford and cut short for Navy service during World War II).

45. *See* Lewis F. Powell, Jr., *Foreword* to GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE xii (1994) (quoting Learned Hand).

than the products of diligent and honest efforts by all involved to make sense of the legal materials at hand.

The first case I wrote for the Tenth Circuit to reach the Supreme Court involved a close question of statutory interpretation, and the Court split 5-4.[46] Justice Breyer wrote to affirm. He was joined by Justices Thomas, Ginsburg, Alito, and Sotomayor. Chief Justice Roberts dissented, with Justices Stevens, Scalia, and Kennedy. Now that's a lineup the public doesn't often hear about, but it's the sort of thing that happens—quietly—day in and day out throughout our country.

As you know but the legal cynic overlooks, the vast majority of disputes coming to our courts are ones in which *all* judges do agree on the outcome. The intense focus on the few cases where we disagree suffers from a serious selection effect problem. Over ninety percent of the decisions issued by my court are unanimous; that's pretty typical of the federal appellate courts.[47] Forty percent of the Supreme Court's cases are unanimous too, even though that court faces the toughest assignments and nine, not just three, judges have to vote in every dispute.[48] In fact, the Supreme Court's rate of dissent has been largely stable for the last seventy years—this despite the fact that back in 1945, eight of nine justices had been appointed by a single President and today's sitting justices were appointed by five different Presidents.[49]

Even in those few cases where we *do* disagree, the cynic also fails to appreciate the nature of our disagreements. We lawyers and judges may dispute which tools of legal analysis are most appropriate in ascertaining a statute's meaning. We may disagree over the order of priority we should assign to these competing tools and their consonance with the Constitution. We may even disagree over the results our agreed tools yield in a particular case. These disagreements sometimes break along

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46. *See* Dolan v. United States, 130 S. Ct. 2533, 2533 (2010).

47. *See* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 (2010).

48. PAMELA C. CORLEY ET AL., THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT 96 (2013).

49. Frank H. Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 S. CT. REV. 389, 392–93; Kurt G. Kastorf, *A more divisive, political U.S. Supreme Court? Think again*, CHRISTIAN SCI. MONITOR, June 25, 2012, http://www.csmonitor.com/Commentary/Opinion/2012/0625/A-more-divisive-political-US-Supreme-Court-Think-again, [http://perma.cc/9TFU-PE8M].

familiar lines, but sometimes not. Consider, for example, the debate between Justices Scalia and Ginsburg, on the one hand, and Justices Thomas and Breyer, on the other hand, over the role the rule of lenity should play in criminal cases,[50] or similar disagreements between Justices Scalia and Thomas about the degree of deference due precedent.[51] Debates like these are hugely consequential. But they are disputes of legal judgment, not disputes about politics or personal will.

In the hardest cases, as well, many constraints narrow the realm of admissible dispute: closed factual records; an adversarial process where the parties usually determine the issues for the court's decision; standards of review that command deference to finders of fact; the rules requiring appellate judges to operate on collegiate panels where we listen to and learn from one another; the discipline of writing reason-giving opinions; and the possibility of further review. To be sure, these constraints sometimes point in different directions. But that shouldn't obscure how they serve to limit the latitude available to all judges, even the cynic's imagined judge who would like nothing more than to impose his policy preferences on everyone else. And on top of all that, what today appears a hard case tomorrow becomes an easy one—an accretion to precedent and a new constraint on the range of legally available options in future cases.

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50. *Compare* Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (suggesting the rule of lenity applies because the defendant's reading of the statutory language is "eminently debatable"), *and* Muscarello v. United States, 524 U.S. 125, 148 (1998) (Ginsburg, J., dissenting) (invoking the rule of lenity because of ambiguity in the criminal statute), *with* United States v. R.L.C., 503 U.S. 291, 311 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("[T]he rule [of lenity] is not triggered merely because a statute appears textually ambiguous *on its face*."), *and Muscarello*, 524 U.S. at 138 (Breyer, J.) ("The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the] rule [of lenity], for most statutes are ambiguous to some degree.").

51. *Compare, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'" (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))), *with id.* at 3062–63 (Thomas, J., concurring in part and concurring in the judgment) ("I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part))).

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Now maybe I exaggerate the cynicism that seems to pervade today. Or maybe the cynicism I see is real but endemic to every place and time—and it seems something fresh only because this is our place and time. After all, lawyers and judges have never been much loved. Shakespeare wrote the history of King Henry VI in three parts. In all those three plays there is only a single joke. Jack Cade and his followers come to London intent on rebellion, and offer as their first rallying cry—"let's kill *all* the lawyers."[52] As, in fact, they pretty much did.[53]

But maybe, just maybe, cynicism about the rule of law—whatever the place and time—is its greatest irony. Maybe the cynicism is so apparent in our society only because the rule of law here—for all its problems—is so successful. After all, who can make so much fun of the law without being very sure the law makes it safe to do so? Don't our friends, neighbors, and we ourselves expect and demand—not just hope for—justice based on the rule of law?

Our country today shoulders an enormous burden as the most powerful nation on Earth and the most obvious example of a people struggling to govern itself under the rule of law. Our mistakes and missteps are heralded by those who do not wish us well, and noticed even by those who do. Neither should we try to shuffle our problems under the rug: we have too many to ignore. The fact is, the law can be a messy, human business, a disappointment to those seeking Truth in some Absolute sense and expecting more of the Divine or Heroic from those of us wearing the robes. And it is easy enough to spot examples where the law's ironies are truly bitter.

But it seems to me we shouldn't dwell so much on the bitter that we never savor the sweet. It is, after all, the law that permits us to resolve our disputes without resort to violence, to organize our affairs with some measure of confidence. It is through the careful application of the law's existing premises that we are able to generate new solutions to changing social

52. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2 (emphasis added).

53. For an account of the rebellion and its victims, see ALEXANDER L. KAUFMAN, THE HISTORICAL LITERATURE OF THE JACK CADE REBELLION 199–202 (2009).

coordination problems as they emerge. And, when done well, the law permits us to achieve all of this in a deliberative and transparent way.

Here, then, is the irony I'd like to leave you with. If sometimes the cynic in all of us fails to see our Nation's successes when it comes to the rule of law maybe it's because we are like David Foster Wallace's fish that's oblivious to the life-giving water in which it swims. Maybe we overlook our Nation's success in living under the rule of law only because, for all our faults, that success is so obvious it's sometimes hard to see.

25

Intention and the Allocation of Risk

*Neil M. Gorsuch**

Others have, and will for years to come, write and speak about, learn from and debate John Finnis's contributions to ethics, philosophy, even Shakespearean scholarship and theology. But as a workaday judge, my daily bread does not consist of such high cuisine. It is instead made up of a comparatively pedestrian—if wholesome and filling—stew of statutes and precedents, regulations and rules. Yet, from time to time Finnis has been kind enough to dine with those of us who subsist on such doctrinal fare—and here, too, he has applied his remarkable talents in important and enduring ways. He is, after all, not just a philosopher but a fine lawyer and a member of the Bar (Gray's Inn). And it is on an aspect of his scholarship in the legal arena that I have been asked to comment.

But before I get to that, I seek (and in any event assume) a point of personal privilege. This to offer a brief recollection of John Finnis not as philosopher or even as lawyer but in the role I know him best—as teacher. Many years ago, I was lucky enough to study under his supervision. It was a time when legal giants roamed among Oxford's spires. John Finnis, Ronald Dworkin, and Joseph Raz were all there, busy with their seminal works, their lectures and seminars open to any curious graduate student, their debates the stuff of student coffee house legend. As a graduate student at the same college where Finnis has spent almost a half century, I was fortunate to have him assigned as my dissertation supervisor. And as busy as he was with his research and scholarship, while a leading figure in his field on an international stage, there was never any question about the degree of his devotion to his students. He took on many (and many thankless) tasks in aid of student life, serving variously as the college's dean of graduates, director of undergraduate studies, and vice-master, even reportedly assuming for a time the position (dreaded by many students) of estates bursar, the keeper of the college finances.[1] Not every great scholar is also such a devoted teacher, taking to heart his role as leader in the daily life of a collegiate community.

Finnis's concern for his students manifested itself in many other and more personal ways. Like the red ink he poured so carefully—and generously—over the papers we produced. Or the gentle but exacting cross-examinations we endured while sweating next to (but never raked over) the coal fire in his paneled college room. To those lucky enough to have experienced all this, we recall well how the good professor (really,

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[1] *University College Record* (2010), 15(3): 19 27.

Reason, Morality, and Law. John Keown.

Doctor to many of us, before the Americanism crept in) patiently and generously read draft after draft we produced, always encouraging our efforts but also always testing, always questioning, and never tolerating a weak argument or an implicit or untested premise—let alone the syntactical sin of a misplaced modifier or split infinitive. I have encountered few such patient, kind, and truly generous teachers in my life.

And I am hardly alone in this assessment. On his (semi-)retirement from Oxford in 2010, University College published a number of recollections from Finnis's former students. A couple are evocative of my experience and emblematic of the sort of teacher Finnis was and is. Nicola Lacey, now a fellow at All Souls, recalled the time she began as one of Finnis's students. Finnis asked her what law courses she intended to study. She replied that she would surely take the popular courses on Jurisprudence and Criminal Justice but that just as surely she intended to avoid the dry stuff of Restitution. Finnis looked at her with intense seriousness and thought for a moment. Then, perhaps peeking out over his glasses—as he does when he wishes to emphasize a really important point—he replied, "But, Mrs. Lacey, Restitution is good for the soul." Needless to say, she took Restitution. Philip Gawith, who later went on to serve as CEO of the Maitland communications agency, recalled a time when his tutorial partner triumphantly concluded that a certain argument was "circular." To which Finnis responded—accompanied, we might imagine, by his characteristically gentle sigh—"and what is a circle but a collection of points equidistant from the center?" As Gawith observed, Finnis had certain quiet and dry ways of letting us know that what we considered to be a good argument was not quite so good.[2] I am just happy to know that, while Finnis may now have largely retired from Oxford, students at a university in my own country (Notre Dame) will continue to have the chance to get to know him not just as a philosopher whose works they encounter in print but as a kind and careful teacher to be enjoyed in person.

And with that point of personal privilege exercised, let me turn to comment on an aspect of Finnis's legal scholarship. Space constraints will allow me to share just one example. But it will, I think, easily suffice to illustrate his enduring importance to the law.

In crime and tort, legal liability has often and long depended on a showing that the defendant *intended* to do a legal wrong. When it comes to inchoate offenses such as attempt and conspiracy, the presence of an unlawful intent is frequently what separates criminality itself from legally innocuous behavior.[3] The same holds true when it comes

[2] *University College Record* (2010), 15(3): 19 27. For these and other recollections, I am indebted to Dr Robin Darwall Smith, the University College archivist who directed the college's published tribute to Finnis, for allowing me to retell here some of the stories he took the time and effort to compile and record.

[3] See, e.g. *Braxton v. US*, 500 US 344, 351 n. * (1991); *US v. Bailey*, 444 US 394, 404 5 (1980); *Direct Sales Co. v. US*, 319 US 703, 711 (1943); Model Penal Code §2.02, Comment 2, §5.01, Comment 2; LaFave, *Substantive Criminal Law*, § 5.2(b) and n. 9, §11.3; Bishop, *New Commentaries on the Criminal Law Upon a New System of Legal Exposition*, §729.4. To be sure, the drafters of the Model Penal Code have suggested extending attempt liability to those who believe their conduct would cause (not intend to cause) an unlawful result. Model Penal Code §5.01(1)(b). As the Code's commentators admit, however, they have advocated an exception to the common law's usual requirement of intent and their proposal has not been adopted in most American jurisdictions. Model Penal Code §5.01 comment 2; LaFave, *Substantive Criminal Law*, §11.3 (a) n. 28.

to accessory liability.[4] The law of homicide, as well, "often distinguishes either in setting the 'degree' of the crime or in imposing punishment" between intended and unintended killings.[5] And many of our most serious torts (say, battery and assault) are denominated *intentional* torts. Of course, what *qualifies* as "intentional" and thus sufficient to render the defendant liable in the civil context is broader than in the criminal context—embracing knowing as well as truly purposeful wrongs in American law. And perhaps this is so for good reason, given that in tort only money, not individual liberty, is at stake.[6] But it remains a fact that the nature of liability (punitive damages, for example) is generally more expansive and serious for what tort law deems an *intentional* wrong than for wrongs involving only lesser *mens rea*.[7]

In comparatively recent years some have argued for tearing down this traditional legal edifice. These theorists have suggested that the presence or absence of an intent to perform a legal wrong should be neither here nor there when it comes to assigning legal liability; that the common law's traditional reference to intention should be scrapped or revised; that a better way forward exists. In the space I have, let me outline just two of the challenges to our received tradition and then highlight some of the defects associated with those efforts, defects that Finnis's scholarship has helped illuminate.

The bolder of the two challenges is perhaps most emblematically identified with the prolific Judge Richard Posner. In Judge Posner's view, legal liability in tort should turn on a comparison of social costs and benefits. Whether a legal wrong is done intentionally is more or less beside the point. Intentional torts merit stiffer penalties than those done recklessly or negligently only if and to the extent economic efficiency requires that outcome.[8] To explain why this is so, Judge Posner asks us to consider the case of *Bird v. Holbrook*[9]—a chestnut that many of us encountered in law school and that, as it happens, involved an actual bird and, perhaps even better still, a bed of tulips.

So let us begin with the facts of that case. In *Bird*, the defendant owned a walled garden where, as the court put it, he "grew valuable flower-roots, and particularly tulips, of the choicest and most expensive description."[10] To protect the garden, the defendant-owner set up a hidden spring gun, a shotgun rigged to fire when any trespasser stumbled over a contact wire.[11] The plaintiff, a William Bird, was a young man of 19 who saw a neighbor's female servant in distress. She was in distress because a wandering pea-hen apparently belonging to her employer had escaped and "alighted in the defendant's garden."[12] So young Will Bird, a well raised young man it would seem, volunteered to collect the bird. He clambered to the top of the defendant's garden wall

[4] See, e.g. Model Penal Code §2.02, Comment 2, §2.06, Comment 6(c); *US v. Peoni*, 100 F 2d 401, 402 3 (2d Cir. 1938) (Hand, J).

[5] *Bailey*, 444 US at 405.

[6] *Restatement (Second) of Torts* (1965), §8A.

[7] See, e.g. Keeton et al., *Prosser and Keeton on the Law of Torts*, §8.

[8] Posner, *Economic Analysis of Law*, 260 5.

[9] (1828) 4 Bing 628, 130 ER 911. Judge Posner used the case as the focus of one of his earliest articles on law and economics, and he continues to use it as the focus of his discussion of intentional torts in his textbook. Posner, "Killing or Wounding to Protect a Property Interest," 209; Posner, *Economic Analysis of Law*, 260 5.

[10] 4 Bing at 631, 130 ER at 912.

[11] 4 Bing at 632, 130 ER at 912.

[12] 4 Bing at 632, 130 ER at 913.

and called out two or three times to see if anyone was around. Receiving no reply, he jumped into the garden. Once in the garden he saw that the pea-hen had taken shelter near a summer house and so he went to collect it.[13] Seeking to pluck the bird, not pick the flowers, he was nonetheless rewarded for his troubles with a spray of swan shot from the defendant's hidden spring gun.[14]

When his case for damages eventually made it to court, the English bench found the garden owner liable.[15] The court did so on the basis that it is unacceptable (at least without notice, it said) for anyone to maim others *intentionally* simply for picking tulips.[16] The *intentional* harming of another's person is a grave thing and generally impermissible at law, even for the protection of property. Neither, the court pointed out, was the defendant really even seeking to defend his tulips. By leaving a hidden spring gun lying around, the owner demonstrated that he was just as happy to injure someone who had *already* picked his flowers as he was someone *about* to pick them. And no doubt in the owner's view punishing the completed picker was a useful deterrent, a way to dissuade other future would-be pickers from even trying. But this was a serious wrong because, as counsel for Mr Bird put it, the sanction of law is required "to give effect to punishment, and pain [intentionally] inflicted for a supposed offence, at the discretion of an individual, without the intervention of a judicial sentence, is a mere act of revenge."[17]

Now back to Judge Posner. For his part, Judge Posner encourages us to analyze *Bird*, and tort law generally, in a radically different way. In his view, the case can be and is perhaps better understood *not* as involving an intentional wrongdoing but as involving an effort to achieve the optimal social balance between two perfectly "legitimate activities, raising tulips and keeping peahens."[18] Spring guns, Judge Posner suggests, may well be an efficient, perhaps even the most efficient, way of protecting tulips in a time and place where police protection is not readily available; conversely, spring guns may be inefficient in times and places where other means of protection are more accessible and accidental shootings more likely.[19] The real trick, Judge Posner argues, and what he says judges already may be doing subconsciously, is "design[ing] a rule of liability [in tort] that maximize[s] the (joint) value of both activities, net of any protective or other costs (including personal injuries)."[20] Neither does Judge Posner confine his critique to the realm of civil liability. In criminal law, too, he argues that intent has significance only as a *proxy* for other variables in an economic cost-benefit analysis.[21] So it is that, under his approach, the fact that a defendant may have *intended* to kill or maim others is itself really "neither here nor there."[22]

[13] 4 Bing at 633, 130 ER at 913.
[14] 4 Bing at 633, 130 ER at 913.
[15] 4 Bing at 633, 130 ER at 913.
[16] 4 Bing at 640 6, 130 ER at 916 18.
[17] 4 Bing at 636; 130 ER at 914.
[18] Posner, "Killing or Wounding to Protect a Property Interest," 209.
[19] Posner, "Killing or Wounding to Protect a Property Interest," 214 16.
[20] Posner, "Killing or Wounding to Protect a Property Interest," 210.
[21] Posner, *Economic Analysis of Law*, 295.
[22] Posner, *Economic Analysis of Law*, 206.

To those who might object that liability for intentionally killing or maiming another human being should not turn on a balancing of economic costs and benefits, Judge Posner offers this reply:

> It is surely not correct to say that society never permits the sacrifice of human lives on behalf of substantial economic values. Automobile driving is an example of the many deadly activities that cannot be justified as saving more lives than they take. Nor can the motoring example be distinguished from the spring-gun case on the ground that one who sets a spring-gun intends to kill or wound. In both cases, a risk of death is created that could be avoided by substituting other methods of achieving one's ends (walking instead of driving); in both cases the actor normally hopes the risk will not materialize. One can argue that driving is more valuable and spring guns more dangerous; but intentionality is neither here nor there.[23]

A second, perhaps more modest, challenge to our received legal tradition, though one headed in much the same direction, might be identified with Glanville Williams and his theory of "oblique intention." While Williams did not insist that intention (however defined at law) is entirely irrelevant to the assignment of legal liability, he argued for collapsing intent with foresight or knowledge and treating the two the same when it comes to determining culpability in the criminal law, much as American law typically does in tort.[24]

To make his point, Williams once offered this example—a colorful and complex one in its own right. Suppose a spy is discovered to be ferrying a top secret and highly sensitive device to a hostile state by way of an international flight. Detected in air, the spy fears he will be prevented from completing his mission, so he seizes a hostage and demands that the flight steward prepare a parachute so that he can escape with the device intact. The steward (apparently steeped in national security matters himself) recognizes that the consequences will be dire if the secret device falls into the hands of the enemy, so he discreetly cuts the parachute's ripcord. In a rush, the spy fails to check the parachute, leaps from the plane, and the device (along with the spy) is destroyed upon hitting the ground. Applying his oblique theory of intention, Williams had this to say:

> It seems clear that, as a matter of law, the steward must still be credited with an intention to kill the criminal. He foresees the certainty of the criminal's death if the events happen as he sees they may, even though he does not desire that death.[25]

Of course, the steward's killing might be legally justified on other grounds, say perhaps because of the affirmative defense involving the defense of others. But Williams used his hypothetical to make a different point. He used it to argue that whether the steward intended the spy's death or merely knew it would happen should not matter when assessing his legal liability or access to any affirmative defense. In Williams's view there

[23] Posner, *Economic Analysis of Law*, 206.

[24] Williams, "Oblique Intention"; Williams, *Textbook of Criminal Law*, 84 7; Williams, *The Mental Element in Crime*, 52 3.

[25] Williams, *The Mental Element in Crime*, 51 3.

is no point in distinguishing between at least intended and foreseen homicides because all that does is "involve the law in fine distinctions, and make it unduly lenient."[26]

With Judge Posner's and Glanville Williams's views now (albeit very briefly) sketched, we might begin to ask some analytical and normative questions about their project, questions that Finnis's scholarship has suggested and illuminated. Once scattered across various journals and years, Finnis's efforts in this area have been recently and happily married together, and can be found published as essays 10 and 11 in Volume II, and essay 16 in Volume IV of Oxford University Press's recent collection of Finnis's work.

Let us begin with the analytical. Judge Posner rests his argument in large measure on the notion that intended harms (however defined) and purely negligent harms are much the same because both involve the imposition of a risk of harm on someone else. In particular, the automobile driver and the spring gun operator, he says, are essentially indistinguishable. Both take actions that create some risk of harm, even though both *hope* that harm will not materialize. Whether any harm is intended is beside the point, neither here nor there, because the risk of the unhoped-for harm is just an inherent cost associated with performing two generally beneficial activities, driving and tulip growing.

But we might well question whether this line of analysis conflates two different things, hoping and intending. After all, as Finnis asks, cannot one "*intend* to achieve a certain result without *desiring* it to come about"?[27] Cannot one "choose and intend to do what is utterly repugnant to one's dominant feelings"?[28] Consider the spring gun owner. We can all agree with Judge Posner that he may well *hope* everyone stays away from the trap he sets. But if he thinks that many will be deterred and only a few will come, then does not he really *intend* to shoot those few?[29] Is it not the whole point of a spring gun deterrent that the owner *intends* to injure or kill those who ignore or test it, however repugnant that result may be to the owner's *hopes*? In this way, does not the spring gun owner *intend* to maim or kill even if he may *hope* not to have to do so? And, having observed this much, can we really say the negligent driver is in the same position as the spring gun owner? After all, the negligent driver neither hopes *nor intends* to hurt anyone when he takes to the road. He may hurt someone by accident, but killing or maiming is simply not part of his plan or intent—as either a means *or* as an end.[30] Any injury he might cause would be grounds for serious regret, not the fulfillment of any intention he harbors. In this way, the cases of the spring gun owner and driver come to us in very different postures analytically—not at all indistinguishable as Judge Posner's analysis would have us posit.

A similar analytical question attends Williams's effort to equate intent and knowledge or foresight. We might approach that question by asking whether it is really fair to say that Williams's steward is guilty of an *intentional* killing. To be sure, the steward *knew* the spy would die; but did he *intend* that death? Or might there be, as Finnis suggests, a strong argument that Williams's steward "did not intend to kill the spy, though he foresaw and accepted that his own choice would certainly bring about

[26] Williams, "Oblique Intention," 425. [27] *CEJF* II.10, 174 (emphasis added).
[28] *CEJF* II.10, 175. [29] *CEJF* IV.16, 342. [30] *CEJF* IV.16, 345.

[the spy's] death"?[31] Indeed, might it be a fairer view of the facts that the spy's "free-fall and death are side effects of the steward's plan to destroy the . . . device" that might do harm to his country?[32] After all, and for all we know from Williams's hypothetical, if the steward could have destroyed the device without killing anyone he gladly would have done so.

And this leads us to the real analytical question confronting Williams's project: Is he right that *no* meaningful distinction exists between intent and foresight that the criminal law might recognize, at least sometimes? In answering this question, it is hard to do better than Finnis once did with this illustration:

> Those who wear shoes don't *intend* to wear them out [even though they may foresee that as an inevitable consequence]. Those who fly the Atlantic foreseeing certain jetlag [likewise] don't do so with the *intention* to get jetlag; those who drink too heavily rarely *intend* the hangover they know is certain. Those who habitually stutter foresee with certainty that their speech will create annoyance or anxiety, but do not *intend* those side effects. Indeed, we might well call [Williams's] extended notion of [oblique] intent the Pseudo-Masochist Theory of Intention—for it holds that those who *foresee* that their actions will have painful effects on themselves *intend* those effects.[33]

Plainly, a meaningful analytical distinction *does* exist between intending and foreseeing a consequence. Recognizing exactly this, the Model Penal Code acknowledges that a line can and sometimes should be drawn in American criminal law "between a [person] who wills that a particular act or result take place and another who is merely willing that it should take place."[34] So, too, the US Supreme Court, which has emphasized that, at least in the criminal law, the idea that "knowledge is sufficient to show intent is emphatically *not* the modern view."[35] Tellingly, even Williams himself ultimately conceded that in certain areas of law—treason, for example—society *should* require proof of intention rather than knowledge before imposing liability. Yet, Williams notably failed to explain *why* this should be so or *how* it might be reconciled with his claim elsewhere that the intent-knowledge distinction lacks force.[36] His ambiguity and equivocation seem the product of a largely unexplored (if ultimately correct) intuition that, at least sometimes, intent *does* matter.

Not only does Finnis help us see that the traditional intent-knowledge distinction in law bears analytical power overlooked by its critics. He also helps expose the undergirding normative reasons for the law's traditional cognizance of intention. He reminds us, for example, that some of the law's harshest punishments are often (and have long been) reserved for intentional wrongs precisely because to *intend* something is to endorse it as a matter of *free will*—and freely choosing something *matters*.[37] Our intentional choices reflect and shape our character—who we are and who we wish to be—in a way that unintended or accidental consequences cannot. Our intentional choices define us. They last, remain as part of one's will, one's orientation toward the

[31] *CEJF* II.10, 185. [32] *CEJF* II.10, 185. [33] *CEJF* II.10, 183 (emphases added).
[34] Model Penal Code §2.02, Comment 2, n. 6 (quoting National Commission on Reform of the Federal Criminal Laws, *Working Papers* 1: 124).
[35] *Giles v. California*, 554 US 353, 368 (2008).
[36] Williams, "Oblique Intention," 435 8. [37] *CEJF* II.10, 194.

world. They differ qualitatively from consequences that happen accidentally, unintentionally: after all, even a dog knows the difference between being tripped over and being kicked.[38] Even to the dog, it is not simply the result that matters so much as, sometimes at least, the intention behind it. Intending to do a legal wrong to another person is something special because, as Finnis puts it,

> [t]o intend something is to choose it, either for its own sake or as a means; and to choose is to adopt a proposal (a proposal generated by and in one's own deliberation). Once adopted, the proposal, together with the reasoning which in one's deliberation made that proposal intelligently attractive, *remains*, persists, in one's will, one's disposition to act.[39]

This is a view, of course, that has long and deeply resonated through American and British jurisprudence, and indeed the Western tradition. It is precisely why the law treats the spring gun owner who maims or kills intentionally so differently from the negligent driver whose conduct yields the same result. As Roscoe Pound once put it, our "substantive criminal law is," at least at minimum, "based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong."[40] At bedrock, and whatever else it may require of citizens, our law rests on what Justice Jackson called the "belief in freedom of the human will and [the] consequent ability and duty of the normal individual to choose between good and evil."[41] Finnis reminds us of the normative power lurking behind familiar precepts and proclamations like these.

But there are still other normative justifications for the special emphasis the law places on intentional conduct. One has to do with human equality. When someone *intends* to harm another person, Finnis encourages us to remember, "[t]he reality and fulfillment of those others is radically subjected to one's own reality and fulfilment, or to the reality and fulfilment of some other group of persons. In *intending* harm, one precisely makes their loss one's gain, or the gain of some others; one to that extent uses them up, treats them as material, as a resource."[42] People, no less than material, become means to another's end. To analyze *Bird v. Holbrook* as the challengers to extant law would have us, we ask merely whether superior collective social consequences are produced by ruling for the plaintiff or defendant. On this account, there is nothing particularly *special* about the individual. Like any other input or good, it gives way whenever some competing and ostensibly more important collective social good is at stake. But it is exactly to prevent all this that the law has traditionally held, in both crime and tort, that one generally ought not *choose* or *intend* to harm another person, and that failing to observe this rule is a particularly grave wrong. This traditional rule "expresses and preserves each individual person's . . . *dignity* . . . as an equal."[43] It recognizes that "to choose harm is the paradigmatic wrong; the exemplary instance of denial of right."[44] It stands as a bulwark against those who would allow the human individual

[38] Holmes, *The Common Law*, 3. [39] *CEJF* IV.16, 347.
[40] Pound, "Introduction," xxxvi vii.
[41] *Morissette v. US*, 342 US 246, 250 (1952).
[42] *CEJF* IV.16, 347 8; Kant, *Groundwork for the Metaphysics of Morals*, 46 8.
[43] *CEJF* IV.16, 349. [44] *CEJF* IV.16, 349 50.

to become nothing more than another commodity to be used up in aid of another's (or others') ends.[45]

Assigning legal liability based on intent can serve still other virtues. While Williams said that requiring a showing of intent rather than knowledge leads to unduly fine distinctions and too much leniency in criminal matters, law-makers and courts have frequently found these distinctions necessary to avoid results they perceive as unjust. So, for example, when it comes to attempt and conspiracy crimes, a showing of intent is often required to establish criminal liability, even though a lesser *mens rea* may suffice to establish liability for the same completed offense.[46] And even when criminal liability attaches to the primary criminal offenders on a lesser *mens rea* showing, proof of intent is typically required to hold liable those only tangentially involved with the illegal enterprise as accessories.[47] While of course legislators are free to vary these rules and sometimes have, these rules largely persist and are no doubt what the Supreme Court has called a product of "an intense individualism . . . root[ed] in American soil" willing to attach criminal sanction for actions just indirectly (or not at all) responsible for harm befalling others *only* if a *choice to do wrong* is present.[48] In this way, attention to the defendant's intent can help address and prevent what Learned Hand once called a "drag net" effect of sweeping up "all those who have been associated in any degree whatever with the main offenders."[49] The intent requirement in attempt, accessory, and conspiracy law ensures that there is no criminal prosecution, for example, when a utility provides telephone service to a customer "knowing it is used for bookmaking" or "[a]n employee puts through a shipment in the course of his employment though he knows the shipment is illegal."[50] In this way, American law seeks to allow the liberty of normal commerce and communication between individuals without forcing them always to be on guard against Williams's "oblique" intentions.

In response to all this, one might imagine Judge Posner or Williams replying that all the doctrine of intent does could be done just as easily through a system that looks purely to social consequences. Or arguing that intent doctrine does, in some sense, serve to maximize collective social welfare because of the very features that distinguish it. But replies like these would, of course, only serve to demonstrate that the fine gradations of *mens rea* traditionally recognized in the common law are *not* beside the point (neither here nor there) as both Judge Posner and Williams have suggested (albeit in their own different ways). In this respect, an argument along these lines would be nearly self-defeating. Neither would responses like these answer the objection that the common law's frequent focus on intent has meaning *for the reasons* the law has traditionally given (free will, equality, liberty)—reasons that seem to be justifiable on bases independent of any underlying social welfare calculus. Nor would they address the objection that the common law's stated reasons for focusing on intent are its true and accurate reasons—that the law possesses an integrity and deep logic to it. And they would do little to confront the argument that the law's prohibition of intentional

[45] *CEJF* IV.16, 349 50. [46] See n. 3. [47] See n. 4.
[48] *Morissette*, 342 US at 251 2.
[49] *US v. Falcone*, 109 F 2d 579, 581 (2d Cir. 1940) (Hand, J).
[50] Model Penal Code §2.06, Comment 6(c).

wrongs should sometimes trump even (and perhaps especially) when a utilitarian calculus suggests a different result.

To be sure, much more could be said about Finnis's contribution to the question of intention in crime and tort. There is a great deal more complexity and subtlety both to his arguments and to those of his antagonists than I can stitch out in these few pages. And many more difficulties to explore. Like the incommensurability problems Finnis argues can sometimes attend consequentialist explanations of the law. Or the complexities involved in trying to distinguish intended means and ends from unintended side effects. Or the question when exactly the law should and should not take special cognizance of intent and distinguish intended consequences from those merely known or foreseen. After all, while Finnis reminds us that the law *may* take cognizance of an analytically and normatively meaningful distinction between intended and unintended conduct, he hardly suggests that the law always *must* do so or that other bases for legal liability should not exist—two positions that would themselves be plainly mistaken.

But while these questions are more appropriately material for other discussions, and certainly more than I might manage to address in these few pages, let me offer one example of how the intent-foresight distinction might play a critical role in the debate over one issue of contemporary interest: the law of assisted suicide and euthanasia. As I explained in my book on that subject, Anglo-American assisted suicide law has long depended on the intent-knowledge divide. As with many other accessory offenses, liability here traditionally falls upon those who *intend* to kill another human being but not on those who *foreseeably* cause death but intend no such thing.[51] In this way, assisted suicide laws have generally sought to ensure that only actors most closely associated with the enterprise are subject to liability; others more loosely affiliated are not swept into the drag net. Unsurprisingly, both Judge Posner and Glanville Williams have sought to level the law's traditional distinction in this arena (too), all in aid of an effort to undermine and undo altogether laws prohibiting assisted suicide and euthanasia.

Their work in the assisted suicide context, however, merely revives and echoes the analytical and normative difficulties and questions we have identified. Using his theory of oblique intention as a starting point, Williams argued that the case for legalizing assisted suicide follows ineluctably from the fact that law already permits a physician to prescribe a lethal dose of palliative drugs to a patient in order to relieve pain, even if he knows that doing so may (even will) cause the patient's death. In Williams's view, the doctor who performs the same act intending to end the patient's life is in essentially the same position. But here again, one might ask whether Williams conflates two analytically different things. Cannot the law draw a rational distinction (as, in fact, it long has) between the act of a caring physician who administers morphine to ease his patient's grave pain, foreseeing death without any intent to kill, and the act of a Dr Kevorkian who injects his patients with potassium chloride in order (intending) to see them

[51] Gorsuch, *The Future of Assisted Suicide and Euthanasia*, Ch. 4.

dead?[52] In *Vacco v. Quill*, the Supreme Court expressly recognized and endorsed the historical pedigree and analytical validity of laws that have long made just this distinction between foreseen and intended deaths in the assisted suicide context; are we really sure it was wrong to do so?[53]

And if we do pull down the law's traditional dependence on intention in this arena, we might ask, what would be the upshot for our commitment to human equality? Judge Posner contends that assisted suicide should be legalized because (in his view) the balance of social utility appears to justify it. But his utilitarian argument for legalization leaves him forced to concede that some human lives are worth greater legal protection than others because of their comparative instrumental value; on his account, some lives should never be taken, but others can (and perhaps should) be.[54] Yet, if human lives bear only instrumental value, how do we decide which lives have sufficient utility to warrant the law's protection and which do not? And if some human lives lack sufficient instrumental utility to merit protection against being intentionally taken, what are we saying about our commitment to human equality?[55] Might existing law do more to protect equality than the would-be authors of its demise might wish to admit?[56]

Other large questions follow, too. If we throw over existing law and permit some persons' lives to be taken intentionally, how are we supposed to go about the business of sorting out which lives may be so taken? Whose life may be taken and who decides? Does it even matter whether we have the consent of those to be killed, at least if we can confidently conclude their lives really lack (what someone deems to be) sufficient instrumental value? Peter Singer's work advocating infanticide reveals just how far the logical progression ignited by this line of inquiry may take us.[57]

But let me leave that preview there, with those dangling questions asked but unanswered. The permutations and even just some very tentative answers took me a long book to spell out. For our purposes here it is enough to note that Finnis has done much to remind us that the law's use of intention as a basis for liability is not always and wholly beside the point; that the law's focus on intent can, at least sometimes, be both analytically and normatively justified; and that all this can make a significant difference in the analysis of many legal questions across many fields and in many different ways. Finnis's work has helped explain and defend the thicket of the common law's traditional *mens rea* rules, reminding us of the intellectual pedigree of those rules and of the reasons why the law has often and for so long taken care with what sometimes seem complex and unduly fine distinctions. No doubt the debate will continue, with rejoinders made, new lessons learned, and echoes heard in the assisted suicide and many other debates for years to come. But no one seeking

[52] Gorsuch, *The Future of Assisted Suicide and Euthanasia*, Chs 4, 9 (discussing Williams's theory, among others).

[53] 521 US 793, 802 (1997) (distinguishing assisted suicide from acceptable medical practice on exactly these grounds, explaining that "[t]he law has long used actors' intent or purposes to distinguish between two acts that may have the same result").

[54] Gorsuch, *Future of Assisted Suicide and Euthanasia*, 160 (discussing Posner, *Aging and Old Age*, 241).

[55] Gorsuch, *Future of Assisted Suicide and Euthanasia*, Chs 7 9.

[56] Walton Report, para. 237 ("Th[e] prohibition of intentional killing . . . is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all are equal.").

[57] Gorsuch, *The Future of Assisted Suicide and Euthanasia*, Ch. 9 (discussing Singer, *Practical Ethics*).

to raze or reimagine the law's protective *mens rea* forest in favor of some (surely well-intentioned) alternative vision will be able to do so without first confronting Finnis's defense. And that, though but a very small part of Finnis's body of work, represents a significant achievement indeed.

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Article

A REPLY TO RAYMOND TALLIS ON THE LEGALIZATION OF ASSISTED SUICIDE AND EUTHANASIA

Hon. Neil M. Gorsuch, J.D., D.Phil. [a]

Raymond Tallis, formerly Chairman of the Royal College of Physicians Committee on Ethical Issues in Medicine, recently reviewed my book, *The Future of Assisted Suicide and Euthanasia*, for *The Times Literary Supplement*. The review was thoughtful, and as generous as one might hope in view of Dr. Tallis' advocacy for the legalization of assisted suicide and the skepticism I have expressed about that project. However, the review also offered a tantalizing glimpse at the assumed and sometimes unspoken premises that underlie the contemporary assisted suicide movement.

Dr. Tallis expresses a deep conviction that: slippery slope problems can be avoided; legalization would bring a net benefit to society, outweighing any undesirable consequences; and the legalization of assisted suicide is necessary to address patient suffering. None of these views is unique to Dr. Tallis; they are shared by a great many people and hold a natural and intuitive appeal. But, can we be so confident that these assumptions, taken as virtual articles of faith by many, are well-founded?

Consider first Dr. Tallis' assertion, in response to slippery slope concerns, that society can draw an "objectively reasonable" line [2] by legalizing voluntary assisted suicide only for mentally competent persons who are terminally ill and suffering intolerable pain. Such a line, Dr. Tallis asserts, is justified by our obligation to afford proper respect to the right to individual self-determination. But on such a principle, why would we honor fully autonomous decisions to ***328** seek out assisted suicide (or euthanasia for that matter) [3] only by the terminally ill or those suffering intolerable pain--much less by individuals satisfying both conditions? In fact, while Dr. Tallis repeatedly touts Oregon's assisted suicide law as a model worthy of emulation elsewhere, that very law makes no mention of suffering; terminally ill individuals can kill themselves freely whether they suffer great pain, little pain, or none at all. [4] Conversely, although the Dutch law permitting euthanasia and physician-assisted suicide requires "unbearable suffering," it does not require the presence of any terminal illness. [5]

Similarly, Dr. Tallis claims that the suffering of the patient in the English case *In re B* [6] dramatizes the need to change our laws and attitudes about assisted suicide. But, *In re B* involved only the discontinuation of treatment, something that need not involve an intention to kill the patient and thus constitute an act of assisted suicide. Further, *In re B* involved a patient who, although paralyzed for life, was not terminally ill. Neither does the published opinion on her case make any finding that she suffered from unbearable physical pain. Instead, the case suggests she simply did not wish to go on living in her condition. Rather than limiting the availability of assisted suicide to those who are both terminally ill and suffering intolerable pain, if *In re B* were extended outside the refusal of treatment context as Dr. Tallis suggests, his own example would thus seem to broaden the argument for legalization of assisted suicide beyond either requisite.

Even if we take those two requisites seriously, though, exactly what do they mean? Should a qualifying terminal illness be understood to encompass those with only six months to live according to physicians? A year? Two? Slippery slope problems seem to persist even in the very application of this requisite. Likewise, what qualifies as "intolerable" pain?

The Dutch experience is illuminating. In 1984, Dutch law required proof of physical suffering considered by the treating physician to be intolerable. In a series of steps over the last 23 years, however, the Dutch have progressed from that understanding to one in which psychological suffering, subjectively considered by the patient to be intolerable, suffices to merit assisted suicide or euthanasia even for the physically fit. Where assisted suicide and euthanasia were once available only to adults, Dutch legislation enacted in 2001 allows even children as young as 12 to qualify for either procedure. [7]

***329** Moreover, contrary to Dr. Tallis' reassurances, many of the leading intellectual defenders of assisted suicide readily admit and even embrace the slippery slope using the same justification upon which Dr. Tallis constructs his argument for legalization--individual autonomy. Sherry Colb of Rutgers Law School, for one, acknowledges that respect for the principle of patient autonomy entails--and will logically tend toward--legalizing assisted suicide for all competent persons, regardless of their reasons for wishing to die. [8] Ronald Dworkin and Margaret Battin similarly suggest that respect for patient autonomy means that we must honor a competent patient's advance request to be killed when dementia sets in--and do so even if the patient later retracts the request after the disease strikes. They tell us that it is the autonomous request, not the one infected by dementia, that counts, and they would seemingly force patients to abide by their original requests--that is, submit to be killed against their current wishes. [9]

From that perspective, how much of a step really remains before we conclude that persons incapable of exercising autonomy are better off dead? Peter Singer of Princeton, for one, insists that respect for autonomy means that it is a positive good for parents to kill infants suffering from Down's Syndrome, hemophilia, or any other inconvenient malady, and to "replace" them with better candidates. Professor Singer reasons that doing so would allow parents to fulfill their own autonomous life plans and inflict no real harm on infants because small children do not enjoy the basic prerequisites necessary to exercise autonomy or self-determination. [0]

Now surely, Dr. Tallis might say, this far down the slope we could never slip. But no less auspicious publications than the *New England Journal of Medicine* and *The New Yorker* have hailed Professor Singer as perhaps the most influential living philosopher. Moreover, the Dutch have already begun to follow his prescription, unveiling in the last couple of years a "protocol" for allowing doctors to kill infants--even those who have long life expectancies-- based on an assessment that their lives would not be worth living. [2]

On such reasoning, we might continue along the slippery slope and also ask why not allow baby boomers to decide when to "divest themselves" of their ***330** burdensome Alzheimer-inflicted parents--and do so even without their parents' consent? At least one leading Dutch scholar, John Griffiths, has already begun pushing for the regularization of non-consensual adult euthanasia to supplement the existing infanticide protocol. [3] Furthermore, it has long been clear that several mainstream leaders of the euthanasia movement in England and the United States (such as the late Professor Glanville Williams) support not only consensual assisted suicide for (all) competent persons, but also the non-consensual destruction of unwanted infants and the demented elderly, among others. [4]

Neither should this come as much of a surprise, for it follows logically from their basic premise that certain lives are not worth living. If killing people who request it is warranted, why can it not also be warranted for those in the same situation who are unable to request it? Although Dr. Tallis calls on us to believe that the slippery slope can be avoided, he offers us no reason to ignore the empirical evidence, logical extensions, and stated intentions of others within the euthanasia movement.

Dr. Tallis' utilitarian argument--that "[a]ny reasonable reading of the experience in countries with liberal legalisation" shows that "there was a net benefit" [5] to society--is a similarly unexplored article of faith. The Netherlands is perhaps the showcase jurisdiction for the assisted suicide and euthanasia movement, yet official Dutch surveys reveal that thousands

of adult patients, some competent, have been killed without their consent. [6] The Dutch government, entrusted as the guardian of the civil rights and equal treatment of all members of the nation has sought to justify these killings on the basis that many of the patients involved were living in what a government committee of inquiry has called a "degrading condition." [7] The same official Dutch surveys have unearthed a high incidence of clandestine euthanasia, suggesting that perhaps half of all physician killings go unreported to authorities as required by law. [8] Is this the sort of "net benefit" that "any reasonable reading" of the record commands?

Unlike even the Dutch, Oregon has no legal process to ensure that physicians obey the state's laws governing assisted suicide, report their cases with ***331** accuracy, or investigate questionable cases. [9] At least until Oregon implements a transparent and reliable regime for reporting and investigation, it remains difficult to divine anything with certainty from Oregon's experiment, let alone that it has netted vast (or even not so vast) societal benefits, leaving the Dutch data the only meaningful empirical evidence available. [20] While dependable data may be wanting, anecdotal evidence from Oregon does suggest something less than an ideal situation, as patients suffering no more than dementia and depression appear to have been coerced by family members into accepting an early death. [2]

Finally, Dr. Tallis expresses the belief that legalization is justified as a matter of necessity to alleviate unremediable suffering and miserable deaths; merely allowing people to refuse unwanted life-sustaining care (Dr. Tallis and I agree refusals of treatment should be permitted) is an insufficient response. Without legalizing assisted suicide, Dr. Tallis argues, we are doomed to "disintegrating, pain-racked" and agonizing deaths. [22]

Naturally, this is a concern that none of us, facing an inevitable death, can afford to dismiss lightly. Yet, Dr. Tallis offers no substantiation for his assertion and, in fact, as palliative and hospice care techniques continue to improve, pain has receded into the background as an asserted basis for legalizing assisted suicide. As noted above, where the Dutch once required evidence of unbearable physical suffering, that requirement has evaporated, even for teenagers; in Oregon, physical suffering has never been required to qualify for assisted suicide.

Meanwhile, a recent empirical study published in the *Journal of Clinical Oncology* expressly set out to prove that Dutch patients rationally choose assisted suicide and euthanasia primarily in response to grave prognoses. [23] The data, though, led the study authors to a very different conclusion. Their study revealed that depression is far and away the primary factor motivating requests for early deaths in the Netherlands. In Oregon, too, data show that 43% of patients seeking assisted suicide cite concerns about becoming a burden on family members and divorcées kill themselves with double the frequency of married persons. Yet, only 13% of Oregon patients seeking assisted suicide are referred by their physicians to palliative specialists for a consultation about the possible treatment of physical pain. [24] We have long known that old-fashioned ***332** suicide is often motivated by depression; [25] such results compel us to wonder whether the same might be true of its modern cousins, assisted suicide and euthanasia.

One also cannot help but ask whether, given the laws of economics, the increasing availability of assisted suicide (a cheaper solution) might serve as a deterrent to the development and dissemination of (more expensive) palliative and hospice options. John Griffiths, the Dutch legalization proponent, readily concedes "there are occasional indications" that economic considerations play a role in the administration of assisted suicide in the Netherlands; he admits, too, that budget-cutting in the Dutch health care system "could lead to increased pressure to engage in life-shortening practices." [26]

Why should we suppose that our own financially besieged health care systems would respond any differently than the Dutch system? Might Dr. Tallis' well-intentioned wish to alleviate suffering actually disincentivize the provision of palliative care and lead to more suffering and more killing? And though such a result surely is not at all what Dr. Tallis

seeks, is that necessarily the case for everyone in his camp? Derek Humphry, author of a best-selling how-to-kill-yourself book [27] and champion of the Oregon law, has candidly conceded that the fight over assisted suicide is not just about patient autonomy and the good death; it is also about saving money. [28] As former Colorado Governor Richard Lamm has put the point: "[W]e've got a duty to die and get out of the way with all of our machines and artificial hearts, so that our kids can build a reasonable life." [29]

At the end of the day, I do not mean to offer any easy answers to the questions--empirical, ethical, and moral in nature--presented by the assisted suicide debate. They are profound and profoundly difficult. But the proper resolution of these questions means a very great deal to us, both individually and as a society, and it depends on a concerted effort by all involved to address them with rigor, care, and mutual understanding--and without resort on any side to unexamined, if alluring, articles of faith.

Footnotes

a1 The author is a Judge on the United States Court of Appeals for the Tenth Circuit. He holds a doctorate in legal philosophy from Oxford and a law degree from Harvard and is the author of THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press 2006) hereinafter GORSUCH]. Many thanks to Jessica Greenston, John Keown, Chris Mammen, and Eugene Volokh for their very helpful suggestions.

1 Raymond Tallis, *Stop Me*, TIMES LITERARY SUPP. (London), Jan. 24, 2007, at 9.

2 *Id.*

3 For a discussion of the relationship between assisted suicide and euthanasia, as well as the recent effort by some to eschew those terms (terms that supporters of legalization initially embraced), in favor of euphemisms like "death with dignity and "end of life choices, see GORSUCH, *supra* note *, at 5 8, 32 43, 221 22.

4 *See* Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800 to .995 (2003).

5 *See* Termination of Life on Request and Assisted Suicide (Review Procedures) Act, Stb. 2001, nr. 137, ch. 2, art. 2, § 1 (Neth.), *available at* http://www.nvve.nl/english (translating 2001 Dutch law) (search "Termination of Life on Request ; then follow "Euthanasia Law hyperlink); *see also* GORSUCH, *supra* note *, at ch. 7 (reviewing Dutch and Oregon laws, procedures, and practices).

6 *In re* B, 2002] WL 347038 (Fam).

7 *See* GORSUCH, *supra* note *, at 104 07.

8 *See* Sherry F. Colb, *A Controversy Over the Netherlands? New Euthanasia Legislation*, FINDLAW, Jan. 17, 2001, *at* http://writ.news.findlaw.com/colb/20010117.html.

9 *See* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 228 29 (1993); MARGARET PABST BATTIN, THE LEAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE 120 21 (1994).

10 *See* PETER SINGER, PRACTICAL ETHICS 171 88 (1993); *see also* GORSUCH, *supra* note *, at 172 80 (analyzing Professor Singer's writings).

11 *See* PETER SINGER, RETHINKING LIFE AND DEATH (1994) (rear cover); Michael Specter, *The Dangerous Philosopher*, THE NEW YORKER, Sept. 6, 1999, at 46.

12 *See* Adam McLeod, *The Groningen Protocol: Legalized Infanticide in the Netherlands and Why It Should Not Be Adopted in the United States*, 10 MICH. ST. J. MED. & L. 557 (2006); *see also* GORSUCH, *supra* note *, at 106 07.

13 *See* JOHN GRIFFITHS, EUTHANASIA AND LAW IN THE NETHERLANDS 286 87 (1998).

14 *See* GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 309 10 (1958); Glanville Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 178 201 (1966); *see also* GORSUCH, *supra* note *, at 6 8, 32 43.

15 *See* Tallis, *supra* note 1, at 9.

16 *See generally* JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALIZATION (2002); *see also* GORSUCH, *supra* note *, at 107 10.

17 *See* John Keown, *Further Reflections on Euthanasia in the Netherlands in the Light of the Remmelink Report and the Van Der Maas Survey, in* EUTHANASIA, CLINICAL PRACTICE AND THE LAW 229 (1994) (quoting the government report).

18 GORSUCH, *supra* note *, at 112 13.

19 *Id.* at 117.

20 *See id.* at 119 20.

21 *See, e.g.*, Kathleen Foley & Herbert Hendin, *The Oregon Experiment, in* THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END OF LIFE CARE 146 69 (Kathleen Foley & Herbert Hendin eds., 2002).

22 Tallis, *supra* note 1, at 10.

23 Marije L. van der Lee et al., *Euthanasia and Depression: A Prospective Cohort Study Among Terminally III Cancer Patients*, 23 J. CLIN. ONCC. 6607 (2005).

24 *See* OR. PUB. HEALTH DIV., DEATH WITH DIGNITY ACT ANNUAL REPORT 2006, *at* http://oregon.gov/DHS/ph/pas/docs/yr9 tbl 1.pdf; *see also* GORSUCH, *supra* note *, at 121 23.

25 *See, e.g.*, Yeates Conwell & Eric Caine, *Rational Suicide and the Right to Die: Reality and Myth*, 325 NEW ENG. J. MEDD. 1100, 1101 (1991); Edwin S. Schneidman, *Rational Suicide and Psychiatric Disorders*, 326 NEW ENG. J. MEDD. 889 (1992); Herbert Hendin & Gerald Klerman, *Physician Assisted Suicide: The Dangers of Legalization*, 150 AM. J. PSYCHIATRY 143 (1993).

26 *See* JOHN GRIFFITHS ET AL., EUTHANASIA AND LAW IN THE NETHERLANDS 304 n.5 (1998).

27 DEREK HUMPHRY, FINAL EXIT (2002).

28 DEREK HUMPHRY & MARY CLEMENT, FREEDOM TO DIE: PEOPLE, POLITICS AND THE RIGHT TO DIE MOVEMENT 339 40, 342, 347, 348 (2000) (noting one "unspoken argument in favor of assisted suicide is that "the hastened demise of people with only a short time to live] would free resources for others, an amount Humphry estimates could run into the "hundreds of billions of dollars).

29 *See Question: Who Will Play God?*, TIME, Apr. 9, 1984, at 68.

ARTICLES

THE LEGALIZATION OF ASSISTED SUICIDE AND THE LAW OF UNINTENDED CONSEQUENCES: A REVIEW OF THE DUTCH AND OREGON EXPERIMENTS AND LEADING UTILITARIAN ARGUMENTS FOR LEGAL CHANGE

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INTRODUCTION

During the 1990s, Dr. Jack Kevorkian reportedly killed or helped kill over 130 persons.[1] While he is now serving a prison sentence for second-degree murder,[2] Kevorkian's activities attracted massive media attention and spawned both legislative[3] and litigation[4] initiatives aimed at toppling laws banning the practice of assisted suicide. So far, the fruits of the political-legal ferment inspired by Kevorkian have been relatively modest. Litigation challenging the constitutionality of laws banning assisted suicide, while meeting some initial success in the lower courts, reached the U.S. Supreme Court in 1997 and culminated in a decision that (at least for now) leaves those laws intact.[5] And, the vast majority of states (approximately thirty-eight) have retained or recently enacted statutes expressly banning the practice of assisted suicide.[6] At least sixteen of these states have considered—and rejected—recent initiatives seeking to legalize assisted suicide.[7] With regard to those states without statutes formally prohibiting assisted suicide, most have disapproved of assisted suicide in some other way. One, Michigan, has a statute banning assisted suicide that may or may not have lapsed,[8] but, in any event, treats assisted suicide as a common law crime.[9] Another, Montana, treats assisting a failed suicide as an independent statutory crime,[10] but appears to classify assisting a successful suicide as a speeies of homicide and thus, subject to the general homicide statute.[11] Of the

1. Brian Murphy, *Kevorkian, Silent, Starts Prison Term*, DETROIT FREE PRESS, Apr. 14, 1999, *available at* http://www.freep.com/news/extra2/qkevo14.htm.

2. *See id.*

3. Since 1992, bills seeking to legalize assisted suicide have been introduced in at least sixteen state legislatures. Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 603-04 (2000).

4. *See, e.g., id.* at 600 n.1, 604-05.

5. *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (rejecting a due process-based right to assisted suicide); Vacco v. Quill, 521 U.S. 793 (1997) (rejecting an equal protection-based right to assisted suicide).

6. *See infra* app. A.

7. *See* Gorsuch, *supra* note 3, at 603-04.

8. *See* MICH. COMP. LAWS ANN. § 752.1027 (West 2004).

9. *See* People v. Kevorkian, 527 N.W.2d 714, 716 (Mich. 1994).

10. *See* MONT. CODE ANN. § 45-5-105 (West 2003) (defining the crime of assisted suicide as occurring only when "[a] person who purposely aids or solicits another to commit suicide, but such suicide does not occur"); *see also* ANNOTATIONS TO THE MONTANA CODE ANNOTATED § 45-5-105 note (2004) ("This section makes it a felony to aid or solicit a suicide attempt which does not result in the death of the victim.").

11. As explained by an annotator's note, those who assist a *successful* suicide may be found guilty of other offenses: "[u]nder the new scctions on Causal Relationship Between Conduct and Result, MCA, 45-2-201, and Accountability, MCA, 45-2-302, a person may be convicted of Criminal Homicide, MCA, 45-5-101 (repealed—now deliberate or mitigated homicide, 45-5-102 and 45-5-103, respectively), for causing

remaining states, some appear to treat assisted suicide as a common law crime[12] and several have health care directive statutes expressly disavowing any approval of assisted suicide.[13] At the federal level, a Republican Congress and Democratic President adopted a law in 1997 denying the use of federal funds in connection with any act of assisted suicide.[14]

In a (very) notable exception to the general trend, Oregon voters approved a referendum in 1994, by a vote of 51% to 49%,[15] permitting assisted suicide in their state,[16] although the administration of George W. Bush issued an interpretative regulation in late 2001 contending that the use of controlled pharmacological substances to assist a suicide contravenes the federal Controlled Substances Act.[17] The Bush administration's move has precipitated a legal battle over the scope of the federal government's authority to interfere with Oregon's experiment. Oregon has won so far, convincing both a federal district court judge[18] and a panel of the U.S. Court of Appeals for the Ninth

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another to commit suicide—notwithstanding the consent of the victim." ANNOTATIONS TO THE MONTANA CODE ANNOTATED, *supra* note 10, § 45-5-105 note.

12. *See, e.g.*, McMahan v. State, 53 So. 89, 90–91 (Ala. 1910) (stating that suicide is a common law crime and anyone who is present when someone commits suicide, or advises or counsels someone to commit suicide, is guilty of murder); Commonwealth v. Mink, 123 Mass. 422, 428–29 (1877) (discussing involuntary manslaughter), *modified by*, Commonwealth v. Catalina, 556 N.E.2d 973, 975–80 (1990) (same); *Kevorkian*, 527 N.W.2d at 716; State v. Mays, 307 S.E.2d 655, 656 (W. Va. 1983) (discussing the facts of a case in which a man was convicted of murder for helping another man commit suicide).

13. *See, e.g.*, ALA. CODE ANN. § 22-8A-10 (Michie 1997); MASS. ANN. LAWS ch. 201D, § 12 (Law. Co-op. 1994); NEV. REV. STAT. ANN. § 449.670(2) (Michie 2000); OHIO REV. CODE ANN. § 2133.12(D) (Anderson 2002); UTAH CODE ANN. § 75-2-1118 (1993); W. VA. CODE ANN. § 16-30-2(a) (Michie 2001).

14. *See* Assisted Suicide Funding Restriction Act of 1997, Pub. L. No. 105-12, 111 Stat. 23 (codified at 42 U.S.C. §§ 14401–14408 (2000)).

15. *See* CTR. FOR DISEASE PREVENTION & EPIDEMIOLOGY, OR. HEALTH DIV., OREGON'S DEATH WITH DIGNITY ACT: THE FIRST YEAR'S EXPERIENCE 1 (1999), *available at* http://www.ohd.hr.state.or.us/pas/year1/pas-rpt.pdf [hereinafter FIRST YEAR'S EXPERIENCE].

16. *See* The Oregon Death with Dignity Act, OR. REV. STAT. § 127.800–.995 (2003).

17. *See* Memorandum from Sheldon Bradshaw, Assistant Attorney General, U.S. Department of Justice, and Robert J. Delahunty, Special Counsel, U.S. Department of Justice, to the Attorney General, U.S. Department of Justice, *Whether Physician-Assisted Suicide Serves a "Legitimate Medical Purpose" Under the Drug Enforcement Administration's Regulations Implementing the Controlled Substances Act* (June 27, 2003), *in* 17 ISSUES L. & MED. 269 (2002) (concluding that assisted suicide is not a "'legitimate medical purpose'" and that dispensing federally controlled suhstances to assist a suicide therefore violates the federal Controlled Substances Act); *see also* Controlled Substances Act, 21 U.S.C. §§ 801–971; 21 C.F.R. pt. 1306 (2004).

18. *See* Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1092–93 (D. Or. 2002).

Circuit to reject the Bush administration's regulations,[19] although the administration is, as this Article goes to press, seeking certiorari in the U.S. Supreme Court.[20]

While Kevorkian's campaign to inspire political and legal change has not (at least for now) yielded many concrete results, the debate he helped spark certainly has not died, as Oregon's experiment amply attests. And, among the central questions in the ongoing debate over assisted suicide is one that might be labeled practical, or perhaps consequentialist or utilitarian in nature: would the "benefits" flowing from any decision to legalize assisted suicide outweigh the attendant "costs" associated with such a change in our legal rules? Justices Sandra Day O'Connor and David Souter have alluded to this question, explaining in *Washington v. Glucksberg* their desire to see the practical results of state legislative "experiments" such as Oregon's, and whether the legalization of assisted suicide might carry with it more societal benefits than harms.[21]

Plainly, the legalization of assisted suicide *would* carry with it benefits for certain persons. Persons who wish to die, but who either cannot, or do not, wish to kill themselves without assistance, would be at liberty to do so, thereby fulfilling their own autonomously chosen wishes and plans. What may not be so obvious is whether there are also any *costs* associated with normalizing assisted suicide, particularly if we do so only for competent adults who are, say, suffering from untreatable pain or a terminal illness. And, if there are such costs, it also remains to be asked how these costs compare in balance against the benefits legalization offers. This Article explores such questions.

To begin, Parts I through III examine recent empirical evidence from the Netherlands, Oregon, and elsewhere. I conclude that anyone seeking to deploy utilitarian or consequentialist arguments in the assisted suicide debate cannot, on the basis of currently available evidence, easily rule out the possibility that nontrivial costs *would* attend the legalization of assisted suicide and euthanasia—and would do so *even if*

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19. *See* Oregon v. Ashcroft, 368 F.3d 1118, 1131 (9th Cir. 2004).

20. *See* Associated Press, *White House Wants Assisted Suicide Law Blocked: Bush Administration Asks Supreme Court to Block Assisted Suicide Law in Oregon*, Nov. 10, 2004, *at* http://abcnews.go.com/Politics/wireStory?id=241365.

21. *See* 521 U.S. at 737 (O'Connor, J., concurring) ("States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. In such circumstances, 'the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the laboratory of the States . . . in the first instance.'") (omissions in original) (citation omitted); *id.* at 785–89 (Souter, J., concurring) ("[E]vents could overtake [the Court's] assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.").

legal permission for the practices is limited to those suffering pain or enduring a terminal illness.

Next, Parts IV and V review certain leading contrary arguments from John Griffiths, Helga Kuhse, and Seventh Circuit Court of Appeals Judge Richard Posner. Each contends, on the basis of certain empirical data, that the legalization of assisted suicide would be a relatively "costless" enterprise—that is, legalization would carry with it few and insignificant unwanted side effects. After a detailed review of their arguments, however, I submit that each contains serious flaws.

Finally, having suggested that the repeal of laws banning assisted suicide has not been shown, convincingly, to be a costless enterprise, I pose in Part VI what is, I think, the critical question at the end of the day: how are we to weigh the competing benefits and costs associated with legalization in a purely consequentialist calculus? How are we to judge whether the benefits associated with normalization are "enough" to outweigh the costs? I see no convincing answer and ultimately suggest that any effort aimed at comparing the benefits and costs of assisted suicide rests on a conceptually flawed premise—namely that there exists a single scale or currency which we can use to measure fundamentally incommensurate goods. The assisted suicide debate, I submit, ultimately cannot be resolved by any utilitarian-style calculation of competing costs and benefits.

Before proceeding further, two cautionary notes about verbiage. First, there is no crime called "assisted suicide" and no legal penalty for a person who seeks help in dying; instead, the crime at issue is *assisting* suicide and it is targeted solely to those who help another commit suicide.[22] The legal right sought by proponents is, to be precise, a right to receive assistance in killing oneself without the *assistant* suffering adverse legal consequences. Recognizing its imprecision, I will defer nonetheless to pervasive usage and employ the term "assisted suicide" as a shorthand description for the proffered right to receive assistance in suicide.

Second, it is important to note that Kevorkian and many other advocates of legal change seek to establish not only a right to receive assistance in suicide, but also a right to be killed by another person, so long as the act is performed with the consent of the decedent and the killer is motivated by compassion or mercy—an act not properly

22. *See e.g.*, Suicide; Aiding, Advising, or Encouraging, CAL. PENAL CODE § 401 (West 1999) ("Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."); Promoting a Suicide Attempt, N.Y. PENAL LAW § 120.30 (McKinney 2004) ("A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony.").

denominated "assisted suicide" at all, but rather one of euthanasia.[23] According to this line of thinking, there is no meaningful moral or practical reason for distinguishing between assisted suicide and euthanasia. And, it is certainly true that in the Netherlands, where both assisted suicide and euthanasia are legal, as well as in most of the rest of the world, rarely is any distinction drawn between the two practices in either academic debate or medical practice.[24]

Within the United States, by contrast, some have expressly sought to obtain legal permission only for assisted suicide[25] (note, in this regard, that Oregon's law permits only assisted suicide, not euthanasia).[26] But, does this position rest on a defensible moral principle or does it perhaps reflect instead a tactical decision to fight political-legal battles piecemeal in order to enhance the chances of ultimate success? Notably, Richard Epstein, who strongly supports the legalization of assisted suicide, has charged compatriots who fail to endorse the legalization of euthanasia with a "certain lack of courage."[27] And, in *Compassion in Dying v. Washington*, the Ninth Circuit all but admitted that any attempt at drawing a legal distinction between the practices would prove impossible.[28]

Those who do see a meaningful moral line between assisted suicide and euthanasia frequently suggest that the patient exercises more control in assisted suicide, remaining the final causal actor in his or her own death, while in euthanasia, another person assumes that role, thus

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23. In 1999, after assisting in scores of suicides over several years, Dr. Kevorkian killed a patient for a nationwide television audience on the CBS program *60 Minutes* specifically to provoke a new debate over euthanasia (Dr. Kevorkian was later convicted of second-degree murder for this act, after a trial in which he chose to act as his own counsel). *See* Murphy, *supra* note 1.

24. *See* JOHN GRIFFITHS ET AL., EUTHANASIA AND LAW IN THE NETHERLANDS 113 (1998) [hereinafter GRIFFITHS ET AL., EUTHANASIA AND LAW] (noting that, in Dutch law or practice, "from the point of view of the justification of necessity, [the practices are] not distinguished"); Gerrit Kimsma & Evert van Leeuwen, *Euthanasia and Assisted Suicide in the Netherlands and the USA: Comparing Practices, Justifications and Key Concepts in Bioethics and Law*, *in* ASKING TO DIE: INSIDE THE DUTCH DEBATE ABOUT EUTHANASIA 35, 51 (David C. Thomasma ed., 1998) [hereinafter ASKING TO DIE] (explaining that "[i]n the Netherlands no *distinct moral* difference is maintained between [euthanasia] and [assisted suicide]").

25. *See, e.g.*, John Deigh, *Physician-Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences*, 88 J. CRIM. L. & CRIMINOLOGY 1155, 1157–59 (1998); Timothy E. Quill et al., *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician Assisted Suicide*, 327 NEW ENG. J. MED. 1380, 1381 (1992).

26. *See* OR. REV. STAT. § 127.800–.995

27. RICHARD EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 340 (1999).

28. *See* Compassion in Dying v. Washington, 79 F.3d 790, 831 (9th Cir. 1996) (noting that the court "agree[s] that it may be difficult to make a principled distinction" between assisted suicide and euthanasia), *rev'd & remanded sub nom. Glucksberg*, 521 U.S. 702.

creating a greater chance for physician malfeasance.[29] But can this distinction withstand scrutiny or the test of time? Morally, in cases of assisted suicide and euthanasia alike, the patient forms an intent to die and the physician intentionally helps the patient end his or her life. Indeed, as bioethicists Gerrit Kimsma and Evert van Leeuwen have explained, the acts are "considered to be identical [in Dutch practice] because intentionally and effectively they both involve actively assisting death."[30] The physical difference, too, between assisted suicide and euthanasia certainly need not be, and frequently is not, very great: as John Keown has asked, "[w]hat, for example, is the supposed differenee between a doctor handing a lethal pill to a patient; placing the pill on the patient's tongue; and dropping it down the patient's throat?"[31]

1. THE DUTCH EXPERIENCE: "VIRTUALLY ABUSE-FREE"?

The Netherlands is one of very few countries in the world with a regularly operating assisted suicide and euthanasia regime.[32] As such, it is a natural focus of attention for those looking to see how such a regime might be applied elsewhere. And, despite concerns expressed by some,[33] the Dutch experience is frequently held out by proponents of

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29. *See supra* note 25.

30. Kimsma & van Leeuwen, *supra* note 24, at 51.

31. JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALISATION 33 (2002) [hereinafter KEOWN, EEPP]; *see also* Rights of the Terminally Ill Act, 1995, pt. 1, §§ 3–4 (N. Terr. Austl. Laws) (defining "assist[ance]" in suicide to embrace euthanasia—namely, to include "the administration of a substance to the patient"), *available at* http://www.notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/4d6231fd5c4f4e396925657000094754/$FILE/Repr030.pdf; Kimsma & van Leeuwen, *supra* note 24, at 51 (arguing that there is no "difference . . . perceived if a physician hands over a cup to drink or gives an injection by needle").

32. Belgium's law has been in force for only a short period, as of this writing. *See* Reuters, *Belgium Approves Euthanasia Bill*, May 16, 2002, *at* http://www.chninternational.com/belgium_approves_bill_on_euthana.htm. The Australian law was in place only for a matter of months. *See* Rights of the Terminally Ill Act, 1995. And, little has been published about Switzerland's experience. *See, e.g.*, Samia A. Hurst & Alex Mauron, *Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians*, Feb. 1, 2003, *at* http://bmj.bmjjournals.com/cgi/content/full/326/7383/271 from Feb 1, 2003. At least some of the publisbed evidence from the brief Australian experiment does not offer reason for much confidence that assisted suicide was practiced there with tremendous care. *See generally* David W. Kissane, *Deadly Days in Darwin*, *in* THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE 192 (Kathleen Foley & Herbert Hendin eds., 2002) [hereinafter THE CASE AGAINST ASSISTED SUICIDE].

33. *See, e.g.*, THE CASE AGAINST ASSISTED SUICIDE, *supra* note 32; CARLOS F. GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS (1991); KEOWN, EEPP, *supra* note 31.

legalizing assisted suicide as a model for emulation and described in glowing terms.

Margaret Pabst Battin, of the University of Utah, for example, has argued that the practice of assisted suicide and euthanasia in the Netherlands is "virtually abuse-free."[34] Joceyln Downie has suggested that the Dutch experience shows that euthanasia, even when legalized, is rarely employed.[35] Epstein has asserted that "Dutch physicians are not euthanasia enthusiasts and they are slow to practice it in individual cases,"[36] and Posner has submitted that the "fear of doctors' rushing patients to their death" in the Netherlands "has not been substantiated and does not appear realistic."[37] In this Part, I consider such claims in light of the formal legal-medical rules associated with the practice of assisted suicide and euthanasia in the Netherlands, as well as data reflecting the actual practices and attitudes of Dutch physicians.

A. An Outline of Dutch Procedures

While voluntary euthanasia societies existed in Britain and the United States as early as the 1930s, no counterpart Dutch movement arose until considerably later.[38] Indeed, the Dutch euthanasia story does not begin in earnest until 1973, when a Dutch physician, who killed her seventy-eight-year-old mother at her request, was tried for homicide and received only a conditional one-week jail sentence along with one year of probation.[39] Though a notable event in Dutch law, however, even that case hardly portended an irrevocable break with the past: between 1969 and 1980, at least three other prosecutions for assisted suicide in the Netherlands resulted in jail sentences ranging from six to eighteen months.[40] The pace of change began to accelerate in 1981, however, when a seventy-six-year-old lay person received a conditional sentence of six months subject to one year probation (after the court found that a jail term would have been too burdensome on the aged defendant), and the court went on to advise in dicta that a *physician* might be exempt

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34. Margaret Pabst Battin, *Should We Copy the Dutch? The Netherlands' Practice of Voluntary Euthanasia as a Model for the United States*, *in* EUTHANASIA: THE GOOD OF THE PATIENT, THE GOOD OF SOCIETY 95, 102 (Robert I. Misbin ed., 1992).

35. *See* Jocelyn Downie, *The Contested Lessons of Euthanasia in the Netherlands*, 8 HEALTH L.J. 119, 128 (2000) (claiming that the notion that euthanasia is widespread "is simply not supported by the data").

36. EPSTEIN, *supra* note 27, at 322.

37. RICHARD A. POSNER, AGING AND OLD AGE 242 & n.23 (1995) (footnote omitted).

38. *See* Herbert Hendin, *The Dutch Experience*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 32, at 97, 99.

39. *See* GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 51–52.

40. *See id.* at 53.

from any punishment for killing a patient suffering severe physical duress (arguably approving not just assisted suicide but also euthanasia, without drawing any distinction between them).[41]

In 1984, events reached a crescendo in a case involving an unnamed ninety-three-year-old woman who was bedridden due to a hip fracture, no longer able to eat or drink, and who was slipping in and out of consciousness.[42] At one point, when the patient regained consciousness, she asked to be euthanized and her physician consented.[43] The case was later reported to the police and ultimately reached the country's supreme court.[44] The Dutch Supreme Court used the dispute to announce an exception, or defense, to the country's express penal laws banning the practice of assisted suicide.[45] The court defended the doctor's conduct, moreover, not because of a perceived need to vindicate patient autonomy, but rather because of the perceived "necessity" resulting from a conflict of duties or *force majeure* (*overmacht*) confronting the doctor, explaining that the killing was justified by the *doctor's judgment* about the quality of his patient's life (or, more precisely, the doctor's judgment about the lack thereof):

> in accordance with [the] norms of medical ethics, and with the expertise which as a professional he must be assumed to possess—[he] balanced the duties and interests which, in the case at hand, were in conflict, and made a choice that—objectively considered, and taking into account the specific circumstances of this case—was justifiable.[46]

The Royal Netherlands Society for the Promotion of Medicine and the

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41. *See id.* at 58–59; Hendin, *supra* note 38, at 99. For detailed, if sometimes conflicting, accounts of all Dutch cases and experience prior to 1984's seminal Dutch Supreme Court decision, see GOMEZ, *supra* note 33; GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24; and Hendin, *supra* note 38.

42. *See* GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, app. 2, at 323–24. A translation of the Dutch *Schoonheim* case is provided in *id.* app. 2, at 322–28.

43. *See id.* app. 2, at 324 In the previous year, the patient had signed a living will in which she manifested her wish to have euthanasia be performed if she suffered from a condition "in which no recovery to a tolerable and dignified condition of life was to be expected." *Id.* app. 2, at 323.

44. *See id.* app. 2, at 322–23.

45. *See* GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, app. 2, at 326–28. Article 293 of the Dutch Criminal Code forbade an individual from taking the life of another even after the latter's "express and earnest request"; Article 294 made it unlawful to "intentionally incite[] another to commit suicide, assist[] in the suicide of another, or procure[] for that other person the means to commit suicide." *Id.* app. 1, at 308 (translating Dutch statutes).

46. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, app. 2, at 326–27.

Recovery Interest Society for Nurses and Nursing Aids, at about the same time, set forth certain criteria for assisting suicide or performing euthanasia in conformity with the court's newly recognized necessity defense,[47] and the Minister of Justice made clear that physicians following these guidelines would not be prosecuted.[48]

In 1994, the Dutch Supreme Court substantially extended the physician "necessity" defense in the *Chabot* case.[49] There, the court considered the justifiability or excusability of the killing of a fifty-year-old woman (identified in court papers as "Ms. B") by a psychiatrist, Dr. Chabot.[50] Ms. B's son had committed suicide in 1986; in 1988, her father died; in 1990, she was divorced and her second son was injured in a traffic accident.[51] In the course of her son's treatment, cancer was discovered, and he died in 1991.[52] The same year, Ms. B attempted suicide, unsuccessfully, using drugs supplied by a doctor.[53] Later, through the Dutch Association for Voluntary Euthanasia, Ms. B was referred to a psychiatrist, Dr. Chabot, who examined Ms. B in four series of meetings over a five week period, for a total of twenty-four actual hours (althougb apparently amounting to thirty "billable" hours).[54] Dr. Chabot also consulted with four psychiatrists, a clinical psychologist, a general practitioner, and a professor of ethics,[55] though none of these professionals actually examined Ms. B.[56] Dr. Chabot then concluded that Ms. B was suffering psychologically in a manner that was subjectively "unbearable" to her, and that she was "without prospect of improvement."[57] In Dr. Chabot's judgment, Ms. B's "rejection of therapy was . . . well-considered."[58] Seven weeks after meeting Ms. B, Dr. Chabot supplied lethal medication to her.[59] She

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47. *See Guidelines for Euthanasia*, 3 ISSUES L. & MED. 429 (Dr. Walter Lagerway trans., 1988). Under the guidelines, a request for assistance in dying had to be voluntary, well-considered, and persistent, and the patient had to be experiencing unacceptable suffering; the physician was also required to consult a colleague. *Id.* at 431-33.

48. *See* Executive Summary, *Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report to the House Judiciary Subcommittee on the Constitution*, 14 ISSUES L. & MED. 301, 313 (1998) ("[The Guidelines] made clear that physicians could practice euthanasia under the Guidelines and not fear prosecution.").

49. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, app. 2, at 329-38. A translation of the Dutch *Chabot* case is provided in *id.* app. 2, at 329-38.

50. *See id.* app. 2, at 329-30.

51. *See id.* app. 2, at 330.

52. *See id.*

53. *See id.*

54. *Id.* app. 2, at 331 & n.23.

55. *See id.* app. 2, at 331 & n.24.

56. *See id.* app. 2, at 332.

57. *Id.*

58. *Id.*

59. *See id.* app. 2, at 329.

consumed the medication and died a half-hour later.[60]

The Dutch Supreme Court held that, for a request for assisted suicide or euthanasia to be justified on "necessity" grounds, the patient's suffering need not be physical, the patient need not be terminally ill, and purely psychological suffering can qualify a patient for an act of euthanasia.[61] The court held that Dr. Chabot erred only by failing to have the colleagues he consulted examine Ms. B before agreeing to help kill her, though the court ultimately declined to impose any penalty for this oversight.[62] Given the *Chabot* decision, John Griffiths, Professor of Sociology of Law at the University of Groningen in the Netherlands, and a leading defender of decriminalization in that country, has surmised that the requirement of unbearable suffering in any form, physical or mental, is likely on the way out: "the decision in *Chabot* may later be seen as having opened the way to a legal development that accepts assistance with suicide to persons who are not 'sick' at all."[63]

And, in fact, that prediction seems well on its way to being proven correct. Between 1986 and 1993, at least three legislative efforts to codify the judiciary's expanding necessity defense failed.[64] Finally, in 2001, a bill was approved by the Dutch Parliament permitting assisted suicide and euthanasia when the physician:

a. holds the conviction that the request by the patient was voluntary and well-considered,
b. holds the conviction that the patient's suffering was lasting and unbearable,
c. has informed the patient about the situation he was in and about his prospects,
d. and the patient [held] the conviction that there was no other reasonable solution for the situation he was in,
e. has consulted at least one other, independent physician who has seen the patient and has given his written opinion on the requirements of due care, referred to in parts a–d, and,
f. has terminated a life or assisted in a suicide with due care.[65]

Under these standards, terminal illness plainly is not a prerequisite to euthanasia, and neither is a physical ailment of any kind. While the

60. *See id.* app. 2, at 329–30.
61. *Id.* app. 2, at 334–35.
62. *See id.* app. 2, at 337–38.
63. *Id.* at 153.
64. *See* 1 H.L., REPORT OF THE SELECT COMMITTEE ON MEDICAL ETHICS 65 (1993–1994) [hereinafter H.L. REPORT].
65. Termination of Life on Request and Assisted Suicide (Review Procedures) Act, Stb. 2001, nr. 137, ch. 2, art. 2, § 1 (Neth.), *available at* http://www.nvve.nl/english [hereinafter 2001 Dutch Act] (translating the Dutch law).

doctor must consider his or her patient to be "suffering," that suffering need not be physical or even really present at all: the doctor need only show that he or she believed (or "[held] the conviction") that the patient endured some sort of (unspecified) suffering.[66] And, procedurally, there is no specified waiting period after the request for euthanasia before it may be performed and no requirement that the patient place his or her wishes in writing.[67]

Griffiths's prediction about the future of assisted suicide in the Netherlands, in fact, actually fails to capture the speed and scope of developments there insofar that the 2001 Dutch Act also extends assisted suicide and euthanasia to children as young as twelve:

> [i]f the minor patient is aged between twelve and sixteen years and may be deemed to have a reasonable understanding of his interests, the physician may [carry] out the patient's request [for termination of life or assisted suicide], provided always that the parent or the parents exercising parental authority or his guardian agree with the termination of life or the assisted suicide.[68]

By contrast, minors between sixteen and eighteen who "may be deemed to have a reasonable understanding of [their] interests" can obtain assisted suicide or euthanasia *without* parental consent, although the parents must be "involved" in the decision-making process.[69] Going yet a step further, in late 2004, the Groningen University Hospital issued a press release announcing that it has proposed guidelines for killing unwanted malformed children (infanticide).[70] The hospital's guidelines are, as of this writing, under review by the Dutch government and have not yet been published. According to the hospital's press release, it seems that the proposal is primarily aimed at malformed infants, but would nonetheless apply to any child under twelve who is "suffering" in a manner that "cannot be relieved by means of other ways."[71] While parental consent is required, consent is of course impossible to obtain

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66. *Id.* ch. 2, art. 2, § 1(b).

67. *See id.* ch. 2, art. 2.

68. *Id.* ch. 2, art. 2, § 4.

69. *Id.* ch. 2, art. 2, § 3.

70. Academisch Ziekenhuis Groningen, Protocol waarborgt zorgvuldigheid bij levenseinde kind (Oct. 29, 2004), *available at* http://www.azg.nl/azg/nl/nieuws/persberichten/43604. An English translation of the hospital's press release is available at Blog, Target="_Blank", Groningen Protocol: The Press Release of the University Hospital Groningen, English Translation, A Protocol to Guarantee Carefulness When Actively Ending a Child's Life, *at* http://blogger.xs4all.nl/wdegroot/articles/16952.aspx (last visited Dec. 20, 2004).

71. Blog, *supra* note 70.

from the newborn children who are the targets of this proposal and it is unclear whether consent would even be required from older children killed under this protocol. Nor is not clear whether the "suffering" need be physical or might also include mental anguish (as the Dutch courts have already held in *Chabot*). And, if the latter comes to qualify, the question will surely arise: might the suffering of the parents qualify without respect to whether the child's physical suffering can be addressed by palliative treatments? All of this, at the moment, remains unclear.

B. The Dutch Practice of Assisted Suicide and Euthanasia

To date, two large-scale studies have been published regarding Dutch assisted suicide and euthanasia practices, one in 1990 ("1990 Survey") and the other in 1995 ("1995 Survey") (collectively the "Surveys").[72] A third survey was published in *The Lancet* in 2003, albeit in abbreviated form and using data from 2001, the year *before* the passage of the Dutch statute formally legalizing assisted suicide and euthanasia, thus leaving us without definitive data on the impact of that landmark legislation.[73] All three studies were performed under the auspices of Gerrit van der Wal of the Institute for Research in Extramural Medicine at Vrije Universiteit in Amsterdam, and Paul J. van der Maas of the Department of Public Health at Erasmus University in Rotterdam.[74]

The Surveys employed two central methods. First, the authors confidentially interviewed a random sample of slightly more than 400 physicians, reflecting general practitioners, and representatives from five different specialties (cardiology, surgery, internal medicine, pulmonology, and neurology).[75] Second, the Surveys examined a random sample of death certificates over the course of a four month period for each year under review, followed up by a questionnaire directed to the physicians identified in each death certificate in the

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72. *See* Paul J. van der Maas & Gerrit van der Wal et al., *Euthanasia, Physician-Assisted Suicide, and Other Medical Practices Involving the End of Life in the Netherlands, 1990–1995*, 335 NEW ENG. J. MED. 1699 (1996) [hereinafter van der Maas & van der Wal et al., *Euthanasia 1996*].

73. *See* Bregje D. Onwuteaka-Philipsen, Paul J. van der Maas & Gerrit van der Wal et al., *Euthanasia and Other End-of-Life Decisions in the Netherlands in 1990, 1995, and 2001*, 362 LANCET 395 (2003) [hereinafter Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*].

74. *See id.* at 395; van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1699.

75. *See* Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, at 395–96; van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1699–1700.

sample under study.[76]

Some of the central findings of the Surveys' physician interviews are summarized in Table 1.

Table 1
Central Findings of 1990 and 1995 Surveys[77]

	1995	1990	% change
Total Deaths	135,546	128,786[78]	5%
Number of explicit requests for euthanasia or assisted suicide later in disease	34,500	25,100	37%
Number of requests for euthanasia or assisted suicide at a particular time	9700	8900	9%
End-of-life practices performed			
Euthanasia As % of all deaths	3118 2.3%	2447 1.9%	27%
Assisted suicide As % of all deaths	542 0.4%	386 0.3%	40%
Ending life without patient's explicit request As % of all deaths	949 0.7%	1030 0.8%	-8%

As reflected in Table 1, the 1990 Survey found that fully 1.9% of all Dutch deaths (2447) were attributable to the practice of euthanasia. Substantially more people died in the Netherlands as a result of euthanasia than HIV, leukemia or homicide.[79] The 1990 Survey found that an additional 0.3% of all deaths—or nearly 400 cases—were the product of physician-assisted suicide. By 1995, these figures had grown measurably: 2.3% of all deaths nationwide that year were the result of euthanasia (a 27% increase) and 0.4% were due to assisted suicide (a 40% increase). The Surveys also reveal that requests for euthanasia increased dramatically between 1990 and 1995 (prospective requests for

76. Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, at 396; van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1700.

77. The figures in this Table are extrapolated from data in van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1700–01 & 1701 tbl.1.

78. The Netherlands has a total population of approximately sixteen million. World Health Org., Netherlands, *at* http://www.who.int/countries/nld/en (last visited Dec. 20, 2004).

79. *See* WHO Statistical Information System, World Health Org., Table 1: Numbers of Registered Deaths, Netherlands—1999, *at* http://www3.who.int/whosis/mort/table1_process.cfm (last visited Dec. 20, 2004).

euthanasia at a later stage of a disease grew 37% and requests for euthanasia at a particular time rose 9%). The actual incidence of euthanasia and assisted suicide also jumped substantially, 27% and 40%, respectively.

Physician interview data from the 2001 survey suggests that the significant rise in the incidence of euthanasia experienced between 1990 and 1995 was consolidated and persisted: euthanasia continued to account for approximately 2.2% of all deaths in the Netherlands in 2001, approximating the results found in the 1995 survey.[80] The physician interview results for 2001, however, diverge somewhat from the results of the death certificate study.[81] The latter study suggests that euthanasia became even more common—rising from 1.7% of all deaths in 1990, to 2.4% in 1995, and to 2.6% in 2001.[82] And, again, we currently have no data suggesting how, if at all, the 2001 statute may have affected these numbers.

We do know, however, that things do not always go smoothly. Dutch researchers have found that problems with "completion" arise in 16% of assisted suicide cases and 6% of euthanasia cases, and "complications" arise in 7% of assisted suicide cases and 3% of euthanasia cases.[83] These complications include nausea and vomiting, and the problems with completion include patients waking from drug-induced comas and living as long as fourteen days after the administration of death-inducing medication.[84]

In 1995, the authors of the Surveys for the first time systematically examined the frequency with which physicians euthanize their patients without consent. As shown in Table 1, they found that 0.7% of all deaths nationwide that year were the result of nonconsensual killings (approximately 950). Although the 1990 Survey did not seek to study this issue on a systematic basis, the more limited death certificate study conducted suggested that nonconsensual killings represented 0.8% of deaths nationwide (approximately 1000). Data from 2001 suggest little improvement, with nonconsensual killings persisting at a rate of

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80. Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, at 396 & tbl.1.

81. *See id.*

82. *See id.* There is a similar divergence in the data for physician-assisted suicide. *Id.* The physician interview results show that the incidence of assisted suicide rose from 0.3% of all deaths in 1990 to 0.4% in 1995, and then dropped to 0.1% in 2001. *Id.* Meanwhile, the death certificate data suggests that the incidence of assisted suicide remained constant in all three years—at 0.2% of all deaths. *Id.*

83. Johanna H. Groenewoud et al., *Clinical Problems with the Performance of Euthanasia and Physician-Assisted Suicide in the Netherlands*, 342 NEW ENG. J. MED. 551, 551 (2000).

84. *See id.* at 555 tbl.5.

approximately 0.7% of all deaths in the country that year.[85]

Downie has sought to downplay the significance of these nonconsensual killings, noting that "in 600 of the 1000 cases [of nonconsensual euthanasia in 1990], something about the patients' wishes was known although explicit consent according to the [Dutch Medical Association's] guidelines had not been given."[86] This interpretation, however, does not address the 400 cases in which patients' wishes were not known *at all*.[87] And, in the 600 remaining cases, the patient was adjudged even by the euthanizing physician to have expressed something less than the "explicit consent" required under the Dutch guidelines to avoid potential prosecution.[88] These comments ranged—according to the physicians themselves—from a "rather vague earlier expression of a wish for euthanasia, as in comments like, 'If I cannot be saved anymore, you must give me something,' or 'Doctor, please don't let me suffer for too long,' to much more extensive discussions" that were still insufficient, in the doctor's own judgment, to satisfy the explicit request required by Dutch law.[89]

In 1995, the New York State Task Force on Life and the Law recommended against legalizing assisted suicide in part on the strength of the then-available 1990 Survey data.[90] Referring to the 2700 reported deaths by assisted suicide and euthanasia in the Netherlands and the 1000 cases of nonconsensual terminations, the task force reasoned that:

> If euthanasia were practiced in a comparable percentage of cases in the United States, voluntary euthanasia would account for about 36,000 deaths each year, and euthanasia without the patient's consent would occur in an additional 16,000 deaths.
>
> The Task Force members regard this risk as unacceptable. They also believe that the risk of such abuse is neither speculative nor distant, but an inevitable byproduct of the

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85. *See* Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, at 396 & tbl.1. While these data seem to suggest that nonconsensual killings decreased slightly, the Surveys' authors have been cautious to reach such a conclusion, explaining that "chance fluctuation cannot be ruled out as an explanation" for the change between 1990 and 1995, adding that their "1990 interview study did not permit sufficiently reliable estimates of this variable." van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1704.

86. Downie, *supra* note 35, at 132.

87. *See* MARGARET PABST BATTIN, *A Dozen Caveats Concerning the Discussion of Euthanasia in the Netherlands*, *in* THE LEAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE 130, 137 (1994) [hereinafter THE LEAST WORST DEATH].

88. *See id.*

89. *Id.*

90. *See* THE N.Y. STATE TASK FORCE ON LIFE & THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 133–34 (1994) [hereinafter N.Y. STATE TASK FORCE].

> transition from policy to practice in the diverse circumstances in which the practices would be employed.[91]

All of the foregoing statistics and analyses, moreover, arguably understate both the incidence of euthanasia in the Netherlands and the frequency with which patients are killed without consent. The later Dutch Surveys include only *affirmative* acts of euthanasia in their analysis of the incidence of mercy killings with and without consent.[92] They do not count omissions or withdrawals of care performed without patient consent and with the intention of killing the patient[93]—even though these are acts that Dutch medical guidelines expressly recognize as euthanasia.[94] The 1990 Survey sougbt to count such deaths separately, but the 1995 and 2001 Surveys, surprisingly and without explanation, simply omitted any such discussion—an unhelpful development for anyone trying to comprehend the facts of the Dutch practice.[95] The 1990 data reveal, however, that 4000 deaths were caused that year by the withdrawal or withholding of treatment without explicit patient consent and "'[w]ith the explicit purpose'" of shortening life.[96] The 1990 Survey found an additional 4750 deaths were caused by withdrawing or withholding without explicit consent but "'[p]artly with the purpose'" of ending life.[97]

Combined, these figures represent 8750 cases where care was discontinued by a doctor who intended to kill the patient, and who acted without the explicit consent of the patient; such deaths accounted for some 6.78% of all deaths in the Netherlands in 1990.[98] It is hard to understand why the Surveys' authors failed to report data regarding nonconsensual killings by omission in the 1995 and 2001 Surveys and it would certainly be unfortunate if they did so simply to diminish attention to those facts (though it seems clear their decision not to report the data has that effect). In any event, when added to the 1000 nonconsensual *affirmative* acts of euthanasia, the total number of intentional killings without patient consent in 1990 was 9750, or 7.56% of all deaths.[99] Extrapolating to the U.S. population, this would translate into approximately 173,650 medically accelerated deaths per year without

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91. *Id.*
92. *See* Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73.
93. *See id.*
94. *See supra* notes 47–48 and accompanying text.
95. *See* Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73.
96. KEOWN, EEPP, *supra* note 31, at 95–96.
97. *Id.*
98. *See id.* at 93, 95–96.
99. *See id.*

explicit patient consent (based on the approximately 2.3 million deaths that occur in the United States annually).[100]

Nor is it clear that killing has been used only in extremis to prevent suffering. In the 1990 Survey, physicians involved in nonconsensual affirmative killings volunteered that ending pain and suffering motivated them in only 18.8% of the cases.[101] Reasons physicians gave more frequently for terminating life without consent included the "absence of any prospect of improvement (60%) . . . avoidance of 'needless prolongation' (33%); the relatives' inability to cope (32%); and [the physician's judgment that the patient enjoyed only a] 'low quality of life' (31%)."[102] In fact, a 2003 regression analysis spanning twenty-five years worth of data found that patient pain had become a "significantly less important" consideration even in cases of *voluntary* euthanasia and assisted suicide. While cited as a major reason for requesting euthanasia and assisted suicide in over 50% of cases in 1977, by 2001, pain was cited as a major reason for requested assisted suicide and euthanasia in less than 25% of cases of consensual killings.[103] Meanwhile, a patient's sense of "deterioration" and "hopelessness" have both increased markedly as reasons cited as motivating assisted suicide and euthanasia requests.[104]

Some studies suggest, too, that Dutch physicians may be undertrained in palliative care techniques that might mitigate the perceived need to resort to assisted suicide and euthanasia. A 1987 Dutch Health Council study found, for example, that a majority of cancer patients in pain suffered because of their caregivers' lack of expertise in pain management,[105] and a 1989 study found that palliative care was "inadequate in slightly more than 50% of evaluated cases."[106] Even among Dutch doctors, most of whom support assisted suicide and

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100. *See* WHO Statistical Information System, World Health Org., Table 1: Numbers of Registered Deaths, United States of America—1999, *at* http://www3.who.int/whosis/mort/table1_process.cfm (last visited Dec. 20, 2004).

101. *See* Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, at 396 & tbl.1 (using statistics from the death certificate study).

102. KEOWN, EEPP, *supra* note 31, at 105 (footnotes omitted); *see also* John Keown, *Further Reflections on Euthanasia in the Netherlands in the Light of the Remmelink Report and the Van Der Maas Survey*, *in* EUTHANASIA, CLINICAL PRACTICE AND THE LAW 219, 230 (Luke Gormally ed., 1994) [hereinafter Keown, *Further Reflections*] (discussing the 1990 Survey results); R.L. Marquet et al., *Twenty Five Years of Requests for Euthanasia and Physician Assisted Suicide in Dutch General Practice: Trend Analysis*, 327 BRIT. MED. J. 201, 201 (2003).

103. R.L. Marquet et al., *supra* note 102, at 201.

104. *See id.*

105. *See* John Keown, *The Law and Practice of Euthanasia in the Netherlands*, 108 LAW Q. REV. 51, 65 (1992).

106. Karin L. Dorrepaal et al., *Pain Experience and Pain Management Among Hospitalized Cancer Patients: A Clinical Study*, 63 CANCER 593, 598 (1989).

euthanasia, fully 40% have signaled their "agreement with the proposition that '[a]dequate alleviation of pain and/or symptoms and personal care of the dying patient make euthanasia unnecessary.'"[107]

Ultimately, a government panel charged with reviewing the 1990 Survey results sought to explain and even defend the seemingly large number of nonconsensual killings, doing so on the ground that:

> The ultimate justification for the intervention is in both cases [that is, where there is and is not an explicit request for assistance in dying] the patient's unbearable suffering. So, medically speaking, there is little difference between these situations . . . because in both cases patients are involved who suffer terribly. The absence of a special . . . request for the termination of life stems partly from the circumstance that the party in question is not (any longer) able to express his will because he is already in the terminal stage, and partly because the demand for an explicit request is not in order when the treatment of pain and symptoms is intensified. The degrading condition the patient is in confronts the doctor with a case of [*force majeure*]. According to the Commission, the intervention by the doctor can easily be regarded as an action that is justified by necessity, just like euthanasia.[108]

Thus, it appears that it is not patient autonomy or even the alleviation of pain that, to the Dutch government at least, stands as the ultimate justification for assisted suicide and euthanasia. Instead, it is the *physician's* assessment of the patient's *quality of life* as "degrading" or "deteriorating" or "hopeless" that stands as the ultimate justification for killing. Echoing the Dutch Supreme Court's decision of 1984, the Dutch government panel found that the "necessity" of assisted suicide stems not from the patient's consent (let alone autonomous choice), but from the *physician's quality of life assessment.*[109] And, as of late 2004, the Dutch are considering the legalization of infanticide—that is, killing children without consent.

As reflected in Table 2, it also appears that the incidence of nonvoluntary euthanasia is closely related to age. The 1995 Survey's death certificate study found that younger patients (especially those from birth to age forty-nine) are far more likely than older persons to be killed without their consent.[110]

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107. KEOWN, EEPP, *supra* note 31, at 111.

108. Keown, *Further Reflections*, *supra* note 102, at 229 (quoting the government's report).

109. *Id.*

110. Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia*

Table 2
End-of-Life Decisions in 1995
by Age[111]

	0–49	50–64	65–79	>80
Total death certificates studied	661	652	1792	2041
% of all deaths in Netherlands (n=135,675)	8%	12%	36%	44%
% of all end-of-life decisions (n=2604)	6%	14%	34%	46%
% ending life without explicit request (n=64)	18%	16%	31%	36%
% ending life without explicit request vs. % of all end-of-life decisions	300%	114%	91%	78%

While the young (from birth to age forty-nine) represented 6% of all end-of-life cases surveyed in 1995, they accounted for 18% of all cases found where life was ended without an express request; the young were, thus, vastly overrepresented (300%) among cases where patients were killed without express consent when compared with their population in the pool of all end-of-life cases. Those between fifty and sixty-four years of age were also overrepresented (114%), constituting 14% of all end-of-life cases, but 16% of cases where life was ended without clear consent. And, the 2001 Survey suggests that little has changed since 1995;[112] indeed, the 2001 Survey authors confirm that "[e]nding of life without a patient's explicit request occurred most frequently among people dying at [an] age younger than 65 years" and data concerning the incidence of such problems "remained virtually unchanged" between 1995 and 2001.[113]

Remarkably, the Surveys have consistently found that a significant proportion of assisted suicides and acts of euthanasia go unreported, even though Dutch professional and legal guidelines allow the practices and expressly require them to be reported to public authorities; state approval of assisted suicide and euthanasia simply has not, it seems, ended the "grey market" for such services. For example, of the 2700

2001, *supra* note 73, at 395-96. Such an age-based study was not performed in 1990.

111. The data in this Table are extrapolated from van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1703 tbl.3.

112. The materials reported in Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, are less specific than those found in prior surveys. For example, they do not disaggregate 2001 data for persons between birth and forty-nine, and between fifty and sixty-four, as the 1995 Survey did.

113. *Id.* at 396–97.

cases of assisted suicide and euthanasia recorded in 1990, only 486 were reported pursuant to Dutch medical guidelines, meaning, in effect, that doctors illegally certified 82% of these cases as death by "natural causes."[114] Of the 147 physicians interviewed in the 1995 Survey who reported participating in cases of assisted suicide or euthanasia, eighty-four—or 57%—admitted they had not reported at least one other case, and none identified any adverse legal consequence from his or her behavior.[115] In the 2001 Survey, the proportion of unreported cases declined, but the authors found that, even after years of unfavorable attention to this issue and the repeated commitment of Dutch authorities to improve physician reporting, as many as 46% of all cases of assisted suicide and euthanasia still go unreported.[116]

As reflected in Table 3, physicians have also admitted that they are far less likely to consult with colleagues or family members, or ensure an explicit patient request, in the cases of assisted suicide and euthanasia they choose not to report to state authorities. Doctors likewise admit that they are far less likely to leave a written record in unreported cases—a record that might permit subsequent inquiries into their conduct.

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114. KEOWN, EEPP, *supra* note 31, at 113.

115. Gerrit van der Wal & Paul J. van der Maas et al., *Evaluation of the Notification Procedure for Physician-Assisted Death in the Netherlands*, 335 NEW ENG. J. MED. 1706, 1708 (1996) [hereinafter van der Wal & van der Maas et al., *Notification Procedure*].

116. Reporting data is not included in Onwuteaka-Philipsen, van der Maas & van der Wal et al., *Euthanasia 2001*, *supra* note 73, but it is summarized in Tony Sheldon, *Only Half of Dutch Doctors Report Euthanasia, Study Says*, 326 BRIT. MED. J. 1164, 1164 (2003). *See also* World Federation of Right to Die Societies, *Netherlands: Euthanasia Reports Decline by 15 Percent over 4 Years* (Apr. 29, 2003) (noting that "it is suspected the actual 'mercy killing' figure is double the amount of recorded cases" and that "many doctors still do not trust the commissions and get annoyed and worried when the commission seeks additional information about specific cases," and quoting Reina de Valk, chairperson for the national body encompassing the various regional reporting commissions, that "'[t]ime is needed to win the confidence of many doctors'"), *at* http://www.worldrtd.net/news/world/?id=534.

Table 3
Characteristics of Reported and Unreported Cases of Euthanasia and Assisted Suicide: 1995[117]

	Reported Cases (N=68)	Unreported Cases (N=68)
Patient request was:		
Highly explicit	100%	92%
"Rather" explicit	0%	8%
Written will present	73%	44%
Express written report on decision	36%	0%
Notes in medical record	84%	57%
No writing	3%	43%
Discussion with colleagues	100%	58%
Contact with patient's relatives	99%	92%

When asked about their unreported cases, sixteen of the eighty-four responding physicians—or 19%—stated that their *most recent* unreported case involved killing the patient without an explicit request.[118] Physicians stated that they had complied with guidelines requiring them to consult with colleagues 100% of the time in their reported cases, but had respected this requirement only 58% of the time in their unreported cases; they likewise revealed that they left behind no written record of their conduct in just 3% of reported cases, but left no such record (again in violation of professional requirements) in 43% of their unreported cases. And, fully 40% of general practitioners simply dismissed the rule requiring them to consult with another colleague before killing a patient as being not very important.[119]

C. The Future: Decriminalization of Nonconsensual Killings?

Faced with the data regarding the prevalence of unreported and nonconsensual killings, the *Chabot* decision extending euthanasia to those suffering subjective mental anguish, new laws affording a right to lethal assistance to minors, and a proposal now on the table to legalize infanticide, one might ask what the future might hold for the practice of assisted suicide and euthanasia in the Netherlands.

Looking particularly at the prevalence of unreported killings,

117. van der Wal & van der Maas et al., *Notification Procedure*, *supra* note 115, at 1709 tbl.2.

118. *Id.* at 1708.

119. KEOWN, EEPP, *supra* note 31, at 113.

Griffiths has acknowledged that, his support for legalized assisted suicide and euthanasia notwithstanding, "the present control-regime [in the Netherlands] does not offer effective control,"[120] and that it "is a bit of a paper tiger, in the sense that only a minority of cases (and these the least problematic ones) are reported, and that little serious enforcement is undertaken in reported cases that do not meet the legal criteria."[121] In fact, of all the data gathered on Dutch assisted suicide and euthanasia practices, the low reporting rate is the issue that, to Griffiths at least, "most gives rise to concern."[122]

To encourage greater reporting, especially of cases that do not meet current legal criteria, Griffiths does not argue for greater vigilance and enforcement of laws against killing patients without consent. Instead, somewhat surprisingly, he advocates for the elimination of any criminal penalty associated with such nonconsensual killings.[123] If doctors do not fear criminal prosecution even for killing their patients without consent, Griffiths's reasoning goes, they will be more apt to report their conduct.[124] Echoing and building on the sentiments of the Dutch governmental commission reviewing (and seeking to justify) the data on nonconsensual killings, Griffiths gives us a hint where the Dutch ultimately may find themselves—namely routinizing "euthanasia and termination of life *without an explicit request* [such that they are] handled in the same way [as voluntary requests for assisted suicide and euthanasia]: deemed 'normal medical practice' and subjected to the controls applicable to other behavior of doctors."[125]

Absent here, once again, is any linkage between assisted suicide and patient autonomy. A physician would be free to kill his patients *without their consent* and have no reason to fear criminal prosecution. Though Griffiths believes that the decriminalization of nonvoluntary euthanasia would lead to better compliance with self-reporting requirements, he (curiously) does not pause to give any significant consideration to the question whether allowing doctors to kill without consent might also lead to additional cases of abusive, coercive, and mistaken killings. In fact, Griffiths's proposal seemingly would preclude the criminal prosecution not just of those acting out of motives of mercy, but even mass murderers like Dr. Harold Shipman.[126] In

120. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 268.
121. *Id.* at 245–46.
122. *Id.* at 282.
123. *See generally id.* at 267–98.
124. *Id.* at 286–87.
125. *Id.* (emphasis added).
126. *See* U.K. DEP'T OF HEALTH, HAROLD SHIPMAN'S CLINICAL PRACTICE 1974–1998: A CLINICAL AUDIT COMMISSIONED BY THE CHIEF MEDICAL OFFICER 1–2 (2000) (finding that Shipman, who was convicted of murdering fifteen of his patients, had 297 "excess" deaths compared to other similarly situated physicians), *available at*

Griffiths's preferred regime, only professional and civil sanctions would be available as remedies when doctors kill without consent—and even these remedies would be available only if and when doctors kill in the absence of what he calls "normal medical practice"—although Griffiths fails to specify when he thinks killing a patient without consent should be considered "normal."[127]

Nor does Griffiths fairly make out the case that his proposal would even guarantee better self-reporting: doctors who fail to meet the guidelines for "normal" nonvoluntary killings (whatever those might be) may very well still choose to avoid reporting their activities for fear of professional and civil penalties which, for doctors, can mean the end of their careers and financial security. Indeed, Griffiths himself acknowledges that *any* regime relying on physician self-reporting is "intrinsic[ally] ineffective[]."[128] Simply put, the absence of *criminal* penalties may not suffice to ensure that physicians report all cases of killing without consent; the continued presence of financial and professional consequences may still serve as strong deterrents to full and accurate reporting. Meanwhile, Griffiths's proposal would abjure patient autonomy as the touchstone for when assisted suicide is appropriate, in favor of physicians' quality of life judgments, and radically rewrite the boundary of acceptable Dutch medical practice from voluntary to nonvoluntary euthanasia.

II. THE OREGON EXPERIENCE: AN "ALL-TOO-CONSCIENTIOUS" STATUTORY REGIME?

Among American jurisdictions, only Oregon has experimented with assisted suicide. Epstein has hailed Oregon's assisted suicide law as "tightly drafted legislation" and an "all-too-conscientious attempt" to avoid cases of abuse, mistake, and pressure.[129] And, Oregon's statute is certainly more refined than the medical guidelines long in force in the Netherlands or the recent Dutch statute. But, Epstein's enthusiastic endorsement is itself subject to question in light of certain deficiencies in both the structure of the Oregon law and its practice in the field.

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http://www.dh.gov.uk/assetRoot/04/06/50/46/04065046.pdf; *see also* James M. Thunder, *Quiet Killings in Medical Facilities: Detection and Prevention*, 18 ISSUES L. & MED. 211, 213 (2003) (noting that, over the last twenty-five years, at least eighteen American health workers suspected of being responsible for approximately 455 "mercy killings" inside medical facilities have been charged with attempted murder, murder or manslaughter, and that twelve have been convicted).

127. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 286–87.

128. *Compare id.* at 292, *with id.* at 257.

129. EPSTEIN, *supra* note 27, at 326–27.

A. An Outline of Oregon's Procedures

To qualify for assistance in dying under the Oregon Death with Dignity Act (the "Act"), a patient must be "[a]n adult who is capable . . . and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die"; meeting these qualifications allows a patient to make "a written request for medication for the purpose of ending his or her life."[130]

The term "capable" is defined by statute to mean "that in the opinion of a court or in the opinion of the patient's attending physician or consulting physician, psychiatrist or psychologist, a patient has the ability to make and communicate health care decisions to health care providers."[131] A "terminal disease" is defined as "an incurable and irreversible disease that . . . will, within reasonable medical judgment, produce death within six months."[132] Written requests for assisted suicide must be "witnessed by at least two individuals who, in the presence of the patient, attest that to the best of their knowledge and belief the patient is capable, acting voluntarily, and is not being coerced to sign the request."[133]

An attending physician is required, among other things, to "[m]ake the initial determination of whether a patient has a terminal disease, is capable, and has made the request voluntarily," and to refer the patient to a consulting physician for confirmation of all three of these findings.[134] If the attending or consulting physician believes that "a patient may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment, either physician shall refer the patient for counseling," and no medication to end the patient's life may "be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment."[135]

Once the medical review process is complete, the attending physician may prescribe life-ending medications.[136] "No less than

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130. OR. REV. STAT. § 127.805(1).

131. *Id.* § 127.800(3).

132. *Id.* § 127.800(12).

133. *Id.* § 127.805(1). One of the witnesses cannot be related to the patient, stand to benefit under the patient's estate or be connected to the medical facility where the patient is being treated. *Id.* § 127.810(2). Nor can the attending physician serve as a witness. *Id.* § 127.810(3). If the patient is a resident in a long-term care facility, one of the witnesses must be an individual designated by the facility that meets qualifications imposed by Oregon's Department of Human Services. *Id.* § 127.810(4).

134. *Id.* § 127.815(a), (d).

135. *Id.* § 127.825.

136. *See id.* § 127.815(l).

fifteen . . . days [must] elapse between the patient's initial oral request and the writing of a prescription"; in addition, forty-eight hours must "elapse between the patient's written request and the writing of a prescription.[137] Doctors who write death-inducing prescriptions in good faith compliance with the Act's requirements are shielded from criminal, civil, and professional sanctions.[138]

Physicians are responsible for maintaining records regarding each act of assisted suicide, including documents reflecting all of the patient's oral and written requests for assistance in dying; the attending and consulting physician's diagnosis, prognosis, and finding that the patient was capable, acting voluntarily, and with full information; and all reports reflecting any counseling that occurred.[139] Oregon's Department of Human Services is charged with reviewing a sample of these records annually.[140]

While perhaps representing a drafting improvement over the Dutch statute, a great many questions might still be asked about how the Oregon law is written and practiced. It is, for example, unclear from the language of the statute whether "terminal" means that the patient is expected to die within six months assuming she is given medical care or assuming she is not.[141] And, approximately 50% of Oregon physicians have acknowledged that they simply are not confident in their own ability to predict whether patients have more or less than six months to live.[142] In point of fact, putatively terminal patients have received lethal prescriptions in Oregon and waited to use them for as long as 466 days—over fifteen months.[143] Although proponents have argued that Oregon's regime helps dying patients avoid unnecessary pain and suffering, Oregon's law (unlike even the Dutch guidelines) nowhere conditions access to assisted suicide on the existence of pain of any kind, let alone pain that cannot be fully treated by readily available medicines.

Because the attending physician under Oregon law is allowed to choose a consulting physician who may be related to the attending doctor or the patient professionally or personally, the consultant is not guaranteed to be free to render a dispassionate judgment (something even Dutch guidelines purport to mandate). Nor does the Oregon statute

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137. *Id.* § 127.850.

138. *See id.* § 127.855(1).

139. *Id.* § 127.855.

140. *Id.* § 127.865(1)(a).

141. KEOWN, EEPP, *supra* note 31, at 171.

142. Melinda A. Lee et al., *Legalizing Assisted Suicide—Views of Physicians in Oregon*, 334 NEW ENG. J. MED. 310, 334 (1996).

143. OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., FIFTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 21 tbl.3 (2003), *available at* http://www.ohd.hr.state.or.us/chs/pas/year5/02pasrpt.pdf [hereinafter FIFTH ANNUAL REPORT].

require that either physician have any special expertise; trainees are free to render judgments on whether an illness is "terminal."[144] Thus, while approximately 86% of patients seeking assisted suicide in 2001 suffered from cancer, prescribing physicians were predominately internal medicine and family practitioners (collectively representing 69% of prescribers); oncologists prescribed death-inducing medication in just 25% of assisted suicide cases.[145] Significantly, there is also no requirement that any of the physicians involved review with the patient potential alternatives (for example, hospice or pain killers), or that those with expertise in such areas (for example, pain management specialists) be brought in to review care options that may alleviate the patient's perceived need for assisted suicide.

While Oregon's statute requires that the attending and consulting physicians make a finding that the patient is mentally capable, it does not require any mental health qualifications or expertise of either doctor, again leaving potentially specialized questions regarding the diagnosis of potential psychological disorders (for example, depression) to individuals without any relevant expertise—this despite evidence suggesting that a great many suicides are caused in whole, or part, by clinical depression or mental illness.[146] In fact, 28% of Oregon physicians polled have admitted that they do not feel competent to recognize depression.[147] And, a recent study of depression in cancer patients (one notably not dependant on physicians' self-assessed ability to detect depression) found that oncologists detected the condition in only approximately 13% of patients who described themselves as suffering from moderate to severe levels of depression.[148]

Oregon's statute (again, in contrast to Dutch medical guidelines)

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144. *See* KEOWN, EEPP, *supra* note 31, at 171.

145. OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., FOURTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 9–10 (2002), *available at* http://www.ohd.hr.state.or.us/chs/pas/year4/01pasrpt.pdf [hereinafter FOURTH ANNUAL REPORT]; *see also* Katrina Hedberg et al., *Legalized Physician-Assisted Suicide in Oregon, 2001*, 346 NEW ENG. J. MED. 450, 451 (2002).

146. *See* ELI ROBINS, THE FINAL MONTHS: A STUDY OF THE LIVES OF 134 PERSONS WHO COMMITTED SUICIDE 10–12 (1981); ERWIN STENGEL, SUICIDE AND ATTEMPTED SUICIDE 51–53 (1964); B. Barraclough et al., *A Hundred Cases of Suicide: Clinical Aspects*, 125 BRIT. J. PSYCHIATRY 355 (1974); Yeates Conwell & Eric D. Caine, *Rational Suicide and the Right to Die: Reality and Myth*, 325 NEW ENG. J. MED. 1100 (1991); Thomas Grisso & Paul S. Applebaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 LAW & HUM. BEHAV. 149 (1995); Herbert Hendin & Gerald Klerman, *Physician Assisted Suicide: The Dangers of Legalization*, 150 AM. J. PSYCHIATRY 143 (1993); Edwin S. Shneidman, *Rational Suicide and Psychiatric Disorders*, 326 NEW ENG. J. MED. 889 (1992).

147. *See* Lee et al., *supra* note 142, at 312–13.

148. Steven D. Passik et al., *Oncologists' Recognition of Depression in Their Patients with Cancer*, 16 J. CLINICAL ONCOLOGY 1594, 1597 (1998).

also does not require the presence of a doctor when the patient commits suicide, and between 1998 and 2002 prescribing physicians were absent 66% of the time.[149] Given this fact, there is no guarantee that a doctor will assess the patient's mental condition at the time of death; indeed, "capability" is assessed only once under Oregon's regime, when the prescription is written, on a day that may be weeks, months or perhaps even years removed from the patient's decision to die. The physician's absence also means that reviewing state authorities do "not all have information about what happened when the patient ingested the medication,"[150] including information about what, if any, complications may arise.[151] It also means that the complications themselves may also go unaddressed. A nationwide survey of U.S. oncologists found that as many as 15% of all attempts at physician-assisted suicide are unsuccessful,[152] and data from the Netherlands, noted above, are similar.[153] In Oregon in 2002, thirty-eight patients ingested lethal medications[154] and the time to death after ingestion varied widely: one patient lived for fourteen hours, another lived for nine hours, and a third lived for twelve hours;[155] in at least four cases since 1998, a patient has vomited or expectorated immediately after taking the prescribed medication[156] and patients have lived as long as thirty-seven hours after ingestion.[157]

All of the data that Oregon has collected on completed suicides, moreover, come entirely from the very physicians who participate in the assisted suicide process rather than a more neutral source—and the physicians must report their activities only after the patient is dead.[158] Consequently, Oregon has no way to review individual cases for compliance with its law until after it is too late to prevent any error or abuse. The Oregon Health Division, which is charged with administering the law, has further acknowledged that this statutory

149. FIFTH ANNUAL REPORT, *supra* note 143, at 20 tbl.3.

150. FOURTH ANNUAL REPORT, *supra* note 145, at 8. Other "health care providers" (presumably nurses, but this is not clear from the Oregon report) were present in 52% of 2001 cases, *id.* at 10, and 78% percent of cases in 2002, FIFTH ANNUAL REPORT, *supra* note 143, at 10.

151. FIFTH ANNUAL REPORT, *supra* note 143, at 13, 21 tbl.3 (describing that complications include coughing, vomiting, living for hours or days after consuming lethal medication, and seizures).

152. Ezekiel J. Emanuel et al., *The Practice of Euthanasia and Physician-Assisted Suicide in the United States: Adherence to Proposed Safeguards and Effects on Physicians*, 280 JAMA 507, 509 (1998).

153. *See supra* notes 83–84 and accompanying text.

154. FIFTH ANNUAL REPORT, *supra* note 143, at 4.

155. *Id.* at 13.

156. *Id.* at 21 tbl.3.

157. *Id.*

158. FIRST YEAR'S EXPERIENCE, *supra* note 15, at 2.

arrangement raises "the possibility of physician bias," and means that it "cannot detect or collect data on issues of noncompliance with any accuracy."[159] Additionally, quite unlike the Dutch regime, Oregon does not have any mechanism for surveying doctors confidentially; all reporting is done "on the record."

Without a means of privately asking doctors about their practices, one might question whether we will ever obtain a true and complete picture of the events on the ground in Oregon. And, even if a doctor were actually to take the extraordinary step of turning himself or herself in for having violated the law, Oregon's statute imposes no duty on the health division to investigate or pursue such cases, let alone root them out in the absence of any such self-reports. Thus, while Oregon is often touted as a "laboratory" or an "experiment" for whether assisted suicide can be successfully legalized elsewhere in the United States, Oregon's regulations are crafted in ways that make reliable and relevant data and case descriptions difficult to obtain. Given this, it is unclear whether and to what extent Oregon's experiment, at least as currently structured, will ever be able to provide the sort of guidance needed and wanted by other jurisdictions considering whether to follow Oregon's lead.

Separately, it is also rather remarkable that, while physicians in Oregon are held to a standard of professional competence in administering all other treatments they provide, the Oregon assisted suicide statute creates an entirely different regime when it comes to administering this "treatment," specifically and uniquely immunizing doctors from criminal prosecution, civil liability or even professional discipline for any actions they take in assisting a suicide, as long as they act in "'good faith.'"[160] Thus, while a doctor may be found liable for mere negligence in any other operation or procedure, there is absolutely no recourse for family members even when a doctor kills a patient on the basis of gross negligence by misdiagnosing the patient as terminal or by misassessing the patient as competent.[161]

B. Oregon's Practice of Assisted Suicide

According to the limited, nonconfidential, and self-reported data available from Oregon physicians, in the first five years of implementation (1998 to 2002), a total of 198 lethal prescriptions were written, and the number of prescriptions increased significantly each

159. *Id.* at 9; *see also* FIFTH ANNUAL REPORT, *supra* note 143, at 14 ("[O]ur numbers . . . do not include patients and physicians who may act outside the law.").

160. Kathleen Foley & Herbert Hendin, *The Oregon Experiment*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 32, at 144, 159 [hereinafter Foley & Hendin, *The Oregon Experiment*].

161. *See id.*

year: from 1999 to 2002, the overall number of lethal dosages prescribed rose 76%.[162] Many of these prescriptions appear to have been written, moreover, by a very small handful of politically active physicians. In its first-year questionnaire, the Oregon Health Division specifically asked physicians whether the patients they helped kill were referred to them by advocacy organizations, such as Compassion in Dying or the Hemlock Society, but the state inexplicably declined to publish the answer.[163] However, it was later revealed by the media that:

> [T]he first fifteen assisted suicide cases reported involved fourteen different doctors. Compassion in Dying, an out-of-state assisted suicide group that moved to Oregon just weeks after the law was implemented, claimed eleven of the fourteen doctors were theirs. . . . [A]t least one additional case came through the Hemlock Society. So at least twelve of fourteen, or 86 percent, of the assisted suicide cases were handled by groups politically active in promoting legalization of assisted suicide. This unsettling fact was the one held back, suggesting to many that OHD had become selective in its silence . . . .[164]

Just as it is inexplicable that Oregon would suppress results from its first-year questionnaire, it is equally troubling that the state has chosen to drop this question from each of its subsequent annual surveys, and to do so without public mention (let alone defense) of its decision—an incident reminiscent of the Dutch Surveys authors' decision to stop reporting on the incidence of euthanasia by omission after 1990.[165]

Of the 198 patients who have received prescriptions for lethal medication, 129 (or 65%) have used them to date.[166] Though these figures provide a small sample, the data do reveal certain correlations, reflected in Table 4.

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162. FIFTH ANNUAL REPORT, *supra* note 143, at 4.

163. N. Gregory Hamilton, *Oregon's Culture of Silence*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 32, at 175, 180–81; *see also* Foley & Hendin, *The Oregon Experiment*, *supra* note 160, at 144–45.

164. Hamilton, *supra* note 163, at 180–81 (footnote omitted); *see also* Foley & Hendin, *The Oregon Experiment*, *supra* note 160, at 145.

165. *See supra* notes 92–95 and accompanying text.

166. *See* FIFTH ANNUAL REPORT, *supra* note 143, at 11.

Table 4
Oregon Assisted Suicide Demographics: 1998-2002[167]

Year	1998	1999	2000	2001	2002
Total deaths	16	27	27	21	38
% change from prior year	-	+69%	0%	-22%	+81%
Median age	69	71	69	68	69
Age range	25-94	31-87	51-93	51-87	38-92
% male	53	59	44	38	71
% female	47	41	56	62	29
% married	13	44	67	38	53
% divorced	27	30	11	33	24
% widowed	33	22	22	24	18

As shown in Table 4, the number of deaths in 1999 appeared to increase greatly over 1998, although a firm comparison cannot be drawn because the law was not in effect for all of 1998. While the number of deaths in 2001 declined 22% compared to 2000, this represented a difference of just six persons. Also, the total number of lethal prescriptions increased in 2001,[168] and two of these prescriptions were apparently filled in 2002,[169] when total deaths increased 81% over 2001, to thirty-eight persons, by far the largest number of deaths in any year since the Oregon law went into effect, and representing 41% more deaths than occurred in 1999, the first full year of legalization.

The median age for assisted suicide seems to be hovering around seventy, although patients have sought assisted suicide at much younger ages—including as young as twenty-five-years-old in 1998, thirty-one-years-old in 1999, and thirty-eight-years-old in 2002. Surprisingly, no special examination has been made into these cases, although it would clearly be useful to have more information about the physical and mental

167. *See* FIRST YEAR'S EXPERIENCE, *supra* note 15, at 13 tbl.1, 15 tbl.3; CTR. FOR DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., OREGON'S DEATH WITH DIGNITY ACT: THE SECOND YEAR'S EXPERIENCE tbl.1 (2000), *available at* http://www.ohd.hr.state.or.us/pas/year2/99pasrpt.pdf [hereinafter SECOND YEAR'S EXPERIENCE]; CTR. FOR DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., OREGON'S DEATH WITH DIGNITY ACT: THREE YEARS OF LEGALIZED PHYSICIAN-ASSISTED SUICIDE 16 tbl.1 (2001), *available at* http://www.ohd.hr.state.or.us/pas/year3/00pasrpt.pdf [hereinafter THREE YEARS OF LEGALIZED PHYSICIAN-ASSISTED SUICIDE]; FOURTH ANNUAL REPORT, *supra* note 145, at 14 tbl.1; FIFTH ANNUAL REPORT, *supra* note 143, at 18 tbl.1.

168. There were forty-four prescriptions for lethal doses of medication in 2001, compared to thirty-nine in 2000, thirty-three in 1999, and twenty-four in 1998. FIFTH ANNUAL REPORT, *supra* note 143, at 4.

169. *See id.*

condition of such young persons committing suicide.

There also appears to be a persistent correlation between assisted suicide and divorce. As shown in Table 5, in each year except 2000, divorced persons have represented over 24% of all assisted suicides in Oregon, well in excess of their representation in the population of all deaths due to similar underlying illnesses:

Table 5
Relative Incidence of Assisted Suicide:
Married vs. Divorced Patients: 1998-2002[170]

	Married	Divorced
Assisted suicides	47%	25%
Oregon deaths due to same diseases	49%	18%
Estimated proportion of assisted suicide deaths per 10,000 Oregon deaths	29.2	54.5
Relative risk	Reference	1.9

As reflected in Table 5, divorced persons constituted 25% of all assisted suicides in 1998 through 2002, but 18% of all deaths in Oregon due to similar underlying maladies as those afflicting the assisted suicide patients. Meanwhile, married persons constituted 47% of all assisted suicides, but 49% of all deaths due to similar illnesses. These data suggest that divorced persons are nearly twice as likely to commit assisted suicide than similarly situated married patients. And, this persistent correlation between divorce and assisted suicide serves to underscore the question whether other things besides terminal illness (for example, social isolation or depression) may drive the decision to seek death.

Of potential concern as well, data show that Oregon physicians are increasingly unlikely to refer their patients for psychiatric or psychological consultation before declaring them competent to make the decision to die, despite the evidence consistently linking suicidal impulses to depression and psychological illness.[171] Physicians referred patients in just 13% of cases in 2002 (five of thirty-eight), compared with 14% of cases in 2001 (three of twenty-one), 19% of cases in 2000 (five of twenty-seven), 37% of cases in 1999 (ten of twenty-seven), and 31% of cases in 1998 (five of sixteen).[172] Even when evaluations are

170. *See id.* at 19 tbl.2.

171. *See supra* note 146 and accompanying text.

172. *See* SECOND YEAR'S EXPERIENCE, *supra* note 167, at tbl.2; THREE YEARS OF LEGALIZED PHYSICIAN-ASSISTED SUICIDE, *supra* note 167, at 19 tbl.3; FOURTH

done, given the fact that many patients are apparently being shepherded to doctors affiliated with advocacy groups that favor assisted suicide, the possibility exists that "a bias may be introduced into the competency evaluation. On balance, the psychiatrists' conclusions may reflect personal values and beliefs more than psychiatric expertise."[173]

Further, physicians in the Netherlands often have longstanding relationships with patients; as a result, they arguably have some basis for assessing the "patient's concerns, values, and pressures that may be prompting the . . . request [for assistance in dying]."[174] By contrast, the American Medical Association (AMA) has opposed the legalization of assisted suicide in part because American physicians, increasingly employees or agents of large corporate health maintenance organizations, lack such long-term relationships with their patients: in the AMA's view, American "physicians rarely have the depth of knowledge about their patients that would be necessary for an appropriate evaluation of the patient's [assisted suicide] request."[175] And, there is data from Oregon that speaks to this concern. In 2002, the median length of the relationship between patients seeking assisted suicide and the physicians who agreed to help them was just eleven weeks, and in some cases was not even a matter of weeks, but of days or hours.[176]

Table 6
Duration of Patient-Physician Relationship[177]
(weeks)

	1998	1999	2000	2001	2002	Total
Median	11	22	8	14	11	13
Range	2–540	2–817	1–851	0–500	0–379	0–851

While Oregon reports the duration of the patient-physician relationship, it fails to collect any similar data regarding the length, if

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ANNUAL REPORT, *supra* note 145, at 16 tbl.3; FIFTH ANNUAL REPORT, *supra* note 143, at 20 tbl.3.

173. Linda Ganzini et al., *Attitudes of Oregon Psychiatrists Toward Physician-Assisted Suicide*, 153 AM. J. PSYCHIATRY 1469, 1474 (1996) [hereinafter Ganzini et al., *Attitudes*].

174. Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Decisions Near the End of Life*, 267 JAMA 2229, 2232 (1992).

175. *Id.*

176. FIFTH ANNUAL REPORT, *supra* note 143, at 21 tbl.3.

177. *See* SECOND YEAR'S EXPERIENCE, *supra* note 167, at tbl.2; THREE YEARS OF LEGALIZED PHYSICIAN-ASSISTED SUICIDE, *supra* note 167, at 20 tbl.3; FOURTH ANNUAL REPORT, *supra* note 145, at 17 tbl.3; FIFTH ANNUAL REPORT, *supra* note 143, at 21 tbl.3.

any, of the relationship between the patient and the psychiatrist or psychologist who may be called in to assess competency. Given that such a consultation is entirely optional under Oregon's law, it seems likely that these relationships are extremely short, often just a single visit—this despite the fact that a survey of Oregon psychiatrists found that only 6% of the psychiatrists surveyed said they were very confident that they could determine whether a patient is competent to commit suicide without a long-term doctor-patient relationship.[178]

Finally, while loss of autonomy topped the list of reasons proffered by patients seeking assisted suicide (a concern in 85% of cases between 1998 and 2002), many other reasons were also given, as shown in Table 7.

Table 7
Reasons Given by Oregon Patients Seeking Assisted Suicide[179]

	1998	1999	2000	2001	2002	Total
Financial implications of treatment	0	5%	4%	6%	3%	2%
Inadequate pain control	7%	53%	30%	6%	26%	22%
Burden on family, friends, and caregivers	13%	47%	63%	24%	37%	35%
Losing control of bodily functions	53%	68%	78%	53%	47%	58%
Decreasing ability to participate in activities that make life enjoyable	67%	47%	78%	76%	84%	79%
Losing autonomy	80%	63%	93%	94%	84%	85%

Again, this data comes from after the fact self-reporting performed by the attending physicians, not a more objective source. Even so, the data reveal that 22% of cases between 1998 and 2002 were motivated in part by inadequate pain control, which, taken together with the evidence that many Oregon doctors lack sufficient training in palliative care,[180] suggest that suicide may have been substituted for adequate care in some cases. In contrast to the official state numbers, moreover, a 1999 survey of Oregon doctors who received requests for assisted suicide

178. Ganzini et al., *Attitudes*, *supra* note 173, at 1473.

179. *See* FIRST YEAR'S EXPERIENCE, *supra* note 15, at 16 tbl.3; SECOND YEAR'S EXPERIENCE, *supra* note 167, at tbl.4; THREE YEARS OF LEGALIZED PHYSICIAN-ASSISTED SUICIDE, *supra* note 167, at 18 tbl.3; FOURTH ANNUAL REPORT, *supra* note 145, at 16 tbl.3; FIFTH ANNUAL REPORT, *supra* note 143, at 20 tbl.3.

180. *See supra* notes 105–07 and accompanying text.

revealed that 43% of patients requesting assisted suicide cited pain as an important reason motivating their request; the same survey shows that physicians recommended a palliative care consultation in just 13% of cases.[181] Also of concern is the role the cost of care may play in the decision to die and the possibility that requesting continued expensive end-of-life care may be seen as selfish or extravagant when assisted suicide is available: 35% of cases involved patients who sought to kill themselves because they were worried about becoming a "burden" on their family and friends; even more pointedly, 2% of cases were expressly motivated by concerns over the financial implications of continued treatment (this in one of the nation's most affluent states where one would expect financial concerns to be less pressing than in other jurisdictions where assisted suicide might be legalized).

C. "Helen" and Ms. Cheney

Kathleen Foley and Herbert Hendin have investigated in detail the case of "Helen" (last name unknown), the first person to obtain assisted suicide under Oregon's regime, [182] and of Ms. Kate Cheney, a more recent applicant.[183] Foley and Hendin's findings offer vivid case studies illustrating some of the questions and concerns I have raised regarding Oregon procedures and practices. Helen was a breast cancer patient in her mid-eighties when the Oregon law went into effect.[184] Helen's regular physician refused to assist in her suicide (for unknown reasons); a second doctor was consulted but also refused, on the stated ground that Helen was depressed.[185] At that point, Helen's husband called Compassion in Dying.[186] The medical director of the group spoke with Helen and later explained that Helen was "'frustrated and crying because she felt powerless.'"[187] Helen was not, however, bedridden or in great pain, but enjoyed aerobic exercises until two weeks before contacting Compassion in Dying, and apparently, she was still performing housework.[188] The Compassion in Dying employee recommended a physician to Helen.[189] That physician, in turn, referred Helen to a specialist (whose specialty is unknown), as well as to a

181. Linda Ganzini et al., *Physicians' Experiences with the Oregon Death with Dignity Act*, 342 NEW ENG. J. MED. 557, 559–60 (2000).
182. *See* Foley & Hendin, *The Oregon Experiment*, *supra* note 160, at 146–50.
183. *See id.* at 156–58.
184. *Id.* at 146.
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.* at 147.

psychiatrist who met Helen only once.[190] A lethal prescription was then supplied.[191]

After Helen died, the prescribing physician was quoted as saying that he regrets that he did not contact Helen's regular physician, as well as that he had only a "very cursory" discussion with the second doctor Helen approached: "[h]ad I felt there was a disagreement among the physicians about my patient's eligibility"—and no doubt there was—"I would not have written the prescription."[192] The prescribing physician further explained that the thought of Helen dying by lethal medication was "almost too much to bear," but that he felt compelled to proceed because he feared how Helen's family might view him otherwise: "I found even worse the thought of disappointing this family. If I backed out, they'd feel about me the way they had [felt] about their previous doctor, that I had strung them along, and in a way, insulted them."[193] An *Oregonian* newspaper reporter who interviewed the family was told that Helen was worried that further care would threaten her financial assets.[194]

When Cheney, an eighty-five-year-old widow, more recently sought a lethal prescription from a physician, her daughter Erika, a retired nurse, accompanied her.[195] Erika described the doctor as "'dismissive,'" so she and her mother requested and received a referral to another physician in the same health maintenance organization (HMO) (in this case, Kaiser Permanente).[196] The second doctor arranged for a psychiatric evaluation; the psychiatrist found that Cheney "did 'not seem to be explicitly pushing for assisted suicide,' and lacked 'the very high level of capacity to weigh options about it.'"[197] The psychiatrist noted that Cheney accepted his assessment when he presented it, but that the daughter became angry.[198]

The HMO then, apparently at Erika's (not Cheney's) request, suggested that the family obtain a second psychiatric evaluation, and agreed to pay for it.[199] The second psychologist found that Erika might have been "'somewhat coercive,'" but concluded nonetheless that Cheney was competent to make the decision to die.[200] Cheney thereafter received a lethal prescription and the drugs were placed under her

190. *See id.*
191. *See id.*
192. *Id.* at 149.
193. Peter Reagan, *Helen*, 353 LANCET 1265, 1266 (1999).
194. *See* Foley & Hendin, *The Oregon Experiment*, *supra* note 160, at 169.
195. *See id.* at 156.
196. *See id.*
197. *Id.*
198. *See id.*
199. *See id.*
200. *Id.*

daughter's care.[201] As time went by, Cheney ate poorly, became weaker, and to afford Erika and her husband a respite, went to a nursing home on a temporary basis to regain her strength.[202] On the day she returned home, Cheney said "that something had to be done given her declining health," that she did not want to go into a nursing home again, and that she would like to use the lethal pills in Erika's custody.[203] After the daughter consented, Cheney took the pills and died.[204]

Helen and Cheney's cases encapsulate and illustrate some of the many difficult questions about Oregon's assisted suicide regime alluded to by the data reviewed above: what is the role of depression, as opposed to terminal illness, actually playing in patient decisions to die in Oregon? Are alternative options, including treatment for depression, being fully presented (or presented at all)? Are the doctors prescribing death even knowledgeable about the alternatives that exist? To what extent are family members unduly influencing patient choices and physician evaluations? What would have happened if family members in each case had argued *against* the request to die and offered care? Should patients be allowed to "shop" around for physicians and psychologists who will find them competent? Do psychologists and physicians have an obligation to do more than a cursory examination? Should they consult the patient's primary care providers and other doctors or psychologists who may have refused prior requests for lethal medication by the patient? Would Cheney's HMO have offered to pay for a second opinion if the first psychologist had found Cheney competent? Do HMOs have a conflict of interest—given that assisted suicide is unquestionably cheaper than continuing care—that may provide an incentive for them to encourage patients to seek death?

III. LEGALIZATION AND OTHER UNINTENDED CONSEQUENCES

Whether the evidence from the Netherlands and Oregon leaves you with brimming confidence or deep concern that legalization will be attended by additional nonconsensual killings due to abuse, mistake, and coercion, that does not entirely end the conversation about the potential "costs" associated with legalization. It bears considering whether yet other unintended costs might also attend legalization including, for example, the possibility of discrimination against minority populations like the elderly, African Americans, and the poor or disabled. Concerned about what might happen to them, many elderly Dutch patients have actually taken to insisting on written contracts assuring

201. *See id.*
202. *Id.* at 157.
203. *Id.*
204. *See id.*

against nonvoluntary euthanasia before they will admit themselves to hospitals.[205] And, poll after poll suggests that ethnic minorities in the United States are relatively more troubled by the prospect of legalized euthanasia and its impact on them than their white counterparts. Indeed, it is an unanswered, but interesting, question whether Oregon's highly homogenous population (approximately 90% white)[206] contributed in any way to its adoption of the first-ever U.S. law allowing assisted suicide.

The *Detroit Free Press* has found, for example, that while 53% of whites sampled in Michigan could envision requesting assistance in suicide, only 22% of blacks could.[207] A poll in Ohio revealed that, while roughly half those sampled favored legalization of assisted suicide, those most likely to favor the practice were those with higher income and education levels, and young adults, and those most likely to oppose the practice were black, people sixty-five and older, and those with low levels of income and education.[208]

Empirical evidence concerning the medical treatment presently provided to minority groups suggests that their relative unease with the legalization of assisted suicide may not be irrational. The *New England Journal of Medicine* has reported that female, African American, elderly, and Hispanic cancer patients are all less likely than similarly situated nonminorities to receive adequate pain-relieving treatment that may obviate a patient's perceived need to resort to assistance in suicide or euthanasia.[209] Indeed, minority cancer patients are fully three times less likely than nonminority patients to receive adequate palliative care.[210] Minorities also receive poorer AIDS treatment: only 48% of blacks receive medicines designed to slow the progress of AIDS, compared to 63% of whites; while 82% of whites receive effective treatments for preventing AIDS-related pneumonia, only 58% of black patients receive similar attention.[211] African Americans have higher mortality rates than whites across disease categories and recent declines in breast cancer mortality rates have been enjoyed among white, but not

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205. *See* H.L. REPORT, *supra* note 64, at 66.

206. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 27 (121st ed. 2001).

207. *See* Joseph P. Shapiro & David Bowermaster, *Death on Trial: The Case of Dr. Kevorkian Obscures Critical Issues—and Dangers*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 31, 39.

208. *See Ohioans Divided on Doctor Assisted Suicide Issue*, UPI, June 28, 1993 (on file with author).

209. *See* Charles S. Cleeland et al., *Pain and Its Treatment in Outpatients with Metastatic Cancer*, 330 NEW ENG. J. MED. 592, 595 (1994).

210. *See id.*

211. *See* Richard D. Moore et al., *Racial Differences in the Use of Drug Therapy for HIV Disease in an Urban Community*, 330 NEW ENG. J. MED. 763, 763 (1994).

black, women.[212] African Americans have fewer physician visits and receive different treatment than whites even within the federally funded Medicare and Veteran's Affairs programs.[213] African Americans are also 3.5 times more likely than whites to have one or more of their limbs amputated, even though diabetes, the most common reason for amputation, is only 1.7 times more common among blacks than whites.[214]

In the events leading up to the consideration of the failed California voter referendum on assisted suicide in 1992, advocates of the measure turned to the American Bar Association (ABA) for support. The ABA, however, ultimately recommended against legalization and did so specifically on the ground that "[t]he proposed right to choose aid-in-dying freely and without undue influence is illusory and, indeed, dangerous for the thousands of Americans who have no or inadequate access to quality health and long-term care services."[215] The Canadian Medical Association, the British Medical Association, the World Medical Association, the American Hospital Association, and the American Nurses Association have all argued against legalizing euthanasia on similar grounds.[216]

The State of New York convened a task force composed of twenty-four members representing a wide variety of ethical, philosophical, and religious views and asked the task force to consider whether the state should drop or revise its laws banning assisted suicide; the commission

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212. Patricia A. King & Leslie E. Wolf, *Lessons for Physician-Assisted Suicide from the African-American Experience*, *in* PHYSICIAN *ASSISTED* SUICIDE: EXPANDING THE DEBATE 91, 101 (Margaret P. Battin et al. eds., 1998) [hereinafter EXPANDING THE DEBATE].

213. *See id.*

214. *See id.*

215. ABA Comm'n on Legal Problems of the Elderly, *ABA Memorandum in Opposition to Resolution No. 8 on Voluntary Aid in Dying*, 8 ISSUES L. & MED. 117, 120 (1992) (emphasis omitted). "The lack of access to or the financial burdens of health care hardly permit voluntary choice for many. What may be voluntary in Beverly Hills is not likely to be voluntary in Watts. Our national health care problem should be our priority—not endorsement of euthanasia." *Id.* at 118.

216. *See* Brief of Am. Med. Ass'n, Am. Nurses Ass'n & Am. Psychiatric Ass'n, et al. as Amici Curiae in Support of Petitioners, *Glucksberg* (No. 96-110), *available at* 1996 WL 656263; Brief Amicus Curiae of Am. Hosp. Ass'n in Support of Petitioners, *Glucksberg* (No. 96-110) & *Quill* (No. 96-1858), *available at* 1996 WL 656278; Can. Med. Ass'n, CMA Policy, Euthanasia and Assisted Suicide (1998), *available at* http://www.cma.ca/index.cfm/ci_id/3214/la_id/1.htm; Med. Ethics Dep't, Brit. Med. Ass'n, Euthanasia & Physician Assisted Suicide: Do the Moral Arguments Differ? (Apr. 1998), *available at* http://www.bma.org.uk/ap.nsf/Content/Euthanasia+and+physician+assisted+suicide:+Do+the+moral+arguments+differ%3F; World Med. Ass'n, Policy, World Medical Association Statement on Physician-Assisted Suicide (Sept. 1992), *available at* http://www.wma.net/e/policy/p13.htm.

returned with a lengthy report, published in 1994, that unanimously favored retaining existing law.[217] The New York task force recommended against legalization in part because it would, in the commission's words, impose severe risks on "the poor, minorities, and those who are least educated and least empowered."[218] "Officially sanctioning [euthanasia] might also provide an excuse for those wanting to spend less money and effort to treat severely and terminally ill patients, such as patients with acquired immunodeficiency syndrome (AIDS)."[219] Even those task force members who thought euthanasia was justified in some instances concluded that, weighing the costs and benefits, continued criminalization would: "[C]urtail[] the autonomy of patients in a very small number of cases when assisted suicide is a compelling and justifiable response, [but would] preserve[] the autonomy and well-being of many others. It [would] also prevent[] the widespread abuses that would be likely to occur if assisted suicide were legalized."[220]

Michigan appointed a similar commission to study the assisted suicide issue after Kevorkian brought attention to the subject there.[221] While the commission was unable to achieve a unanimous judgment, those who concluded that euthanasia should not be legalized focused specifically on the dangers of "social biases."[222] Although "[p]roponents of assisted suicide would . . . point out that the criteria for allowing assisted suicide should be blind to the factors of age or disability," commission members argued that: "[t]o suggest that legalizing assisted suicide will not continue to reinforce negative stereotypes and prejudices against [the] disabl[ed] . . . is to ignore the practical realities of how, and for whom, assisted suicide would be applied."[223]

The British House of Lords Committee on Medical Ethics, after lengthy hearings, reached much the same conclusion, recommending against legalization out of

> concern[] that vulnerable people—the elderly, lonely, sick or distressed—would feel pressure, whether real or imagined, to request early death. . . . [W]e believe that the message which society sends to vulnerable and disadvantaged people should

217. N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 90, at vii–ix.
218. *Id.* at 125.
219. *Id.* at 96.
220. *Id.* at 141.
221. *See* MICH. COMM'N ON DEATH & DYING, FINAL REPORT OF THE MICHIGAN COMMISSION ON DEATH AND DYING (1994).
222. *See id.* at 5–7.
223. *Id.* at 6.

> not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.[224]

Because normalizing assisted suicide and euthanasia would represent such a sea change in our end-of-life laws and ethics, it would undoubtedly carry with it other consequences for medicine, law, and social norms that cannot now be predicted or foreseen. Still, we might ask, what glimmers can we make out, if only barely, on the horizon?

By way of example, as a cheaper and easier option (killing) becomes available as a legitimate medical response to terminal illness or grave physical suffering, might it create disincentives to the development and dissemination of other more expensive end-of-life options? A 1988 study strongly suggested that physician incompetence and the lack of adequate palliative medicines in the Netherlands has, in fact, contributed to the number of requests made for assisted suicide and euthanasia in that country: more than 50% of Dutch cancer patients surveyed suffered treatable pain unnecessarily, and 56% of Dutch physician practitioners were found to be inadequately trained in pain relief techniques.[225] Another study conducted under the auspices of the U.S. Department of Health and Human Services similarly concluded that:

> Patients with cancer often have pain from more than one source, but in up to 90 percent of patients the pain can be controlled by relatively simple means. Nevertheless, undertreatment of cancer pain is common because of clinicians' inadequate knowledge of effective assessment and management practices, negative attitudes of patients and clinicians toward the use of drugs for the relief of pain, and a variety of problems related to reimbursement for effective pain management.[226]

Providing assisted suicide and euthanasia is a cheap means of responding to patients suffering grave pain—cheaper surely than

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224. H.L. REPORT, *supra* note 64, at 49. During the brief experiment with legalization in the Northern Territory of Australia, a consultant was commissioned by the government to explain its goals and operation to Aboriginal communities. *See* John Finnis, Euthanasia, Morality, and Law, Comments at the Fritz B. Burns Lecture (Nov. 22, 1996), *in* 31 LOY. L.A. L. REV. 1123, 1144 n.75 (1998). Despite his initial support for the law, the deep fear Aboriginal communities expressed about the law's implications for them led the consultant to advise the Northern Territory legislature to repeal the statute. *See id.* (referring to unpublished reports on file with John Finnis).

225. *See* H.L. REPORT, *supra* note 64, at 67.

226. Ada Jacox et al., *New Clinical-Practice Guidelines for the Management of Pain in Patients with Cancer*, 330 NEW ENG. J. MED. 651, 651 (1994).

guaranteeing the care, attention, and pain medication required for some patients to die in comfort. Accordingly, it is only reasonable to ask whether the recognition of killing as a valid medical response to patient discomfort might create disincentives not just to the development of new palliative treatments, but also to the full dissemination of nursing and hospice care as well as existing and readily available pain suppressants that can prevent suffering and the perceived need for assistance in dying. Griffiths, while defending the Dutch euthanasia regime and advocating its extension to nonvoluntary killings, has expressly acknowledged that "there are occasional indications" that economic considerations do play a role in the administration of assisted suicide in the Netherlands, noting that "some 12% of the doctors and 15% of the prosecuting officials interviewed [in 1995] expect[ed] that drastic budget-cutting in the health-care system could lead to increased pressure on doctors to engage in life-shortening practices."[227] And these findings come in a society where, quite unlike America, virtually everyone is guaranteed medical insurance.[228]

We may see in the case of Cheney what may, in this respect, be a glimpse of the future for American patients—even ones with medical insurance. The HMO in her case was quite willing to pay (at the daughter's urging) for a second opinion after the first psychologist refused to certify Cheney for death; subsequently, it agreed to allow the assisted suicide to proceed despite evidence of coercion and patient incompetence; and at no point did the HMO intervene to offer continued psychiatric counseling or a palliative care consultation.[229] More recently, the very same HMO has even solicited its doctors to participate in assisted suicide.[230] A Kaiser executive e-mailed more than 800 Kaiser doctors asking them to "'act as Attending Physician under the [assisted suicide] law for YOUR patients' and [soliciting doctors] 'willing to act as 'Attending Physician under the law for members who ARE NOT your patients' to contact 'Marcia L. Liberson or Robert H. Richardson, MD, KPNW Ethics Services.'"[231] As one observer has noted, "Kaiser is apparently willing to permit its doctors to write lethal prescriptions [even] for patients [within Kaiser's HMO system whom] they have not treated."[232]

What others have left implicit, or perhaps chosen to turn a blind eye to, Derek Humphry, cofounder of the Hemlock Society, an assisted

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227. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 304 n.5.

228. *See id.* at 31 (describing the Dutch health care system).

229. Foley & Hendin, *The Oregon Experiment*, *supra* note 160, at 156.

230. *See* Wesley J. Smith, *Doctors of Death: Kaiser Solicits Its Doctors to Kill*, NAT'L REV. ONLINE (Aug. 19, 2002), *at* http://www.nationalreview.com/comment/comment-smith081902.asp.

231. *Id.*

232. *Id.*

suicide advocacy organization, has made remarkably explicit, candidly acknowledging that money is an "'unspoken argument'" in favor of his position: "'*the hastened demise of people with only a short time to* [*live*] *would free resources for others,*'" an amount Humphry estimates could run into the "'*hundreds of billions of dollars.*'"[233]

Even overlooking the economic forces that come into play if we treat assisted suicide and euthanasia as legitimate forms of medical treatment, we cannot ignore the possibility that we may also wind up establishing a new standard of care—imposing, in essence, a professional *duty* on physicians to offer to "treat" patients with assisted suicide under certain circumstances, perhaps even opening medical care professionals to suits in negligence by families upset that their relatives suffered needlessly because a doctor or nurse did *not* advocate their death. Far-fetched as this may seem today, some advocates of legalization are already openly discussing putative professional and legal "duties" along just these lines.[234]

More modestly, we might also ask whether legalization would foster a culture in which physicians at least feel freer to disregard patient wishes for what doctors may perceive as futile or unduly expensive care. Certainly such a result would *harm*, not help, the objective of patient autonomy that many assisted suicide advocates claim as their goal. But, it is a possibility that cannot be considered implausible or remote in an environment where some, like Griffiths and the Dutch government itself, have expressly defended, and even advocated, the decriminalization of *nonvoluntary* killings.[235]

Indeed, at least one U.S. court has already endorsed the notion that physicians may override a patient's autonomous desire for treatment. In April of 1995, a Massachusetts court ruled "that a hospital and its doctors need not provide [life-sustaining] care they deem futile," even if the patient expressly requests it.[236] The case involved an elderly woman, Mrs. Catherine Gilgunn, who became comatose after suffering irreversible brain damage.[237] Gilgunn's daughter instructed the hospital that her mother wished everything medically possible be done for her should she become incompetent.[238] The hospital, however, ignored the

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233. *Id.* (emphasis added).

234. *See, e.g.*, GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 285–92; Frances M. Kamm, *Physician-Assisted Suicide, Euthanasia, and Intending Death*, *in* EXPANDING THE DEBATE, *supra* note 212, at 28, 35–36 (stating that a doctor has a "duty to relieve physical suffering" and provide a requested legal dose as well as kill); Patricia S. Mann, *Meanings of Death*, *in* EXPANDING THE DEBATE, *supra* note 212, at 11, 21–22.

235. *See supra* Part I.C.

236. Gina Kolata, *Court Ruling Limits Rights of Patients: Care Deemed Futile May Be Withheld*, N.Y. TIMES, Apr. 22, 1995, § 1, at 6.

237. *See id.*

238. *See id.*

daughter's instructions and refused to place Gilgunn on a respirator or provide cardiopulmonary resuscitation.[239] The lawyer defending the hospital provided his forthright assessment of the ruling: the court's "'real point,'" he said, was that, "'physicians can't be required to do things that they feel would be inappropriate and harmful to the patient'"—regardless of how the patient herself "feels" (that is, instructs her fiduciary caregiver).[240]

Patricia Mann, who, notably, takes no position in the assisted suicide debate, describes in vivid detail some of the cultural consequences that a shift to legalization might entail for the medical profession:

> [M]any doctors will adjust their practices, and gradually their values . . . . Insofar as assisted suicide is a cost-efficient means of death, doctors are . . . likely to be rewarded by healthcare companies for participating in it. As institutional expectations and rewards increasingly favor assisted suicide, expectations and rewards within the medical profession itself will gradually shift to reflect this. Medical students will learn about assisted suicide as an important patient option from the beginning of their training. We may expect that a growing proportion of doctors will find themselves sympathetic to the practice, and will find themselves comfortable with recommending it to their patients.[241]

But, as Mann notes, the medical profession would not be the only one affected:

> Family members may want a loved one to remain alive as long as possible, while also harboring secret desires to be done with this painful process. Many people today are ashamed of such secret desires . . . . But if assisted suicide becomes legal, such desires will cease to be wrongful in such an obvious way. If patients themselves may decide to put an end to this painful process of dying, then it is not blameworthy for relatives of such a patient to inquire whether he or she may be thinking along these lines, and to offer sympathetic support for the idea.
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> . . . Once assisted suicide ceases to be illegal, its many advantages to busy relatives will become readily apparent. More than merely an acceptable form of ending, relatives and

239. *See id.*
240. *Id.*
241. Mann, *supra* note 234, at 21.

> friends may come to see it as a preferred or praiseworthy form of death.[242]

Nor can Mann's predictions be dismissed as the stuff of science fiction; the former Governor of Colorado, Richard Lamm, for one, has openly and repeatedly defended the view that the elderly have a duty to die to make room (and save resources for) the young.[243]

And, of course, we already accept that economic incentives play a role for HMOs in the care they choose to dispense (and not dispense); why should this arena prove any different? Although doctors and hospitals may have incentives to keep patients alive to generate higher bills for additional care, if assisted suicide comes to be considered a legitimate (or perhaps even a professionally preferred) form of "care" in such cases, wouldn't we *expect* HMOs to cut back on reimbursement for more expensive options? Is it not possible—even likely—that more expensive forms of end-of-life care may come to be seen as luxuries, "elective," and nonreimbursable (or only partially reimbursable) options? Perhaps even extravagant? Or selfish? As Mann notes:

> If dying sooner is more cost efficient, their profit-based concerns will make them prefer patients to choose assisted suicide. . . . Economic interests may still seem crass in relation to dying patients, and yet we are already accustomed to recognizing them in the context of treatment, as well as in all other contexts of daily life. When we legalize assisted suicide, it too becomes a part of daily life.[244]

Indeed, "[i]n our society, where almost everyone is pressed for time, and many are pressed for money, individual notions of agency and the fabric of social agency relations may evolve very quickly to reflect [assisted suicide's] conveniences and cost efficiency."[245] If anyone should doubt how quickly economic forces can change cultural norms and expectations, Mann asks us only to look back to the 1950s and 1960s and compare "how rapidly we have come" to alter our views on women working outside the home, with many today even "consider[ing] it somewhat indulgent and eccentric" for highly educated women to give up professional careers in favor of remaining at home.[246] How can we doubt that our views of dying (and what amounts to self-indulgent

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242. *Id.* at 21–22.
243. *See* Nat Hentoff, *Duty to Die?*, WASH. POST, May 31, 1997, at A19.
244. Mann, *supra* note 234, at 22.
245. *Id.*
246. *Id.* at 23.

behavior in the dying process) would change just as radically if assisted suicide were legalized?[247]

IV. GRIFFITHS AND KUHSE: DECRIMINALIZATION AS A "COSTLESS" ENTERPRISE

A. Griffiths's Argument

Griffiths has sought to press the somewhat counterintuitive notion that the decriminalization of assisted suicide is an essentially "costless" enterprise. Just because assisted suicide is routine today in the Netherlands, Griffiths submits, that fact does not necessarily mean that the number of such deaths "increased after legalization" or that the number of such deaths "is higher in the Netherlands than elsewhere."[248] In fact, Griffiths argues, assisted suicide and euthanasia are practiced on a "widespread, if hidden," basis in the United States "at rates roughly comparable [to] those in the Netherlands," a "fact" which leads Griffiths to conclude that the "[l]egalization of euthanasia apparently does not lead to an increase even in the rate of euthanasia itself."[249]

To be sure, Griffiths is right to note that the data we have from the Netherlands, like the data from Oregon, only tells us about the incidence of assisted suicide and euthanasia *after* they became legally permissible in those jurisdictions, and that we lack much data regarding the rate of voluntary or nonvoluntary killings in those jurisdictions *before* legalization. But Griffiths does nothing to dispel concerns that Dutch and Oregon procedures and practices raise on their own terms, and Griffiths goes far beyond noting the limitations of current data to an argument that is itself unwarranted on the available evidence.

First, Griffiths's hypothesis—that decriminalization of assisted suicide and euthanasia does not result in any additional cases of those practices—runs directly contrary to the intuitive principle of the law of

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247. The unintended consequences of legalization would surely include, as well, the fact that it would leave some set of persons who remain morally and religiously opposed to assisted suicide and euthanasia in a position similar to the one in which abolitionists found themselves in antebellum America or contemporary abortion and capital punishment opponents find themselves today—in distress at even passive participation in a regime which facilitates what they believe to be wrong. The social division and unrest associated with such discontent is yet one more "cost" that would have to be figured into any utilitarian calculus hoping to encompass comprehensively the assisted suicide debate.

248. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 26 (emphasis omitted).

249. John Griffiths, *The Slippery Slope: Are the Dutch Sliding Down or Are They Clambering Up?*, *in* ASKING TO DIE, *supra* note 24, at 93, 100 [hereinafter Griffiths, *Slippery Slope*]; *see also* GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 27 (arguing to the same effect).

demand. The law of demand holds that, other things being equal, the quantity demanded of a good falls when the price of the good rises.[250] Consistent with the law of demand, one would expect that if certain "costs" associated with assisted suicide and euthanasia (for example, the social stigma and difficulty of finding a willing physician to help when the practices remain illegal) are lowered or eliminated by legalization, *more*, not fewer, people would take advantage of this fact and seek an early death. Advocates of legalization usually champion exactly this point, arguing for the regularization of assisted suicide precisely because doing so would allow *more* people the autonomy to decide to kill themselves. Griffiths gives us no reason to adopt a contrary, and entirely counterintuitive, assumption.

Second, while Griffiths asserts that assisted suicide and euthanasia are secretly practiced in the United States on approximately the same scale as they are openly practiced in the Netherlands, the only authority he provides for this claim is a citation to an amicus brief in *Glucksberg* signed by Ronald Dworkin, among others, and described by its authors as the "Philosophers' Brief"; that legal advocacy piece hardly purported to provide a systematic study of assisted suicide and euthanasia rates in the United States.[251]

Griffiths's empirical assertion is, in fact, contradicted by available data—data which is entirely consistent with what one would expect under the law of demand. The 1995 Survey of Dutch physicians found that 63% of general practitioners and 37% of clinical specialists in the Netherlands (53% of all physicians) had performed euthanasia or assisted suicide.[252] By contrast, a survey of physicians in Oregon

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250. *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 68 (2d ed. 2001). Theoretically, some goods may violate the law of demand ("Giffen goods," so named for economist Robert Giffen); their demand curves slope upward because of an exceptionally large negative income effect which dominates the substitution effect. *Id.* at 479. Thus, some

> suggest that potatoes were in fact a Giffen good during the Irish potato famine of the nineteenth century. Potatoes were such a large part of people's diet that when the price of potatoes rose, it had a large income effect. People responded to their reduced living standard by cutting back on the luxury of meat and buying more of the staple food of potatoes.

Id.

Whether any Giffen good has ever been discovered, however, remains a matter of substantial dispute among economists, and, in any event, Griffiths does not invoke the Giffen good theory in his argument for an assisted suicide exception to the law of demand.

251. *See* GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 27 & n.23; Griffiths, *Slippery Slope*, *supra* note 249, at 100 & nn. 6–8; *see also* Brief of Amicus Curiae Bioethicists Supporting Respondents, *Quill* (No. 95-1858) & *Glucksberg* (No. 96-110).

252. *See* van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1702 tbl.2.

conducted prior to the legalization of assisted suicide in that state found that only 21% had received a request for euthanasia or assisted suicide and just 7% had written a lethal prescription at a patient's request.[253] Further, a 1996 nationwide survey of over 1900 U.S. physicians (conducted by, among others, Timothy Quill, a highly vocal assisted suicide advocate)[254] found that, over the entire course of their careers, 11.1% of physicians had received a request for euthanasia, 18.3% had received a request for assisted suicide, and approximately 6% had acceded at least one request for either euthanasia or assisted suicide.[255] One of Quill's coauthors remarked that the "most important finding" in this survey was that "'[t]his is really not happening very often . . . . It's a rare event.'"[256] As van der Maas himself has noted, the figures from the United States "are consistently lower than those we found" for the Netherlands,[257] and extant data suggest that "the proportion of deaths in the United States that involve physician-assisted suicide and euthanasia is likely to be small."[258] The American Geriatrics Society has concurred, suggesting that the widespread practice of assisted suicide and euthanasia "seems unlikely. Three-quarters of all deaths happen in institutions where a regularized practice would require the collusion of a

253. *Id.* at 1705. In Washington State, a survey found that 12% of physicians had received requests for physician-assisted suicide and 4% had received a request for euthanasia in the prior year; 24% of these requests were granted. *Id.*

254. *See, e.g.*, Timothy E. Quill, *The Ambiguity of Clinical Intentions*, 329 NEW ENG. J. MED. 1039, 1039–40 (1993); Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991); Timothy E. Quill et al., *The Rule of Double Effect—A Critique of Its Role in End-of-Life Decision Making*, 337 NEW ENG. J. MED. 1768 (1997).

255. *See* Diane E. Meier et al., *A National Survey of Physician-Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193, 1193 (1998).

256. Daniel Q. Haney, *Six Percent of Doctors Say They Helped Patients End Lives with Drugs*, WASH. POST, Apr. 23, 1998, at A9 (referring to a survey performed by Diane E. Meier of the Mount Sinai School of Medicine and quoting Dr. Ezekiel Emanuel of the National Institutes of Health who has estimated that 3% to 13% of all physicians have "hastened" the death of a patient); *see also* KEOWN, EEPP, *supra* note 31, at 62 (noting the results of that study); Dick L. Willems et al., *Attitudes and Practices Concerning the End of Life: A Comparison Between Physicians from the United States and from the Netherlands*, 160 ARCHIVES INTERNAL MED. 63, 66 (2000) (reporting the results of a study comparing Dutch and Oregonian doctors, and concluding that far fewer American doctors receive requests for euthanasia and physician-assisted suicide, as well as intentionally assist patients in dying).

257. van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1705.

258. Paul van der Maas & Linda L. Emanuel, *Factual Findings*, *in* REGULATING HOW WE DIE: THE ETHICAL, MEDICAL, AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 151, 159 (Linda L. Emanuel ed., 1998); *see also* KEOWN, EEPP, *supra* note 31, at 61–62 (discussing British and American evidence that suggests that the practice of euthanasia and assisted suicide is uncommon).

large number of persons."[259]

Third, even supposing, counterfactually, that the rates of voluntary assisted suicide and euthanasia in the United States (where the practices are generally illegal) and the Netherlands (where the practices are allowed) are presently comparable, it would be error to leap to the conclusion that legalization in the United States would therefore be a "costless" enterprise. It would be equally consistent with the facts to suppose that different countries have different baseline (prelegalization) rates of assisted suicide and euthanasia because of unrelated cultural phenomena and that, consistent with the law of demand, legalizing voluntary assisted suicide and euthanasia (and thus reducing the "price" associated with the practices) would lead to an *increase* in the frequency of the practices when compared with baseline, prelegalization rates in any given country.

B. Kuhse's Argument

In a variation of Griffiths's hypothesis, Kuhse rejects any suggestion that "the rate at which doctors intentionally end patients' lives without an explicit request is higher in a country where voluntary euthanasia is [practiced] openly . . . than in a comparable country which prohibits the practice."[260] Simply put, in her view, "laws prohibiting the intentional termination of life . . . do not prevent doctors from intentionally ending the lives of some of their patients" without consent.[261]

As with Griffiths's theory, however, the foundation on which Kuhse seeks to build her argument is not free from question. Kuhse argues that nonvoluntary killings in her home country of Australia, where assisted suicide is now illegal, occur more frequently than in the Netherlands,[262] and, therefore, that legalization is likely to reduce (or at least not increase) the total number of cases of nonvoluntary killings.[263] But, again, the fact that nonvoluntary killings in Australia may already be high when compared with the Netherlands does not mean that the problem of nonconsensual killings won't be exacerbated in Australia if voluntary assisted suicide and euthanasia are legalized there. Kuhse's

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259. Brief of the Am. Geriatrics Soc'y as Amicus Curiae Urging Reversal of the Judgments Below at *10, *Glucksberg*, 1996 WL 656290 (No. 96-110).

260. Helga Kuhse, *From Intention to Consent: Learning from Experience with Euthanasia*, *in* EXPANDING THE DEBATE, *supra* note 212, at 252, 263 [hereinafter Kuhse, *From Intention to Consent*].

261. *Id.*

262. *See* Kuhse et al., *End of Life Decisions in Australian Medical Practice*, 166 MED. J. AUSTRALIA 191, 194–95 (1997) [hereinafter Kuhse et al., *Australian Medical Practice*]; Kuhse, *From Intention to Consent*, *supra* note 260, at 263.

263. *See* Kuhse, *From Intention to Consent*, *supra* note 260, at 263–66.

empirical claim is equally consistent with the supposition that Australia simply starts from a different (higher) baseline of nonconsensual killings and that, as voluntary assisted suicide and euthanasia become more common, so too will nonconsensual killings due to abuse, mistake or coercion.

Similarly, Kuhse's thesis—like Griffiths's—is in tension with the law of demand. As nonconsensual killings become more acceptable—as they surely have in the Netherlands, where the government has sought to justify them as a "necessity,"[264] and where some, such as Griffiths, have urged their complete decriminalization[265]—one would expect the number of such cases to increase, not remain constant as Kuhse seems to suppose. While an exception to the law of demand is not inconceivable, any theory that depends on such an extraordinary exception would require considerable proof.

The empirical data Kuhse cites, like her theory itself, are open to question. Kuhse's data come from a postal survey of physicians that Kuhse conducted together with Peter Singer.[266] Beyond her academic and survey work, Kuhse is, perhaps not incidentally, past president of a euthanasia advocacy group, the World Federation of Right-to-Die Societies.[267] Singer, formerly at Monash University in Australia but now DeCamp Professor at Princeton University's Center for Human Values, is, like Kuhse, a vocal exponent of legalizing assisted suicide.[268] Indeed, Singer even advocates killing unwanted infants—that is, infanticide.[269] Kuhse's and Singer's survey was limited to Australian doctors and makes no findings that would permit them to reach any conclusions about the frequency of assisted suicide in America.[270] Within Australia, their most fundamental finding was that voluntary euthanasia and assisted suicide collectively represent approximately 1.8% of all deaths.[271] By comparison, however, voluntary euthanasia and assisted suicide accounted for 2.2% of all deaths in the Netherlands in 1990, and 2.7% of all deaths in 1995.[272] These data, standing alone, are hardly consistent with the thesis that legalization does not result in more killings; rather, it suggests that euthanasia and physician-assisted

264. *See supra* note 108 and accompanying text.

265. *See supra* notes 120–25 and accompanying text.

266. *See* Kuhse et al., *Australian Medical Practice*, *supra* note 262.

267. *See* Voluntary Euthanasia Society of Victoria Inc., The World Federation of Right to Die Societies *at* http://www.vesv.org.au/docs/worldfed.htm (last visited Dec. 22, 2004).

268. *See generally, e.g.*, PETER SINGER, PRACTICAL ETHICS 169–76, 181–91 (2d ed. 1993).

269. *See, e.g., id.*

270. *See* Kuhse et al., *Australian Medical Practice*, *supra* note 262, at 191–92.

271. See *id.* at 191.

272. *See supra* tbl.1.

suicide were 50% more common in the Netherlands in 1995 than in Australia in 1996, exactly what one would expect given the law of demand.

Kuhse and Singer, perhaps unsurprisingly, seek to emphasize other findings from their survey. By way of example, Kuhse claims that passive (that is, by omission) nonvoluntary euthanasia is more common in Australia than the Netherlands, despite its greater acceptability in the Netherlands.[273] But, at least some of the data on which Kuhse and Singer base this conclusion do not seem to bear out their assertion. For example, Kuhse and Singer claim that 22.5% of all deaths in Australia were the result of omissions of care without "explicit" patient request, and they seek to contrast this figure with the Dutch experience, noting that *all* decisions to omit treatment, consensual and nonconsensual, accounted for 13.3% of deaths in the Netherlands in 1995.[274] After unearthing data buried in a table, however, one finds that *included within* the critical 22.5% figure of supposedly nonconsensual killings is a very large number of cases (21% of all omission cases) where patient-physician discussions, if any, are *unknown*, because the participating physicians simply declined to provide any information in the write-in postal survey.[275] The analogous nonreport rate in the Netherlands was far lower (5%).[276] This large difference could, perhaps, be attributed to the fact that Kuhse's survey depended on voluntarily mailed-in results, while the van der Maas survey relied on in-person interviews and studies of mandatory death certificates filed with the state; accordingly, it would have been relatively easy (and understandable) for doctors in the Australian survey to bypass questions about what, if any, private (and privileged) doctor-patient discussions they may have had.

In any event, an apples to apples comparison of nonvoluntary euthanasia by omission, avoiding nonreport cases, seems to undercut Kuhse's and Singer's thesis. According to Kuhse and Singer, 28.6% of

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273. *See* Kuhse, *Australian Medical Practice*, *supra* note 262, at 195. The Kuhse-Singer study was poorly designed to identify true cases of passive euthanasia. Participants were asked whether they had withheld or withdrawn treatment with the "explicit intention of not prolonging life or of hastening death." *Id.* at 194; *see also* Kuhse, *From Intention to Consent*, *supra* note 260, at 262. But this question obviously risks conflating different things; physician-assisted suicide and euthanasia, as we have discussed, involve actions where an intent to end life is present. An intention "not to prolong life" is unclear and not necessarily the same thing at all, arguably embracing decisions where no intent to end life is present at all, but simply an intent to avoid burdensome or futile care. *See* KEOWN, EEPP, *supra* note 31, at 18–30; Gorsuch, *supra* note 3, at 652–53.

274. Kuhse, *Australian Medical Practice*, *supra* note 262, at 195.

275. *See id.* at 194 tbl.3 (reporting that in sixty-two of 289 surveys regarding omissions of care, doctors simply did not report their discussions, if any, with patients).

276. *See* van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1704 tbl.4.

all deaths in Australia are the result of omissions of care with or without consent.[277] Of that universe, only 27% occurred without *some* indication, explicit or less than explicit, of patient consent;[278] thus, deaths by omission of care without any indication of patient consent amounted to just 7.72% of all deaths in Australia. From the 1995 survey, by comparison, we know that omissions of care accounted for about 20.2% of all deaths in the Netherlands in 1995.[279] And, we know that 51% of these cases involved no physician-patient discussion at all—nearly double the same applicable percentage for Australia.[280] Accordingly, approximately 10.3% of patients in the Netherlands—or 33% more persons than in Australia—appear to have died as a result of omissions of care without any indicia of consent.[281]

Other problems exist in Kuhse's and Singer's data. Robert Manne of Australia's LaTrobe University, for example, has questioned the finding that 64.8% of all deaths in Australia are the result of some medical decision, formally labeled as a "medical decisions concerning the end of life" ("MDELs").[282] By comparison, Dutch data shows that MDELs occur in approximately 40% of all deaths.[283] This considerable disparity has led Manne to ask:

> As about 30 per cent of deaths in Australia must be, as in Holland, sudden or acute where MDELs could not take place, what [the authors] are effectively claiming is that while in Holland an MDEL takes place in a little over *one-half* of non-acute deaths, in Australia a medical decision concerning the end of life takes place in *almost every case*. . . . To my mind

277. *See* Kuhse, *Australian Medical Practice*, *supra* note 262, at 191.

278. *See id.* at 194 tbl.3.

279. *See* van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1701 tbl.1.

280. *See id.* at 1704 tbl.4.

281. Kuhse and Singer suggest that nonvoluntary active euthanasia is also more pervasive in Australia than in the Netherlands—representing fully 3.5% of all deaths, compared with 0.8% and 0.7% of deaths in the Netherlands in 1990 and 1995, respectively. Kuhse, *Australian Medical Practice*, *supra* note 262, at 196 tbl.5. This, if reliable, could be a significant finding, although the authors do not draw much attention to the fact that Australian doctors are apparently more likely to have some discussion with their patients before killing them: 65% of Australian doctors who killed without "explicit" consent reported that the patient either expressed a wish for the procedure, or at least discussed the action, compared with 52% of similarly situated Dutch doctors. *See id.* at 194 tbl.3; van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1704 tbl.4.

282. Robert Manne, Opinion, *Research and Ye Shall Find*, BIOETHICS RES. NOTES, Mar. 1997, at 1, 1–2; *see also* Kuhse, *Australian Medical Practice*, *supra* note 262, at 196 tbl.5.

283. van der Maas & van der Wal et al., *Euthanasia 1996*, *supra* note 72, at 1701 tbl.1.

> this finding calls into question the scientific rigour of the whole study . . . .[284]

Finally, *even if* Griffiths and Kuhse could convincingly prove their counterintuitive hypotheses that decriminalization does not encourage more cases of voluntary and nonvoluntary assisted suicide and euthanasia, it would not necessarily demonstrate that decriminalization is necessarily the appropriate policy response. As the U.S. Department of Justice has observed,

> [b]y parity of reasoning, if it could be shown that physicians violated traditional medical canons of ethics more often than is usually supposed, e.g., by engaging in sexual relations with their patients or disclosing patient confidences, it would follow that the evidence of such deviations overturned the professional standards prohibiting such misconduct.[285]

Simply put, evidence about the pervasiveness of the "clandestine" practice of assisted suicide and euthanasia under current law can be wielded by partisans on *both* sides of the debate—constituting to some a reason for greater vigilance and enforcement rather than a reason for legalization; certainly, the contemporary debate over the status of illicit drugs illustrates this point, with politicians and the public on *both* sides agreeing that drug usage occurs on a large scale, but utterly disagreeing on whether to step up enforcement measures or repeal possession laws. And, of course, we bave seen how the argument has played out so far in the American debate over assisted suicide: the recent activities of Kevorkian and his followers have induced state legislatures across the country, along with the U.S. Congress and the U.S. Attorney General, to take steps aimed at enhancing, not watering down, the enforcement of laws against the practice.[286]

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284. Manne, *supra* note 282, at 1–2 (emphasis added). Further calling into question Kuhse's and Singer's results, a Belgian study also showed that all medical decisions concerning the end of life ("MDEL") accounted for 39.3% of deaths, a figure in line with findings in the Netherlands, and only a fraction of the findings Kuhse and Singer reported in Australia. *See* Luc Deliens et al., *End-of-Life Decisions in Medical Practice in Flanders, Belgium: A Nationwide Survey*, 356 LANCET 1806, 1808 tbl.1 (2000). The Belgian study did suggest that patients actively killed without consent represented 3.2% of all deaths, approximating the result found in Australia, *id.* at 1810 tbl.5, although the Belgium study estimates that in 38% of these cases some discussion had been held or a wish had been stated, *id.* at 1809 tbl.4.

285. Bradshaw & Delahunty, *supra* note 17, at 280 (original pagination omitted).

286. *See supra* notes 5–20 and accompanying text; *see also* KEOWN, EEPP, *supra* note 31, at 63.

One might, at this point, respond that legalization would at least allow the state to oversee and regulate the practice of assisted suicide and euthanasia, ensuring that safeguards are respected by bringing the practices out of the closet and into the light of day. But the evidence from the Netherlands and Oregon does not offer great comfort that decriminalization would result in zealous regulatory reporting or enforcement. Again, Oregon officials admit that they have no idea how often state law is violated, and no way to detect cases of abuse and mistake.[287] Meanwhile, nearly half of Dutch doctors admitted in 2001 that, *despite* the acceptability of assisted suicide and euthanasia in the Netherlands, they have refused to comply with reporting requirements—and they have done so disproportionately in cases where they kill the patient without consent and fail to consult professional colleagues.[288] Even Griffiths has acknowledged that the present control regime in the Netherlands "is a bit of a paper tiger,"[289] one apparently so irremediable that the only solution Griffiths offers is the decriminalization of *nonconsensual* homicide—an alternative that may well make enhanced enforcement of existing law look preferable by comparison to many.

V. POSNER'S ARGUMENT FOR LEGALIZATION

Posner argues for legalization of assisted suicide primarily on the strength of an empirical claim that it would lead to fewer, not more, suicides.[290] Without assisted suicide as a viable legal option, the argument runs, people frightened of disability associated with terminal illness are forced either to kill themselves while they still can or face the prospect of losing self-control.[291] If assisted suicide were legalized, people would not feel compelled to kill themselves early, but would instead rest assured that assistance in dying will be available to them even after they become physically incapacitated:

> If the only choice is suicide now and suffering later, individuals will frequently choose suicide now. If the choice is suicide now or suicide at no greater cost later, they will choose suicide later because there is always a chance that they are mistaken in believing that continued life will impose unbearable suffering or incapacity on them. They would give up that chance by committing suicide now. The possibility of

287. *See supra* notes 158–59.

288. *See supra* tbl. 3 and accompanying text.

289. GRIFFITHS ET AL., EUTHANASIA AND LAW, *supra* note 24, at 245–46; *see also* KEOWN, EEPP, *supra* note 31, at 63.

290. *See* POSNER, *supra* note 37, at 243–53.

291. *See id.*

> physician-assisted suicide enables them to wait until they have more information before deciding whether to live or die.[292]

Posner's hypothesis—that the primary benefit of legalization accrues to elderly persons faced with the prospect of oncoming disability—is, however, in notable tension with his simultaneous assertion that "some of the strongest cases of rational suicide" do not involve the elderly at all, but "people who face an indefinite lifetime of paralysis, severe pain, or other terrible disability."[293] In this case, one thinks not of the aged patient facing a terminal illness, but the young quadriplegic with years to live. The primary empirical benefit Posner claims for legalization (fewer and older suicides), thus, seemingly has little to do with what he identifies as the most compelling cases for assisted suicide (young persons who suffer from neither a terminal illness nor unendurable pain). Posner's hypothesis also depends heavily on the supposition that people frequently use suicide as a rationally calculated means of escaping future and oncoming disabilities. But, Posner presents no evidence for this supposition; in fact, extant evidence strongly suggests that suicide is more closely linked not with such careful rational reflection but with depression and psychological ailments.[294] Further, by far the highest rates of suicide in the United States today belong not to younger or middle-aged adults supposedly responding in a reasoned way to the fear of future illness and disability, but to the very elderly (those over seventy-five)—thus suggesting that one of the primary benefits Posner seeks to achieve through legalization (later suicides) may have been accomplished already.[295]

While the foregoing analysis indicates an unresolved tension between Posner's thesis and his stated goal, and while it raises the question whether there really is a significant unresolved problem with relatively younger persons coolly choosing to kill themselves rather than risk the prospect of future illnesses, none of this directly addresses the specific empirical data that Posner offers in support of his fewer-and-later-suicides hypothesis.

A. Posner's Argument from U.S. Data

The first piece of evidence Posner presents in support of his fewer-and-later-suicide hypothesis is a regression analysis testing the

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292. *Id.* at 247–48.

293. *Id.* at 237.

294. *See supra* note 146 and accompanying text.

295. *See* World Health Org., Suicide Rates (Per 100,000), by Gender and Age, USA, 2000, *at* http://www.who.int/mental_health/media/en/374.pdf (last visited Dec. 20, 2004).

relationship between suicide rates and the status of state law on assisted suicide:

> The question whether allowing physician-assisted suicide in cases of physical incapacity would increase or reduce the suicide rate can be studied empirically. Table 10.1 regresses state suicide rates in the United States on state per capita income, the percentage of the state's population that is black (blacks have much lower suicide rates than whites), and a dummy variable that takes a value of 1 if a state has a law criminalizing physician-assisted suicide and 0 otherwise.

Table 10.1 Regression of Suicide Rate on Assisted-Suicide Law and Other Variables (t-statistics in parentheses)

Per Capita Income	Percentage Black	Assisted-Suicide Law	R^2
-.0005	-.1287	-.7601	.31
(-3.388)	(-2.999)	(-0.951)	

> The coefficients of the income and percentage-black variables are negative and highly significant statistically, and these two variables explain a good deal of the variance across states in the suicide rate. The coefficient of the law variable is also negative, implying that states that forbid physician-assisted suicide do have lower suicide rates than states that permit it. But it is not statistically significant, though perhaps only because most suicides are not committed by terminally ill or otherwise desperately ill people and thus do not come within the scope of the hypothesis that I am trying to test. Although these results do not suggest that repealing an assisted-suicide law is a sound method of reducing a state's suicide rate, they cast at least some doubt on the hypothesis, which I have been questioning despite its intuitive appeal, that making suicide easier is likely to lead to more suicides.[296]

Posner here concedes that he finds no statistically significant relationship between assisted suicide laws and the rate of suicide. Yet, somewhat remarkably, Posner proceeds to argue that the data lend

296. POSNER, *supra* note 37, at 250–51 (footnote omitted).

support to his hypothesis anyway: "[a]lthough these results do not suggest that repealing an assisted-suicide law is a sound method of reducing a state's suicide rate, they cast at least some doubt on the hypothesis . . . that making suicide easier is likely to lead to more suicides."[297] But Posner's findings simply are not helpful to his own thesis. Before a regression's findings are deemed sufficiently reliable for an economist to offer them in evidence in a federal court, typically they must reflect a 95% confidence level (with a t-statistic of 1.96).[298] Posner's t-statistic for assisted suicide laws is less than 1.00 (0.951), suggesting a possibility of sampling error of approximately *40%*.

Making matters worse, Posner reveals that his data regarding the status of state assisted suicide laws are drawn from a single footnote in a student-written law review note.[299] That student note, however, merely declared that "most states" ban assisted suicide by statute and proceeded to cite a great many state laws as *examples* to support that claim.[300] When constructing his regression, Posner apparently (mis)inferred that the remaining, unlisted states do not have statutes banning the practice. In fact, at least ten states not identified by the student note have statutes banning assisted suicide.[301] Posner's "dummy variable" column, thus,

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297. *Id.* at 251.

298. *See, e.g.*, Moultrie v. Martin, 690 F.2d 1078, 1083 n.7 (4th Cir. 1982) ("Statisticians usually use 95% or 99% confidence levels."); FTC v. Swedish Match, 131 F. Supp. 2d 151, 160–61 (D.D.C. 2000) (rejecting use of an 85% confidence level); Procter & Gamble Co. v. Chesebrough-Pond's Inc., 588 F. Supp. 1082, 1088 & n.19 (S.D.N.Y. 1984) (stating that a 95% confidence level is sufficient to be considered statistically significant).

299. *See* POSNER, *supra* note 37, at 250 n.34 ("Data on assisted-suicide laws are from Julia Pugliese, 'Don't Ask—Don't Tell: The Secret Practice of Physician Assisted Suicide,' 44 *Hastings Law Journal* 1291, 1295 n.20 (1993).").

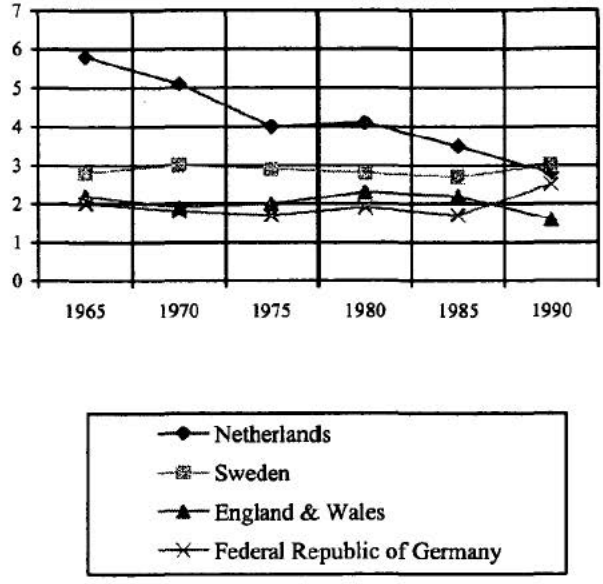
300. Julia Pugliese, Note, *Don't Ask—Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1295 n.20 (1993).

301. States which, although not mentioned in Julia Pugliese's note, do have statutes banning assisted suicide include Georgia, Offering to Assist in Commission of Suicide; Criminal Penalties, GA. CODE ANN. § 16-5-5 (Lexis 2003); Illinois, Inducement to Commit Suicide, 720 ILL. COMP. STAT. ANN. 5/12-31 (West 2002); Iowa, Assisting Suicide, IOWA CODE ANN. § 707A.2 (West 2003); Kentucky, Causing a Suicide—Assisting in a Suicide, KY. REV. STAT. ANN. § 216.302 (Michie 1999); Louisiana, Criminal Assistance to Suicide, LA. REV. STAT. ANN. § 14:32.12 (West 1997); Maryland, Assisting Another to Commit or Attempt Suicide, MD. CODE ANN., CRIM. LAW § 3-102 (Michie 2002); North Dakota, Assisting the Commission of Suicide—Causing Death by Suicide—Penalties, N.D. CENT. CODE § 12.1-16-04 (Michie 1997); Rhode Island, Prevention of Assisted Suicide, R.I. GEN. LAWS ANN. § 11-60-03 (Lexis 2002); South Carolina, Assisted Suicide; Penalties; Injunctive Relief, S.C. CODE ANN. § 16-3-1090 (West 2003); and Tennessee, Assisted Suicide, TENN. CODE ANN. § 39-13-216 (Lexis 2003). *See also infra* app. A. Still other states not on Pugliese's list condemn assisted suicide as a matter of common law. *See, e.g.*, *Kevorkian*, 527 N.W.2d at 716 (permitting prosecution of Kevorkian under common law before Michigan enacted a statute banning assisted suicide); *see also supra* note 12.

B. Posner's Argument from Dutch Data

Lacking meaningful support for his thesis based on American data, Posner also seeks to rest his argument on data from the Netherlands. Posner posits that the rate of elderly male suicide was "very high in the Netherlands before euthanasia became common in the early 1970s and has fallen since, both absolutely and relatively" compared to other Western European countries,[302] and Posner points to data reproduced here in Graph 1.

Graph 1
Suicide Rate of Elderly Dutch Males as a Multiple of the Total Dutch Male Suicide Rate 1965–1990[303]



Posner asserts that the legalization of assisted suicide caused the drop in the Dutch male suicide rate between 1965 and 1990, yet he, somewhat surprisingly, makes no effort whatsoever to consider—let alone rule out—the statistical significance of other potential causal

Michigan enacted a statute banning assisted suicide); *see also supra* note 12.

302. POSNER, *supra* note 37, at 252–53.

303. *Id.* at 253.

factors for the phenomenon he observes in the data.[304] There are, moreover, ample reasons to question Posner's untested causal assertion.

First, as discussed above, assisted suicide became legally permissible only with a decision by the Dutch Supreme Court in 1984 recognizing a limited "necessity" defense to homicide charges for physicians who kill the terminally ill.[305] The fact that the male suicide rate, as depicted in Graph 1, declined profoundly between 1970 and 1984—before the key judicial decision—suggests that other factors, besides legalization, may have been responsible for reducing the incidence of suicide. Since the Dutch effectively legalized assisted suicide in 1984, moreover, Graph 1 reveals that the rate of Dutch male suicides has followed roughly the same trajectory as the rate of male suicides in England and Wales, where assisted suicide remains unlawful, casting doubt on whether one can attribute the decline between 1984 and the present to any factor unique to the Netherlands.

Second, Posner notably rests his argument on suicide data for *men*. He relegates to a footnote any mention of—equally available—data for women.[306] And, as reflected in Graph 2 below, an examination of the data for Dutch women shows that the rate of elderly Dutch female suicides *has not declined* since de facto legalization in 1984.[307]

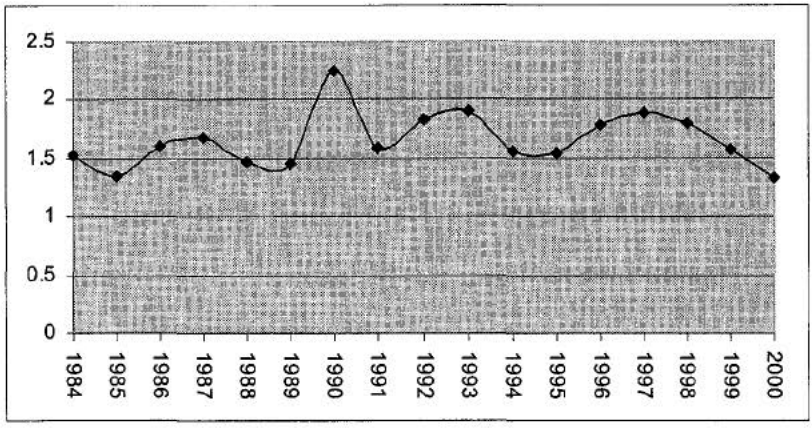
304. *See id.* at 252–53; *cf.* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–95 (1993).

305. *See supra* Part I.A.

306. *See* POSNER, *supra* note 37, at 252 n.39.

307. *But see id.*

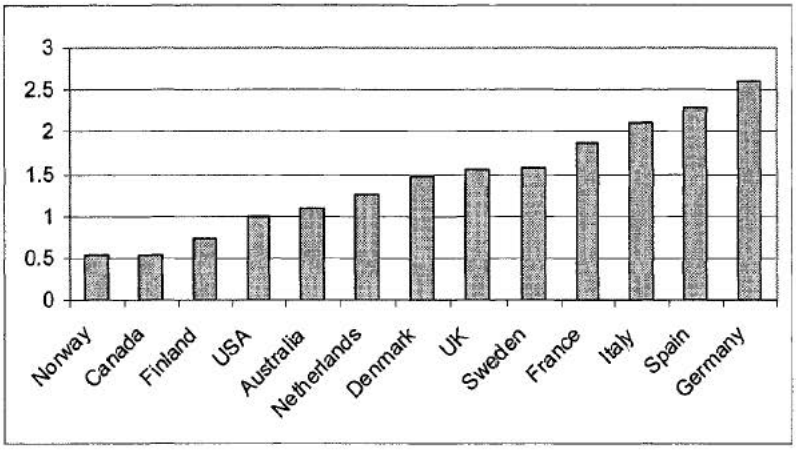
Graph 2
Suicide Rate of Elderly Dutch Women as a Multiple of the Total Female Suicide Rate, 1984–2000[308]



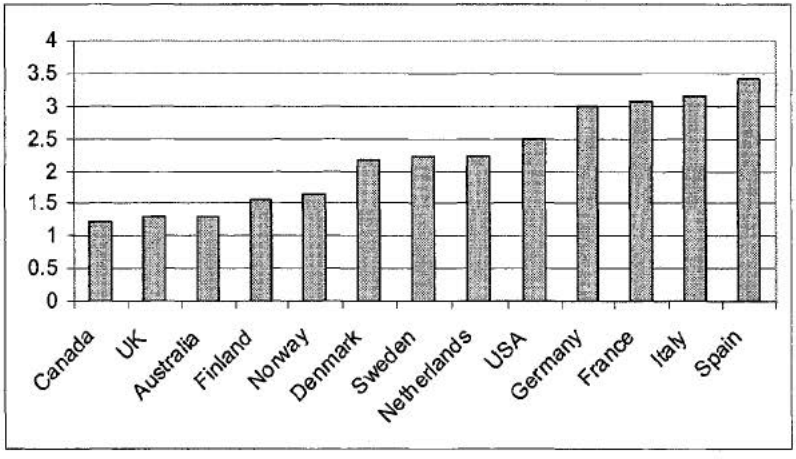
Third, World Health Organization data depicted in Graphs 3 and 4 reflect that, after nearly two decades of de facto legalization (and the very large number of deaths now attributable to assisted suicide and euthanasia in the Netherlands), the rate of *unassisted* suicides among the elderly in the Netherlands remains comparable to the rate of elderly suicides in many other countries where assisted suicide is unlawful. For example, the suicide rate for elderly women is actually *higher* in the Netherlands than it is in the United States (meanwhile the suicide rate for elderly men is only slightly lower in the Netherlands than it is in America, but still higher than the comparable suicide rate for elderly men in Britain or Canada or Australia). Arguably, the most one might venture to state with confidence about the Dutch experience is that decades ago the elderly suicide rate was out of kilter with many other western countries and in recent years has more or less fallen in line.

308. *See infra* app. B for data and calculations underlying this graph.

Graph 3
Suicide Rate of Elderly Women as a
Multiple of the Total Female Suicide Rate[309]



Graph 4
Suicide Rate of Elderly Men as a
Multiple of the Total Male Suicide Rate[310]



Fourth, while Posner focuses on the rate of elderly Dutch suicides as compared to that country's overall suicide rate, such a comparison tells us only the relative percentage of suicides committed by *elderly*

309. *See infra* app. B for data and calculations underlying this graph.
310. *See infra* app. B for data and calculations underlying this graph.

persons. Posner's comparison sheds little or no light on his own hypothesis, namely that legalization of assisted suicide should result in *younger* and *healthier* persons committing suicide less frequently.

Indeed, if Posner's hypothesis were true—and younger and healthier persons commit fewer suicides when assisted suicide is legally tolerated—one might expect to find that the *overall* number of Dutch suicides, including those committed by younger, healthier persons, declined after 1984 when assisted suicide was effectively legalized. Posner, however, does not squarely address that question, nor would doing so appear to aid his argument. The overall suicide rate in the Netherlands is nearly double what it was fifty years ago—9.4 deaths per 100,000 persons in 2000 versus 5.5 per 100,000 persons in 1950.[311] Since 1980, four years before de facto legalization, the Dutch suicide rate has consistently hovered somewhere in the range of 9.4 and 11.3 deaths per 100,000 persons.[312] Simply put, the Dutch have been unable to effect meaningful decreases in the overall suicide rate despite de facto legalization of assisted suicide in 1984.

Finally, and perhaps most remarkably, Posner's thesis—much like the theories offered by Griffiths and Kuhse[313]—appears to be in tension with the law of demand, suggesting that legalizing assisted suicide (that is, reducing the costs and barriers associated with its practice) would result in fewer, rather than more, cases of suicide and assisted suicide overall. Unlike Griffiths or Kuhse, however, Posner recognizes the inconsistency between his argument for assisted suicide and the law of demand and openly argues for a rather extraordinary exception to the rule:

> It may be objected that my entire analysis violates the economist's Law of Demand; that lowering the price of a good or service—here, suicide—must increase rather than reduce the demand for it. This is not the correct way to frame the issue. We have two goods, not one: unassisted suicide, and physician-assisted suicide. They are substitutes, so lowering the price of the second (by legalizing it) will reduce the demand for the first, and nothing in economics teaches that this reduction must be fully offset by the increased demand for the second good. A razor blade that retains its sharpness for ten shaves is a substitute for one that retains it for only one shave, but if the former takes over the market the total number

311. *See* World Health Org., Suicide Rates (per 100,000), by Gender, Netherlands, 1950–2000, *at* http://www.who.int/mental_health/meadia/en/338.pdf (last visited Dec. 20, 2004) [hereinafter Netherlands Suicide Rates].

312. *See id.*

313. *See* discussion *supra* Part IV.

> of razor blades produced and sold will decline even if the longer-lasting blade is no more expensive than the other blade.[314]

Essentially, Posner supposes that demand will simply shift from unassisted suicide to assisted suicide, and that *no* additional demand will be generated from the latter's legalization. But, Posner offers no evidence that assisted suicide is a one-for-one substitute for unassisted suicide, and available data do not seem to support this proposition. Contrary to what one would expect to find if Posner's hypothesis were true, the Dutch suicide rate has *not* changed substantially since assisted suicide was effectively legalized in 1984.[315] At the same time, although we do not have pre-1984 data for assisted suicide and euthanasia, we know that assisted suicide and euthanasia have become leading causes of death: more deaths now result from those practices combined than from many other significant causes (for example, HIV, leukemia or homicide).[316] In 1995 alone, the Dutch recorded 3118 acts of euthanasia, 542 assisted suicides, and 949 affirmative killings without patient consent, for a total of 4609 deaths, amounting to 3.4% of all deaths in the Netherlands that year.[317]

Posner's exception to the law of demand hypothesis runs not only against the grain of the available empirical data, but his hypothetical analogy lacks explanatory value in the "market" for end-of-life services. In Posner's hypothetical, unassisted suicide is like a disposable, single-use razor blade.[318] With the introduction of a reusable, ten-shave razor (which Posner likens to assisted suicide) the overall output of razor blades declines.[319] But, notably, Posner's analysis omits any discussion about consumer *demand* for the service rendered by both products (that is, the total number of shaves) in his hypothetical market. Nor, in fact, is there reason to suppose that the advent of a new razor would lead consumers to wish to shave less often. If anything, one could imagine reasons why the advent of reusable disposable razors would lead consumers to shave more often.

Likewise, there is no reason to suppose that the introduction of

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314. POSNER, *supra* note 37, at 249–50.

315. *See* Netherlands Suicide Rates, *supra* note 311 (stating that suicides per 100,000 deaths in the Netherlands were 10.1 in 1980, 11.3 in 1985, 9.7 in 1990, 9.8 in 1995, and 9.4 in 2000).

316. *See supra* note 79.

317. *See supra* tbl. 1. The Dutch also record thousands of cases where patients are intentionally killed by omission without their consent, including some 8750, or 6.78% of all deaths, in 1990 (again, 1995 data was not published). *See supra* notes 96–98 and accompanying text.

318. POSNER, *supra* note 37, at 249–50.

319. *See id.*

assisted suicide would reduce total consumer demand for end-of-life services. The only reason Posner supposes for a decline in razor sales in his hypothetical market has nothing to do with a reduction in consumer demand for shaves, but rather, with an innovation (the reusable razor) that permits manufacturers to satisfy a constant (or even growing) consumer demand for shaves with a smaller supply. Translating to the suicide market, Posner's imaginary razor market gives us no reason to think that overall *demand* iu the unassisted suicide-assisted suicide market would decline, and quite unlike a ten-shave razor that is capable of satisfying higher demand with a smaller supply, the "new product" he promotes (assisted suicide) is, like the original product (unassisted suicide), good for just one use per customer.

Rather than analogizing to a ten-shave razor, perhaps a more accurate analogy might be between razors with equally long useful lives for the consumer. The disposable single-use razor blade (like unassisted suicide) has been available to consumers for years, but some find it uncomfortable to use. Eventually, the razor merchants devised the "sensitive skin" single-use razor, which sports a "moisturizing strip." Like assisted suicide, this new razor has the same basic use as the original disposable, but it also contains an added feature that some consumers find superior and thus, prefer. One would expect the introduction of such a product to lead to an *increase* in overall sales of disposable razors; indeed, this is precisely why manufacturers introduce line extensions of this sort and business scholars develop complex models for evaluating how to use line extensions to maximize consumer demand and profits.[320] Similarly, as progressively easier and less stigmatizing options to suicide become available, first assisted suicide and then euthanasia, the overall use of such "end-of-life services" might be expected to increase. Posner offers little evidence that this particular arena of human activity presents any exception to the law of demand, and his analogy to a hypothetical razor market simply does not prove the point on its own terms.[321]

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320. *See, e.g.*, Richard D. McBride & Fred S. Zufryden, *An Integer Programming Approach to the Optimal Product Line Selection Problem*, 7 MARKETING SCI. 126 (1988); Kamalini Ramdas & Mohanbir S. Sawhney, *A Cross-Functional Approach to Evaluating Multiple Line Extensions for Assembled Products*, 47 MGMT. SCI. 22 (2001).

321. Posner seeks to supplement his empirical case for legalization by positing that terminally ill persons would find comfort in knowing that they could choose to die on demand even if they never use the option. *See* POSNER, *supra* note 37, at 239. Living would become more bearable, the argument runs, knowing that death is easily available. *See id.* at 239–40. But Posner makes no attempt to quantify how many people would find an unrealized option to obtain assisted suicide to be valuable, how valuable they would find it or how the psychic benefit of a never-used option compares against the harms that may attend the regularized practice of assisted suicide—both actual (for example, people killed without their consent as a result of accident or abuse)

C. *Posner's Analysis of the Costs Associated with Assisted Suicide*

The purpose of a utilitarian project like Posner's is to weigh the competing costs and benefits of alternatives to determine which, on balance, produces the "best" or "most efficient" result. While Posner's own analysis focuses intently on the possible benefits associated with legalization, he readily, and significantly, admits that his argument for legalization can be considered only "tentative" precisely because he does not attempt to enumerate or consider the costs associated with legalization.[322]

That said, through a colorful anecdote about his grandfather, Posner at least implicitly touches on the possibility that legalization would bring with it the unwanted "cost" of some patients being killed erroneously. Physicians told Posner's grandfather, then in his forties, that he had a fatal kidney disease but might manage to live a year or two if he gave up meat.[323] Posner's grandfather refused to give up meat, lived to be eighty-five, and died of an unrelated ailment.[324] "Like other professionals," Posner explains, "doctors sometimes speak with greater confidence than the facts warrant."[325] Although Posner does not directly acknowledge the point, in the very regime he advocates, his grandfather would have been a prime candidate for an early, and mistaken, act of euthanasia.

While Posner gives only the briefest attention to the potential for mistaken and abusive killings, he does discuss in some detail another possible cost associated with legalization. If, as Posner hypothesizes, fewer people would decide to kill themselves and those who do decide to kill themselves would do so later, medical costs would rise in a regime where assisted suicide is lawful.[326] People who decide not to end their lives early would incur substantial additional costs as they age and become sicker, and in our society many of these costs would be borne by third party payers, not the individual patient.[327] We cannot, Posner tells us, "disregard [such] tangible costs borne by people who through their taxes, health-insurance premiums or doctors' bills are forced to pay other people's medical expenses."[328] Although he stops short of saying so explicitly, Posner seems to suggest (remarkably) that we might not

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as well as psychic (for example, people who are frightened that they might be killed without consent even if they are never so killed).

322. *See id.* at 244.
323. *See id.* at 245 n.27.
324. *See id.*
325. *Id.*
326. *See id.* at 243–44.
327. *See id.* at 244.
328. *Id.*

want to legalize assisted suicide because it is cheaper for society to have more people commit suicide at a younger age (as Posner posits they now do) rather than linger longer, spend more on health care, and raise our taxes and health insurance premiums in the process.

VI. HOW TO "BALANCE" THE BENEFITS *AND* COSTS ASSOCIATED WITH LEGALIZATION

To this point, I have sought to suggest that legalization, even if narrowly limited to the terminally ill or gravely suffering, cannot readily be labeled a "costless" enterprise in any utilitarian calculus. It is perhaps equally important, however, to emphasize what I have *not* done: I have not proven that the costs we might associate with legalization outweigh the benefit of permitting people who really wish to kill themselves the liberty of doing so. I have not even sought to show that the costs and benefits of normalization are in equilibrium. All I have done or sought to do, to this point, is to question whether the application of a utilitarian analysis inexorably leads to the conclusion that legalization represents the best solution for the greatest number of persons. Having suggested that the utilitarian scales do not obviously or necessarily tip in the direction of legalization, the question remains: how are we to balance the competing costs and benefits? Accepting that legalization may bring with it unintended and unwanted consequences, as well as real benefits, the utilitarian wants to somehow try to "sum up" these competing costs and benefits and arrive at the most efficient or optimal social policy result. But how?

Utilitarians do not, of course, uniformly line up in favor of legalizing assisted suicide or euthanasia. In the 1950s, Glanville Williams wrote *The Sanctity of Life and the Criminal Law*, the classic utilitarian case for euthanasia.[329] Soon afterward, however, Yale Kamisar published an article arguing for the opposite conclusion while applying the same utilitarian approach and methods.[330] The most interesting feature of the Williams-Kamisar debate is not that two utilitarians disagree. Nor is it in trying to determine who offered the more complete or accurate utilitarian calculation. Instead, the interesting question raised by the debate they began (and which, as we have seen, continues with vigor to this day) is whether—even if one could definitively identify *all* of the positive and negative consequences associated with assisted suicide or euthanasia—one could then rationally and objectively weigh those consequences to ascertain the "correct"

329. *See* GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1958).

330. *See* Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958).

result. On a purely utilitarian account, how can we compare, for example, the interest the rational adult seeking death has in dying with the danger of mistakenly killing persons without their consent?

Such questions suggest a fundamental problem besetting *both* Williams's and Kamisar's projects: the absence of any agreed scale on which the utilitarian can weigh or compare radically different competing values. Endeavoring to compare or weigh, say, the interest the rational adult tired with life has in choosing death against the interest the incompetent elderly widow has in avoiding being killed by a greedy guardian and heir, without reference to any extrinsic, agreed upon moral rule or code is a seemingly impossible, even senseless, enterprise. It is senseless in the way that it is senseless to compare or commensurate the virtues of apples to those of oranges, or "in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book."[331]

Posner himself hints at this incommensurability problem confronting his utilitarian argument for assisted suicide after explaining his fear that legalizing assisted suicide could also mean higher medical costs, insurance premiums, and taxes. Fearful of such costs, Posner ultimately backs away from his argument for legalization, submitting that it would be "difficult to say whether allowing physician-assisted suicide would be socially cost-justified."[332] Posner, at least here, sees real costs and benefits on *both* sides of the ledger and admits that he is not sure how the "balance" should be struck. Nor is the problem merely one of enhancing our ability to measure costs and benefits with exactitude. Even supposing we could estimate with complete accuracy the increased medical costs Posner identifies, how could we as a society measure the (hypothesized) benefit of fewer and later suicides against increased medical costs to be borne by the public through increased taxes or health insurance premiums? In the end, Posner seems to admit the inability of a purely utilitarian calculus to resolve such dilemmas—such competition between fundamentally incommensurate goods or objectives—and in doing so makes a tactical retreat to the harm principle, or what he calls "Mill's approach,"[333] to resolve the problem. "Mill's approach" (a.k.a. the harm principle) holds that each person must be afforded the right to exercise self-control "[o]ver himself, over his own body and mind," and that the state may coerce an individual to take actions against his or her will only to "prevent harm to others."[334]

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331. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 115 (1980). *See generally* JOSEPH RAZ, THE MORALITY OF FREEDOM 321–68 (1986).

332. POSNER, *supra* note 37, at 244.

333. *Id.*

334. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

Assuming that assisted suicide is a purely self-regarding (or "harmless-to-others") activity, Posner argues that Mill's approach "enables us to exclude (*as a strictly economic or utilitarian analysis would not*) the disutility"[335] associated with legalization, thereby vindicating a right to assisted suicide and euthanasia regardless of any negative side effects that would have to be carefully considered in a utilitarian analysis.[336]

Battin also appears to identify the incommensurability problem underlying utilitarian arguments against assisted suicide and euthanasia, acknowledging that:

> The wedge argument against euthanasia [that is, the fact that allowing voluntary euthanasia may lead to acceptance of nonvoluntary euthanasia] usually takes the form of an appeal to the welfare or rights of those who would become victims of later, unjustified practices. Usually, however, when the conclusion is offered that euthanasia therefore ought not be permitted, no account is taken of the welfare or rights of those who are to be denied the benefits of this practice. Hence, even if the causal claims advanced in the wedge argument are true . . . they still do not establish the conclusion. *Rather, the argument sets up a conflict.* Either we ignore the welfare and abridge the rights of persons for whom euthanasia would clearly be morally permissible in order to protect those who would be the victims of corrupt euthanasia practices, or we ignore the potential victims in order to extend mercy and respect for autonomy to those who are the current victims of euthanasia prohibitions.[337]

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335. POSNER, *supra* note 37, at 244 (emphasis added).

336. A full consideration of harm principle arguments for and against assisted suicide is beyond the scope of this paper, but it is far from a foregone conclusion that the principle would, as Posner seems to suppose, *mandate* legalization of assisted suicide. Even John Stuart Mill argued that states may ban slavery contracts and other "harmless" consensual practices, under certain circumstances, without offending his harm principle, MILL, *supra* note 334, at 101, and Joel Feinberg has argued that the harm principle can be reconciled with an absolute legal ban against the (consensual) practice of dueling, 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 18-19 (1986). *See also* FEINBERG, *supra*, at 75-79 (commenting on Mill's discussion of slavery contracts). To the extent that the harm principle is used to justify the legalization of assisted suicide, moreover, it is unclear whether many restraints on the practice—for example, limiting access to assisted suicide to the terminally ill or those suffering from grave physical pain—could be sustained, or whether such restrictions might instead be deemed improper limitations on "harmless" consensual activity. One cannot help but ask whether the logical end of an unadulterated harm principle approach would be to adopt a consensual homicide "right" open to all competent adults. *See* Gorsuch, *supra* note 3, at 669-77.

337. MARGARET PABST BATTIN, *Euthanasia: The Fundamental Issues*, *in* THE LEAST WORST DEATH, *supra* note 87, at 101, 119 (emphasis added).

Although she seemingly identifies the incommensurability problem—namely, that utilitarian reasoning merely "sets up a conflict" between competing goods without resolving it—Battin claims to see a way out on utilitarian grounds:

> To protect those who might wrongly be killed or allowed to die might seem a stronger obligation than to satisfy the wishes of those who desire release from pain, analogous perhaps to the principle in law that "better ten guilty men go free than one be unjustly convicted." However, the situation is not in fact analogous and does not favor protecting those who might wrongly be killed. To let ten guilty men go free in the interests of protecting one innocent man is not to impose harm on the ten guilty men. But to require the person who chooses to die to stay alive in order to protect those who might unwillingly be killed sometime in the future is to impose an extreme harm—intolerable suffering—on that person, which he or she must bear for the sake of others. Furthermore, since, as I have argued, the question of which is worse, suffering or death, is person-relative, we have no independent, objective basis for protecting the class of persons who might be killed at the expense of those who would suffer intolerable pain; perhaps our protecting ought to be done the other way around.[338]

In this latter passage, Battin intimates that the conflict between the competing autonomy interests of those who wish to die and those who wish not to be killed without their consent *can* be resolved, and perhaps resolved in favor of allowing euthanasia—that is, "perhaps our protecting ought to be done the other way around."[339] Battin begins, however, by acknowledging that the "ten guilty men" maxim, frequently cited as an ideal of our justice system, seems to cut against her position.[340] Battin responds to this by suggesting that the maxim is not properly applicable in, or analogous to, the assisted suicide and euthanasia debate.[341] She suggests that society's traditional willingness to protect the one innocent man even at the expense of letting ten guilty men go free is based, at least in part, on the fact that doing so imposes no "harm" on the guilty men; by contrast, Battin observes, preventing

338. *Id.* (footnote omitted).
339. *Id.*
340. *See id.*
341. *See id.*

persons from seeking assistance in dying does impose real harms on them.[342]

This argument does not seem to work. The point of the "ten guilty men" is not that we protect innocent human life against the risk of mistaken or wrongful killings *only* when it imposes no harm on the guilty, as Battin seems to suggest. Rather, it is that society protects the innocent individual life against such risks *even when* it means accepting harms to the guilty men's potential future victims and to other innocent victims of those emboldened by the state's leniency. Any attempt to apply the maxim in the consensual homicide context would therefore surely result in the conclusion that it is wrong to risk killing one innocent person even if it means accepting the fact that other innocent persons may be forced to forgo the opportunity to obtain assisted suicide or euthanasia.

Other utilitarians seeking a way around the incommensurability problem sometimes seem to resort to the principle of double effect, arguing that the undesirable consequences associated with permitting assisted suicide and euthanasia (for example, deaths caused by abuse, mistake or pressure) may be discounted because they are *unintended*; in legalizing assisted suicide, society *intends* not to do anyone any harm but only to permit freely chosen decisions to die.[343] Joel Feinberg, for one, argues that we should

> consider reasonable mistakes in a legalized voluntary euthanasia scheme to be "the inevitable by-products" of efforts to deliver human beings, at their own requests, from intolerable suffering, or from elaborate and expensive

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342. *See id.*

343. The principle of double effect is commonly interpreted as setting forth certain conditions for assessing whether a person may morally perform an action from which two effects will follow, one bad, and the other good:

> (1) The act itself must be morally good or at least indifferent. (2) The agent may not positively will the bad effect but may merely permit it. If [the agent can] attain the good effect without the bad effect, he should do so. . . . (3) The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words, the good effect must be produced directly by the action, not by the bad effect. Otherwise, the agent would be using a bad means to a good end, which is never allowed. (4) [Finally], [t]he good effect must be sufficiently desirable to compensate for the allowing of the bad effect.

4 NEW CATHOLIC ENCYCLOPEDIA 1021 (1967). As suggested by these conditions, the principle of double effect categorically rules out any action that is *intended* to bring about a morally "evil" effect. *See id.* Meanwhile, actions that bring about such effects *unintentionally*, even if fully foreseen, are not categorically prohibited, but are instead analyzed to determine whether the intended (good) effect is proportional to the unintended (bad) consequence. *See id.*

> prolongations of a body's functioning in the permanent absence of any person to animate that body.[344]

Williams similarly downplays the fact that legalizing assisted suicide is likely to carry with it (additional) killings due to abuse, mistake or pressure: "[i]t may be allowed that mistakes are always possible, but this is so in any of the affairs of life."[345] Yet, Williams's apparent reliance on double effect doctrine in this context—distinguishing between "mistakes" or other unintended consequences associated with legalization, and those consequences that are intended—is distinctly at odds with his vociferous attack on the principle elsewhere.[346] It is also, fundamentally, a recognition that utilitarianism cannot, by itself, solve the assisted suicide question. In suggesting that *intended* consequences are more important or weighty than *unintended* ones, Feinberg and Williams step outside a purely utilitarian analysis aimed at enhancing pleasurable or social welfare-maximizing consequences to endorse a *separate, independent moral theory* for ranking or scoring different kinds of consequences, one that is foreign to a strictly utilitarian account.

Even if they could somehow rank consequences based on the intent behind them without undermining the promise of their consequentialist-utilitarian enterprise (and it is hard to see how they could), Feinberg's and Williams's argument still does not end the assisted suicide debate. Rather, it only raises the question whether a state that chooses legalization, with the *intent* to permit freely chosen deaths (with the unintended and unwanted "expense" of new cases of killing due to abuse, mistake, and pressure), is preferable, by reference to some moral principle, to a state that chooses to make assisted suicide illegal, with, say, the *intent* of protecting innocent life against nonconsensual killings due to abuse, mistake or pressure (with the unintended and unwanted "expense" of denying some people who wish to die a legal right to obtain help from others). Simply put, merely referencing intent is hardly enough: Feinberg and Williams still owe us some explanation why a regime that *intends* to allow some persons the freedom to engage legally in assisted suicide is to be preferred to one that *intends* to protect innocent life by prohibiting such practices.

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344. JOEL FEINBERG, *An Unpromising Approach to the "Right to Die"*, *in* FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 260, 273–74 (1992).

345. WILLIAMS, *supra* note 329, at 283.

346. *See* GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 37 (2d ed. 1983) (rejecting the notion that punishment is justified on the theory that society's intent is not to harm offenders through incarceration but to prevent crime (with punishment being an unintended side effect), and arguing that punishment is justified by "utilitarian opinion" under the theory that any harm done to offenders is outweighed by the benefit of preventing graver evils from occurring to future victims).

CONCLUSION

In this Article, I have sought to show that the utilitarian case for assisted suicide and euthanasia is not altogether free from doubt. To be sure, benefits would flow from legalization. I do not seek here to discount such benefits or suggest that they are "outweighed" by attendant costs. Instead, I have sought only to show that legalization may also entail real and material costs, and thus, that the utilitarian interested in selecting the legal rule that serves the greatest good for the greatest number is presented with a nontrivial choice.

Such practical concerns about the costs attendant to legalization have, in fact, persuaded many authorities to retain laws against assisted suicide. The Canadian Supreme Court declined to find a right to assisted suicide precisely because, in its judgment, "the concerns about abuse and the great difficulty in creating appropriate safeguards" make it impossible to say that a blanket prohibition on assisted suicide is inappropriate or fails to refleet "fundamental values at play in our society."[347] The British House of Lords also recommended against legalization, in part, because "it would not be possible to frame adequate safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalised. It would be next to impossible to ensure that all aets of euthanasia were truly voluntary, and that any liberalisation of the law was not abused."[348] In the United States, Justice Souter, concurring in *Glucksberg*, declined to find a constitutional right to assisted suicide because, in his view,

> [t]he case for the slippery slope is fairly made out here . . . because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not."[349]

Such judgments, I submit, cannot be ruled out as unreasonable on the available evidence.

In the end, moreover, I submit that the utilitarian focus on competing costs and benefits—such as the interest in allowing patients to exercise their autonomy versus the interest in preventing the nonconsensual killing of innocent persons—may help sharpen our thinking about the policy choice we face, but it provides us with no definitive guidance when it comes to choosing between such radically

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347. Rodriguez v. Attorney Gen. of Canada & Attorney Gen. of B.C., [1993] 3 S.C.R. 519, 522 (Can.).

348. H.L. REPORT, *supra* note 64, at 49.

349. 521 U.S. at 785 (Souter, J., concurring).

different, and ultimately incommensurate, interests. A utilitarian approach to the assisted suicide question may help clarify the consequences of legalization or nonlegalization, but it will not—and, more fundamentally, cannot—resolve the debate.

APPENDIX A

CERTAIN AMERICAN STATUTORY LAWS BANNING OR DISAPPROVING OF ASSISTED SUICIDE

42 U.S.C. §§ 14401-14408 (2000) (denying the use of federal funds in connection with acts of assisted suicide).
ALA. CODE ANN. § 22-8A-10 (Michie 1997) (stating that Alabama's medical directive statute shall not be construed to condone assisted suicide).
ALASKA STAT. ANN. § 11.41.120(a)(2) (Lexis 2002).
ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (West 2001).
ARK. CODE ANN. § 5-10-104(a)(2) (Michie 1997).
CAL. PENAL CODE § 401 (West 1999).
COLO. REV. STAT. ANN. § 18-3-104(1)(b) (West 2004).
CONN. GEN. STAT. ANN. § 53a-56(a)(2) (West 2001).
DEL. CODE ANN. tit. 11, § 645 (Michie 2001).
FLA. STAT. ANN. § 782.08 (West 2000).
GA. CODE ANN. § 16-5-5 (2003).
HAW. REV. STAT. ANN. § 707-702(1)(b) (Michie 2003).
IDAHO CODE § 56-1022 (Michie 2002) (stating that Idaho's medical directive statute shall not be construed to make legal or condone mercy killing, assisted suicide or euthanasia).
720 ILL. COMP. STAT. ANN. 5/12-31 (West 2002).
IND. CODE ANN. § 35-42-1-2, -2.5(b) (Lexis 2004).
IOWA CODE ANN. § 707A.2 (West 2003).
KAN. STAT. ANN. § 21-3406 (Supp. 2003).
KY. REV. STAT. ANN. § 216.302 (Michie 1998).
LA. REV. STAT. ANN. § 14:32.12 (Michie 1998).
ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1983).
MD. CODE ANN., CRIM. LAW § 3-102 (Michie 2002).
MASS. ANN. LAWS ch. 201D, § 12 (Law. Co-op. 1994) (stating that Massachusetts's medical directive statute shall not be construed to condone assisted suicide).
MICH. COMP. LAWS ANN. § 752.1027 (West 2004). "Regarding the recommendations referred to in subsection (5), at the time of publication [2001] recommendations had been submitted to both houses but it was not certain whether the recommendations were those of the full commission or whether both houses 'accepted' the recommendations were presented." MICH. COMP. LAWS SERV. § 752.1027 ed. note (Lexis 2001).
MINN. STAT. ANN. § 609.215 (West 2003).
MISS. CODE ANN. § 97-3-49 (West 1999).
MO. ANN. STAT. § 565.023.1(2) (West 2003).

MONT. CODE ANN. § 45-5-105 (West 2003). An annotator noted: "[u]nder the new sections on Causal Relationship Between Conduct and Result, MCA, 45-2-201, and Accountability, MCA, 45-2-302, a person may be convicted of Criminal Homicide, MCA, 45-5-101 (repealed—now deliberate or mitigated homicide, 45-5-102 and 45-5-103, respectively), for causing another to commit suicide—notwithstanding the consent of the victim."
ANNOTATIONS TO THE MONTANA CODE ANNOTATED § 45-5-105 note (2004).
NEB. REV. STAT. ANN. § 28-307 (Lexis 2003).
NEV. REV. STAT. ANN. § 449.670(2) (Michie 2000) (stating that Nevada's medical directive statute shall not be construed to condone assisted suicide or euthanasia).
N.H. REV. STAT. ANN. § 630:4 (Michie 1996).
N.J. STAT. ANN. § 2C:11-6 (West 1995).
N.M. STAT. ANN. § 30-2-4 (Michie 2004).
N.Y. PENAL LAW § 120.30 (McKinney 2004).
N.D. CENT. CODE § 12.1-16.04 (1997).
OHIO REV. CODE ANN. § 2133.12(D) (Anderson 2002) (stating that Ohio's medical directive statute shall not be construed to condone assisted suicide).
OKLA. STAT. ANN. tit. 21, § 813 (West 2002).
18 PA. CONS. STAT. ANN. § 2505 (West 1998).
R.I. GEN. LAWS ANN. § 11-60 (Lexis 2002).
S.C. CODE ANN. § 16-3-1090 (West 2003).
S.D. CODIFIED LAWS § 22-16-37 (Michie 1998).
TENN. CODE ANN. § 39-13-216 (Lexis 2003).
TEX. PENAL CODE ANN. § 22.08 (Vernon 2003).
UTAH CODE ANN. § 75-2-1118 (Michie 1993) (stating that Utah's medical directive statute shall not be construed to condone assisted suicide).
VA. CODE ANN. § 8.01-622.1 (Lexis 2000) (enacting a civil statute providing that a person may be enjoined from assisting suicide or may be liable for monetary damages by assisting or attempting to assist suicide).
WASH. REV. CODE ANN. § 9A.36.060 (West 2000).
W. VA. CODE ANN. § 16-30-2(a) (Michie 2001) (presenting the legislative finding that West Virginia's medical directive statute does not legalize, condone, authorize or approve of assisted suicide).
WIS. STAT. § 940.12 (2003–2004).

APPENDIX B

Below are certain calculations used in preparing certain graphs in the text. All calculations are based on mortality statistics from the World Health Organization.

Graph 2
Suicide Rate of Dutch Elderly (75 years +) Women as a Multiple of the Total Female Suicide Rate, 1984–2000[350]

Year	Elderly (75+) Female Suicide Rate per 100,000	Total Female Population Suicide Rate per 100,000	Suicide Rate of Elderly Women as a Multiple of Total Female Suicide Rate
1984	14.6	9.6	1.5208333
1985	10.8	8.0	1.35
1986	13	8.1	1.6049383
1987	13.8	8.2	1.6829268
1988	10.7	7.3	1.4657534
1989	10.7	7.4	1.4459459
1990	15.3	6.8	2.25
1991	11.3	7.1	1.5915492
1992	12.2	6.7	1.8208955
1993	12.2	6.4	1.90625
1994	9.5	6.1	1.557377
1995	9.6	6.1	1.5737704
1996	11.2	6.3	1.7777778
1997	11.7	6.2	1.8870968
1998	10.8	6.0	1.8
1999	9.3	5.9	1.5762711
2000	7.7	5.8	1.3275862

350. Reg'l Office of Eur., World Health Org., Mortality Indicators by 67 Cause of Death, Age and Sex, *at* http://www.euro.who.int/InformationSources/Data/20011017_1 (last visited Dec. 22, 2004).

Graphs 3 & 4
Suicide Rate of Elderly Persons (75 yrs.+)
as a Multiple of the Total Suicide Rate[351]

Country (Year)	Elderly (75+) Suicide Rate per 100,000	Total Suicide Rate per 100,000 Population	Suicide Rate of Elderly as Multiple of Total Suicide Rate
Finland (2002)			
Men	50.3	32.3	1.56
Women	7.5	10.2	0.74
Canada (2000)			
Men	22.7	18.4	1.23
Women	2.8	5.2	.54
Australia (2001)			
Men	26.3	20.1	1.31
Women	5.8	5.3	1.09
Norway (2001)			
Men	30.0	18.4	1.63
Women	3.2	6.0	0.53
USA (2000)			
Men	42.4	17.1	2.48
Women	4.0	4.0	1.00
U.K. (1999)			
Men	15.5	11.8	1.31
Women	5.1	3.3	1.55
Sweden (2001)			
Men	42.2	18.9	2.23
Women	12.7	8.1	1.57
France (1999)			
Men	80.5	26.1	3.08
Women	17.5	9.4	1.86
Netherlands (2000)			
Men	28.3	12.7	2.23
Women	7.8	6.2	1.26

351. World Health Org., Mental Health, Country Reports and Charts Available, *at* http://www.who.int/mental_health/prevention/suicide/country_reports/en/ (last visited Dec. 20, 2004). All data is for the most recent year for which the World Health Organization has published online statistics for the country in question.

Italy (2000)			
Men	34.2	10.9	3.14
Women	7.4	3.5	2.11
Denmark (1999)			
Men	46.6	21.4	2.18
Women	10.9	7.4	1.47
Germany (2001)			
Men	60.9	20.4	2.99
Women	18.2	7.0	2.6
Spain (2000)			
Men	44.9	13.1	3.43
Women	9.1	4.0	2.28

NewsRoom

3/18/04 WashingtonPost.com (Pg. Unavail. Online)
2004 WLNR 24476027

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March 18, 2004

Nonpartisan Fee Awards

The March 9 front-page article on the three- judge panel overseeing the independent counsel law noted that the court recently denied the attorney fee applications of some targets in the Whitewater investigation on the ground that the Justice Department would have examined their actions even without the independent counsel statute. In the article, John Barrett, who worked in the independent counsel's office during the Iran-contra investigation, charges that the court's rationale is a cover for a "partisan" agenda because the Justice Department investigated violations of the Boland Amendment before independent counsel Lawrence Walsh was appointed, yet the court approved some fee awards for people caught up in the Iran-contra investigation.

But the article nowhere discloses a fact that precludes such claims of partisanship: None of the independent counsels in the Iran-contra affair contested fee applications arising from that investigation on the ground that the Justice Department already had started an investigation of Boland Amendment violations. If Mr. Walsh's team (on which Mr. Barrett served) knew of such "facts" and failed to share them with the court, the fault plainly lies there. Courts rule only on the evidence that the parties present. The article also said that the presiding judge of the panel, David Sentelle (for whom I clerked years ago), named his daughter Reagan after the president who appointed him to the court. But Judge Sentelle's daughter was born in 1970, and Ronald Reagan appointed Mr. Sentelle to the court in 1985, when his daughter was 15. This is at least the second time The Post has printed this apocryphal story. And by the way, the article was kind to enough to say that Mr. Sentelle is 59; he is, in fact, 61. NEIL M. **GORSUCH** Vienna

---- Index References ----

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NATIONAL REVIEW

Liberals'N'Lawsuits

Too much reliance on litigation is bad for the courts and the Dems.

By Joseph _6 — February 7, 2005

Who do you think said this: "Reliance on constitutional lawsuits to achieve policy goals has become a wasting addiction among American progressives…. Whatever you feel about the rights that have been gained through the courts, it is easy to see that dependence on judges has damaged the progressive movement and its causes"? Rush Limbaugh? Laura Ingraham? George Bush? The author is David von Drehle, a *Washington Post* columnist. This admission, by a self-identified liberal, is refreshing stuff. It is a healthy sign for the country and those rethinking the direction of the Democratic party in the wake of November's election results. Let's hope this sort of thinking spreads.

There's no doubt that constitutional lawsuits have secured critical civil-right victories, with the desegregation cases culminating in *Brown* v. *Board of Education* topping the list. But rather than use the judiciary for extraordinary cases, von Drehle recognizes that American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.

This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary. In the legislative arena, especially when the country is closely divided, compromises tend to be the rule the day. But when judges rule this or that policy unconstitutional, there's little room for compromise: One side must win, the other must lose. In constitutional litigation, too, experiments and pilot programs–real-world laboratories in which ideas can be assessed on the results they produce–are not possible. Ideas are tested only in the abstract world of

legal briefs and lawyers arguments. As a society, we lose the benefit of the give-and-take of the political process and the flexibility of social experimentation that only the elected branches can provide.

At the same time, the politicization of the judiciary undermines the only real asset it has–its independence. Judges come to be seen as politicians and their confirmations become just another avenue of political warfare. Respect for the role of judges and the legitimacy of the judiciary branch as a whole diminishes. The judiciary's diminishing claim to neutrality and independence is exemplified by a recent, historic shift in the Senate's confirmation process. Where trial-court and appeals-court nominees were once routinely confirmed on voice vote, they are now routinely subjected to ideological litmus tests, filibusters, and vicious interest-group attacks. It is a warning sign that our judiciary is losing its legitimacy when trial and circuit-court judges are viewed and treated as little more than politicians with robes.

As von Drehle recognizes, too much reliance on constitutional litigation is also bad for the Left itself. The Left's alliance with trial lawyers and its dependence on constitutional litigation to achieve its social goals risks political atrophy. Liberals may win a victory on gay marriage when preaching to the choir before like-minded judges in Massachusetts. But in failing to reach out and persuade the public generally, they invite exactly the sort of backlash we saw in November when gay marriage was rejected in all eleven states where it was on the ballot. Litigation addiction also invites permanent-minority status for the Democratic party–Democrats have already failed to win a majority of the popular vote in nine out of the last ten presidential elections and pandering to judges rather than voters won't help change that. Finally, in the greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold.

During the New Deal, liberals recognized that the ballot box and elected branches are generally the appropriate engines of social reform, and liberals used both to spectacular effect–instituting profound social changes that remain deeply ingrained in society today. In the face of great skepticism about the constitutionality of New Deal measures in some corners, a generation of Democratic-appointed judges, from Louis

Brandeis to Byron White, argued for judicial restraint and deference to the right of Congress to experiment with economic and social policy. Those voices have been all but forgotten in recent years among liberal activists. It would be a very good thing for all involved–the country, an independent judiciary, and the Left itself–if liberals take a page from David von Drehle and their own judges of the New Deal era, kick their addiction to constitutional litigation, and return to their New Deal roots of trying to win elections rather than lawsuits.

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NO LOSS; NO GAIN

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Body

Points of View

THE SUPREME COURT SHOULD MAKE CLEAR THAT SECURITIES FRAUD CLAIMS CAN'T DODGE THE ELEMENT OF CAUSATION

The free ride to fast riches enjoyed by securities class action attorneys in recent years appeared to hit a speed bump on Jan. 12, when the Supreme Court heard arguments in .

The case gives the high court its first chance to explain the doctrine of loss causation in securities fraud litigation. The case is significant because it offers the Court an opportunity to curb frivolous fraud claims merely by enforcing the simple and straightforward causation requirement that Congress wrote into the Private Securities Litigation Reform Act more than a decade ago.

NEW NAME, OLD PROBLEM

The term is nothing more than a new name for a very old problem. Suppose an investor purchases $50 of stock in a corporation. The value of the investment later declines to $5. Some time after this decline, the corporation announces a restatement of an accounting error. The investor's shares remain at $5.

The investor sues, pointing to the sharp drop in the value of his stock and alleging that the company's earlier accounting misstatement constituted fraud on the market. But can the plaintiff's loss actually be attributed to the corporation's alleged accounting fraud? In most circuits, the answer is no, and a securities fraud claim on these facts would be dismissed for a

reason that any first-year law student could explain with ease: an absence of proximate causation.

Whether couched in terms of the defendant's duty to the plaintiff or in terms of the foreseeability of the particular harm as a result of the defendant's conduct, the common law tort requirement of proximate causation sets limits on recovery as a matter of public policy.

In the Private Securities Litigation Reform Act of 1995, Congress expressly adopted the then-prevailing view in the federal circuit courts that loss causation is a separate and unique element of any securities fraud claim. The PSLRA requires plaintiffs to prove that the defendant's act or omission caused the loss for which the plaintiff seeks to recover damages. Congress added this requirement specifically to increase the plaintiff's pleading burden in order to deter what legislators believed was an increasing trend in unmeritorious securities fraud claims.

The 3rd, 7th, and 11th circuits have already read this simple and efficient pleading requirement to mean that the defendant's conduct must be a proximate cause of the plaintiff's loss. And that interpretation received a ringing endorsement from the U.S. Court of Appeals for the 2nd Circuit on Jan. 20 as the court affirmed the decision of the late Judge Milton Pollack in

In the Merrill Lynch case, a class of investors in once high-flying Internet startups brought suit for losses suffered after the irrational exuberance of the late 1990s diminished and the Internet bubble burst. Eager to find someone to blame for their losses, the plaintiffs filed suit against Merrill Lynch claiming the company deliberately issued falsely positive recommendations in its analyst reports (this despite the fact that the plaintiffs had not even seen a copy of Merrill's reports). The 2nd Circuit rejected the plaintiffs' construction of the loss causation requirement and held that they failed to account for the price-volatility risk inherent in the stocks they chose to buy or to plead any other facts showing that it was defendant's fraud -- rather than other salient factors -- that proximately caused [their] loss.

FRIVOLOUS CLAIMS

The problem is that securities fraud litigation imposes an enormous toll on the economy, affecting virtually every public corporation in America at one time or another and costing businesses billions of dollars in settlements every year. Recent studies conclude that, over a five-year period, the average public corporation faces a 9 percent probability of facing at least one securities class action.

Yet despite congressional efforts at reform (first in the PSLRA and then in the Securities Litigation Uniform Standards Act of 1998), the number of securities class actions has not declined. Quite the opposite, in fact, has occurred: In the first six years after the enactment of the PSLRA, the mean number of securities fraud suits rose by an astonishing 32 percent according to one law review article. Another study concluded that, since the enactment of the PSLRA, public companies face a nearly 60 percent chance of being sued by shareholders. And the dismissal rate of securities fraud suits between 1996 and 2003 averaged only 8.4 percent.

As Rep. Anna Eshoo (D-Calif.) put it back in 1995, Businesses in my region place themselves in one of two categories: those who have been sued for securities fraud and those that will be.

One explanation for this trend is that securities fraud class actions are fundamentally different from other types of commercial litigation: Because the amount of damages demanded can be so great, corporations confront the reality that one bad jury verdict could mean bankruptcy. That sobering prospect encourages many responsible corporate fiduciaries to forgo the adversarial process, settling even meritless suits to avoid the risk of financial oblivion. Since the PSLRA's passage, more than 2,000 securities fraud cases have been filed in federal court, yet defendants have taken less than 1 percent to trial. So great is the pressure to settle that in 2004 one defendant agreed to settle a pending class action for $300 million even the suit was dismissed by the trial court.

The resulting drain on the American economy is substantial. In the last four years alone, securities class action settlements have exceeded $2 billion per year.

LAWYER-DRIVEN MACHINATIONS?

While plaintiffs attorneys have a strong financial incentive to bring even meritless suits if there's a chance they will settle, and defendants have a strong incentive to settle them, neither has a particularly strong incentive to protect class members. Once the scope of the settlement fund is determined, defendants usually have no particular concern how that fund is allocated between shareholders and plaintiffs counsel. And with the threat of adversarial scrutiny from the defendant largely abated, plaintiffs counsel has free rein to seek (and little reason not to try to grab) as large a slice of the settlement fund as possible.

The 3rd Circuit has put the problem this way: Settlement hearings frequently devolve into pep rallies in which no party questions the fairness of the settlement and judges no longer have the full benefit of the adversarial process.

The result is that securities fraud class actions can end up not only harming the company but also failing to help the supposedly wronged shareholders.

FROM BAD TO WORSE

Given the plain meaning of the PSLRA, the legislative history, the scholarship, and the decisions of the 2nd, 3rd, 7th, and 11th circuits, seems like it should be an easy case for the Supreme Court.

On Feb. 24, 1998, Dura announced a revenue shortfall. By the next day, shares in Dura had dropped from $39.125 to $20.75 for a one-day loss of 47 percent. More than eight months later, on Nov. 3, 1998, Dura announced for the first time that the Food and Drug Administration had declined to approve its Albuterol Spiros asthma device. Nonetheless, Dura shares fell only slightly after this announcement. Share prices initially dropped from $12.375 to $9.75, but, within 12 trading days, they had recovered to $12.438, ultimately climbing back to $14 within 90 days. A claim of fraud on the market was brought on behalf of Dura investors, who allege that Dura knew about the possibility that the FDA might not approve Albuterol Spiros in advance and failed to disclose it in Securities and Exchange Commission filings.

Seeking to boost their recovery, the class action plaintiffs never alleged damages based on the brief $2.625 stock price dip after the Nov. 3 disclosure of the supposed fraud. Rather, they

demanded recovery based on the much more significant Feb. 24 decline of almost $19. In other words, the plaintiffs sought damages based on a decline in share value that occurred nine months the disclosure of the alleged fraud.

The facts were as simple, and seemingly insufficient, as if the unfortunate Mrs. Palsgraf had filed suit for a headache she developed before ever leaving for the train station. The District Court agreed and dismissed the action. But the 9th Circuit saw things differently, finding the causation requirement satisfied where the plaintiffs have shown that the price on the date of purchase was inflated because of the misrepresentation.

The economic implications of the 9th Circuit's decision are staggering. Rather than holding companies liable for the damage they inflict on their shareholders as reflected by an actual market decline, the 9th Circuit's rule permits liability to be found and damages to be awarded even when the plaintiff can point to no material market reaction to a disclosure of alleged fraud.

The 9th Circuit decision would deny courts an important means for weeding out at the pleading stage lawsuits where the alleged fraud had no empirical effect on share price, and thus imposed no demonstrable harm on class members. The decision thus adds fuel to a fire in which virtually every case is settled, and only the lawyers truly win.

A SKEPTICAL SUPREME COURT

Accepting the request of the solicitor general, the Supreme Court granted certiorari to determine whether the 9th Circuit's holding meets the standards established by the PSLRA.

The questions posed by the justices at oral argument earlier this month suggest a fundamental disagreement with the 9th Circuit's logic. Justice Ruth Bader Ginsburg asked: How could you possibly hook up your loss to the news that comes out later? There is no loss until somehow the bad news comes out. Justice David Souter commented that the plaintiffs' argument strikes me as an exercise in an inconsistent theory. And Justice Sandra Day O'Connor summed up the problem: The reason why loss causation is used is because a 'loss' experienced by the plaintiff is 'caused by the misrepresentation.

These observations demonstrate a sensitivity to the practical impact of the 9th Circuit's decision. By allowing recovery where disclosures do not prompt any stock price decline, the lower court's rule encourages, and in fact depends upon, a return to the use of junk science: Parties and courts, lacking any empirically verifiable proof of injury, will reach for a grab bag of speculative theories to estimate damages.

Like (1993) and its progeny, the loss causation requirement arms courts with a tool to ensure that the legal system compensates fully for empirically confirmable losses, but not for phantom losses where cause-and-effect relationships have not been reliably proved and perhaps cannot be.

Moreover, the 9th Circuit's rule serves to chill investment advice and the free flow of information and the exchange of opinions critical to our capital markets. Without a requirement tying the disclosure of the alleged fraud to a timely market effect, dissatisfied investors will be encouraged to comb through the musings of television investment shows, Internet investment sites and, of course, investment banks, regardless of whether anyone actually listened to them, to find any

investment advice proved mistaken by later events and then to sue for damages, claiming that the advice artificially inflated the value of the stock in question.

Such dangers confirm that the 9th Circuit's departure from the essential element of loss causation in claims for fraud is not only doctrinally inconsistent with basic common law tort pleading elements but also bad public policy.

To be sure, the rising tide of meritless securities fraud claims won't be stemmed in a single decision. The Supreme Court, however, has a unique opportunity to apply the undisputable principles of common law and the clear intent of the legislature to articulate a uniform standard for pleading securities fraud claims that will protect true investor loss due to fraud without damaging our national economy. Sometimes easy answers are the best solution to easy cases.

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SETTLEMENTS IN SECURITIES FRAUD CLASS ACTIONS: IMPROVING INVESTOR PROTECTION

by
Neil M. Gorsuch and Paul B. Matey
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

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INTRODUCTION

In 1941, Harry Kalven, Jr. and Maurice Rosenfield suggested a new use for class action lawsuits based on the emerging marketplace for publicly traded securities.[1] Kalven and Rosenfield argued that the securities markets had become so complex that investors had little incentive to seek remedies under the Securities Act because the cost of prosecuting a claim far surpassed the expected recovery.[2] To remedy this problem, the authors proposed using civil class actions to police abuses in the securities markets – a theory that would later be dubbed the "private attorney general."[3] The

[1]*See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

[2]*See id*.; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 569 (1992).

[3]The term was coined by Judge Jerome Frank of the United States Court of Appeals for the Second Circuit. *See Associated Indus. of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."). For a discussion of the rise of private enforcement actions under federal regulatory

current class action provision codified in Federal Rule of Civil Procedure 23 embodies Kalven's and Rosenfield's idea that civil class action suits could empower individual consumer redress while simultaneously ensuring enforcement of the federal securities laws.[4]

While securities class actions have offered some of the social benefits Kalven and Rosenfield envisioned, experience has shown that, like many other well-intended social experiments, they are not exempt from the law of unintended consequences, having brought with them vast social costs never imagined by their early promoters. Today, economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims. These same incentives operate to encourage significant attorneys' fee awards even in cases where class members receive little meaningful compensation. And the problem is widespread. Recent studies conclude that, over a five-year period, the average public corporation faces a 9% probability of facing *at*

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laws, *see generally* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983). For criticism of the private attorney general model, *see generally* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorneys' Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (proposing private rights of action be auctioned to attorneys seeking to bring the class claim).

[4]Although there is little documentation of the discussion of Kalven's and Rosenfield's theory during the advisory committee sessions, their arguments proved important to the final proposed rule. *See* Note, *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1321-23 (1976).

least one securities class action lawsuit.[5] As Congresswoman Anna Eshoo (D-Cal.) has put it, "Businesses in my region place themselves in one of two categories: those who have been sued for securities fraud and those that will be."[6] In the last four years alone, securities class action settlements have exceeded two billion dollars *per year*.[7]

What are the sources of the problems confronting securities class litigation? And how might we address them in a way that ensures we protect the valuable function securities class action litigation was originally intended to serve? This article seeks to offer a preliminary step toward answering these questions.

I. CERTAIN STRUCTURAL PROBLEMS OF SECURITIES FRAUD CLASS ACTIONS

A. The Incentive to Bring – and the Pressure to Settle – Meritless Suits

Because the amount of damages demanded in securities class actions is frequently so great, corporations often face the choice of "stak[ing] their companies on the outcome of a single jury trial, or be forced by fear of the

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[5]*See* Elaine Buckberg et al., NERA, *Recent Trends in Securities Class Action Litigation: 2003 Early Update* 4 (Feb. 2004) ("*2003 Early Update*").

[6]Conference Report on H.R. 1058, Private Securities Litigation Reform Act of 1995, 141 Cong. Rec. H14039, H14051 (Dec. 6, 1995).

[7]*See Laura E. Simmons & Ellen M. Ryan*, Cornerstone Research, *Post-Reform Act Securities Settlements Reported Through December 2004* at 1 (Mar. 2005), *available at* http://securities.cornerstone.com. Settlements in 2001 were estimated at $2.1 billion, rising to $2.537 billion in 2002, holding at $2.016 billion in 2003, and rising to a record high 2.8 billion in 2004. *Id*.

risk of bankruptcy [into settling] even if they have no legal liability."[8] Unsurprisingly, executives faced with the potential destruction of their companies in a single trial typically opt to settle – even if it means paying out on meritless claims. They are, as Congress has recognized, "confronted with [an] implacable arithmetic . . . even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages."[9] Illustrating just how powerful the incentive to settle can be, Bristol-Myers Squibb recently agreed to settle a pending class action for $300 million *even after the suit was dismissed with prejudice* at the trial court level.[10]

With such pressure to settle meritless suits comes, unsurprisingly, a concomitant incentive to bring them. As one academic commentator has candidly recognized, there is simply "*no appreciable risk* of non-recovery" in securities class actions; merely "*[g]etting the claim into the legal system*,

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[8] *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *see also* Victor E. Schwartz, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 490 (2000) ("For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable.") (internal quotation marks omitted); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064 (1995); Woodruff-Sawyer & Co., *A Study of Shareholder Class Action Litigation* 25 (2002) (83% of securities fraud cases are resolved through settlement).

[9] H.R. Rep. No. 106-320, at 8 (1999). *See also West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (noting scholarly concerns that "settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions"); Schwartz, *supra* note 8, at 490.

[10] Jonathan Weil, *Win Lawsuit – and Pay $300 Million*, WALL ST. J., Aug. 2, 2004, at C3.

without more, sets in motion forces that ultimately compel a multi-million dollar payment."[11] And the Second Circuit concurs: "[a]necdotal evidence tends to confirm this conclusion. Indeed, [Melvyn I.] Weiss and his partner William S. Lerach of the Milberg firm have stated that losses in these cases are 'few and far between,' and they achieve a 'significant settlement although not always a big legal fee, in 90% of the cases [they] file.'"[12] Even the Supreme Court has acknowledged that, as a result of this phenomenon, securities class action litigation poses "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[13] Illustrating how tempting these cases are for plaintiffs' lawyers, one court found it "peculiar that four of the lawsuits consolidated in this action were filed around 10:00 a.m. on the first business day following [the defendant's] announcement" of business problems and that "[m]ost of the complaints are virtually identical (including typographical errors)."[14] At the hearing on the

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[11]Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 578, 569 (1991) (emphasis added). *Accord Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (noting "numerous courts and scholars have warned that settlements in large [securities] class actions can be divorced from the parties' underlying legal positions"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (discussing the "inordinate or hydraulic pressure on [securities fraud] defendants to settle, avoiding the risk, however small, of potentially ruinous liability").

[12]*Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) (quoting *In re Quantum Health Res., Inc. Sec. Litig.*, 962 F. Supp. 1254, 1258 (C.D. Cal. 1997)). The Milberg Weiss Bershad Hynes & Lerach firm has now divided into two separate partnerships known as Milberg Weiss Bershad & Schulman, and Lerach Coughlin Stoia Geller Rudman & Robbins.

[13]*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

[14]*Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1106 n.8 (D. Conn. 1991).

defendant's motion to dismiss, the judge inquired:

> [H]ow did you get to be so smart and to acquire all this knowledge about fraud from Friday to Tuesday? On Friday afternoon, did your client suddenly appear at your doorstep and say 'My God, I just read in the Wall Street Journal about Travelers. They defrauded me,' and you agreed with them and you interviewed them and you determined that there was fraud and therefore you had a good lawsuit, so you filed it Tuesday morning, is that what happened?[15]

The court tellingly noted that "[c]ounsel for the plaintiffs was not responsive to this line of inquiry."[16]

B. The Incentive to Reward Class Counsel But Not Necessarily Class Members

While plaintiffs' attorneys have a strong financial incentive to bring meritless suits, and defendants have a strong incentive to settle them, neither has a particularly strong incentive to protect class members. Once the scope of the settlement fund is determined, defendants usually have no particular concern how that fund is allocated between class members and plaintiffs' counsel. And with the threat of adversarial scrutiny from the defendant largely abated, plaintiffs' counsel has free reign to seek (and little reason not to try to grab) as large a slice of the settlement fund as possible. Thus, settlement hearings frequently devolve into what the Third Circuit has called "jointly orchestrated . . . pep rallies," in which no party questions the

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[15] *Id.*

[16] *Id.*

fairness of the settlement or attorneys' fee request and "judges no longer have the full benefit of the adversarial process."[17] This arrangement has led one prominent securities fraud attorney to boast that "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do."[18]

Just how true that is can be illustrated by a 2002 settlement involving AT&T and Lucent regarding allegedly improper billing practices. A settlement fund for class members and counsel was established and valued at $300 million in settlement hearing proceedings. Soon after, the lawyers for the class collected some $80 million in fees, or more than 26% of the $300 million fund. Class members, meanwhile, "didn't collect as easily."[19] Two years later, in 2004, the parties revealed that class members found the settlement terms so unattractive that they had bothered to redeem a mere $8 million from the settlement fund – meaning that the plaintiffs' lawyers earned *ten times* the amount of the injured consumers.[20]

In re PeopleSoft Securities Litigation exemplifies the same problem.[21]

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[17]*Id.* at 1310. *See also Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984).

[18]*In re Network Assocs. Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999).

[19]Editorial, *Fees Line Lawyers' Pockets*, USA TODAY, Apr. 6, 2004.

[20]*Id.*

Immediately following a decline in the common stock of PeopleSoft, Inc., 19 complaints were filed alleging that top company executives had made materially false and misleading statements to inflate the stock price. At the onset of the action, counsel represented that the case was worth hundreds of millions of dollars in damages. Yet, one year later, the plaintiffs sought approval for a settlement of $15 million. In reviewing the proposed settlement, the district court concluded that counsel had engaged in "minimal" discovery, "on the borderline of acceptability" given the purported scope of the case. Although the district court concluded that "a substantial part of the allegations that led the court to sustain the complaint in the first place are untrue, were never true, and had, at most, razor-thin support," plaintiffs' counsel pocketed $2.5 million in fees and expenses all taken from the common settlement fund.[22]

C. The Transfer Effect

Yet another unique structural issue affects securities class action settlements. Because settlement payments often come largely out of corporate coffers (directors' and officers' insurance policies also contribute), securities class actions frequently involve only "a transfer of wealth from

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[21] *See* Order Certifying Settlement Class, Approving Class Settlement, and Awarding Fees and Expenses, *In re PeopleSoft, Inc. Sec. Litig.*, No. C 99-00472 WHA, at 9-10 (N.D. Cal. Aug. 24, 2001).

[22] *Id*.

current shareholders to former shareholders."[23] That is, to the extent the corporation pays out, it is only transferring a portion of that wealth to existing shareholders' bank accounts (essentially an economic wash) in addition to sums paid to former shareholders who sold at some point during the class period and, of course, class counsel. Thus, to the extent that class members still own shares in the company at the time of the suit (as they often do), "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up."[24] All this led Judge Friendly to observe that securities fraud litigation carries the risk of "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers."[25]

II. WHERE TO GO FROM HERE?

A. Recent Efforts at Reform

To be sure, Congress has recognized and sought to address some of

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[23] Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996). *See also* Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 638-39 (1985); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 698-700; Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 650 & n.48 (1996); Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921-22.

[24] Alexander, *supra* note 23, at 1503.

[25] *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968).

the negative side-effects of securities class action litigation.[26] In 1995, Congress enacted the Private Securities Litigation Reform Act[27] ("PSLRA").[28] It followed up in 1998 with the Securities Litigation Uniform Standards Act ("SLUSA").[29] Together, these bills sought to toughen pleading standards for securities class action suits,[30] encourage the appointment of pension funds as lead plaintiffs in the hope that they might better oversee class counsel,[31] and ensure that cases are tried in federal courts rather than in state courts.[32]

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[26]H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1996 U.S.C.C.A.N. 730, 731. Congress explained that:

> The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability.

Id.

[27]15 U.S.C. § 78u-4.

[28]Pub. L. No. 104-67, 109 Stat. 737, 15 U.S.C. §§ 77k *et seq*. (1995).

[29]Pub. L. No. 105-353, 112 Stat. 3227, 15 U.S.C. §§ 77b *et seq*. (1998).

[30]*See* S. Rep. No. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694 (noting the PSLRA imposes a "strong pleading requirement" on the filing of any securities fraud action); H.R. Conf. Rep. No. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 (the PSLRA "requires the plaintiff to plead and then to prove that the misstatement or omission alleged in the complaint actually caused the loss incurred by the plaintiff"); s*ee also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc*., 532 U.S. 588, 597 (2001) (noting the "stricter pleading requirements" imposed in the PSLRA).

[31]H.R. Conf. Rep. No. 104-369, at 34, *reprinted in* 1995 U.S.C.C.A.N. at 733.

[32]*See* H.R Conf. Rep. No. 105-803 (Oct. 9, 1998) (explaining Congress's intent that SLUSA would "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court").

Congress's reforms, however, did little to address the underlying incentives that encourage plaintiffs' lawyers to bring – and defendants' lawyers to settle – meritless suits, or the incentives the parties have to benefit class counsel more than class members.[33] In fact, there has been a 32% nationwide increase in the mean number of securities fraud suits filed in the six years since the enactment of the PSLRA.[34] According to one published report, public companies now face a nearly 60% greater chance of being sued by shareholders.[35] And virtually all of these suits continue to be settled. One recent opinion quoted a statistic showing the dismissal rate in the Ninth Circuit as *only 6%*.[36] Studies show, too, that six years after the passage of the PSLRA, shareholders in class action suits collected, on average, just six cents for every dollar of claimed loss while their counsel continue to reap enormous fees.[37] As a result, despite congressional efforts at reform securities class action settlements reached an all-time high in

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[33]*See* Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, *Post-Reform Act Securities Lawsuits: Settlements Reported Through December 2003* (May 2004) ("*Post-Reform Study*"), *available at* http://www.cornerstone.com.

[34]Perino, *supra* note 23, at 930.

[35]*See* Todd S. Foster et al., National Economic Research Associates, *Trends in Securities Litigation and the Impact of PSLRA* 4 (2003).

[36]*In re Infospace, Inc. Secs. Litig.*, No. C01-931Z, 2004 WL 1879013, at *4 (W.D. Wash. Aug. 5, 2004).

[37]Cornerstone Research, *Securities Class Action Case Filings 2002: Year in Review* (2003).

2004 of $2.9 billion.[38]

More recently, Congress passed the Class Action Fairness Act of 2005.[39] That law imposes several new hurdles for class action litigants. First, the Act expands the original jurisdiction of the federal courts to include suits where the aggregate amount of controversy exceeds $5 million and the class includes at least 100 potential members, only one of whom must be a citizen of a different state than the defendant.[40] Second, the Act eliminates restrictions on removal, including the one-year time limitation otherwise applicable to civil suits, the need for all defendants to consent to removal, and the inability for defendants to remove from state courts where they are citizens.[41] Third, the Act closes the so-called "joinder loophole" that allowed massive actions on behalf of numerous plaintiffs to proceed without seeking class action certification by extending federal jurisdiction over most all civil actions seeking monetary damages on behalf of 100 or more persons.[42] The Class Action Fairness Act also places new controls on the

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[38]*See Laura E. Simmons & Ellen M. Ryan*, Cornerstone Research, *Post-Reform Act Securities Settlements Reported Through December 2004* (Mar. 2005) at 1, *available at* http://securities.cornerstone.com. Notably, the $2.9 billion total was adjusted for the effects of inflation and did not include the $2.6 billion partial settlement in the WorldCom, Inc. litigation. *Id*.

[39]Class Action Fairness Act of 2005, Pub. L. 109-2, § 2 (outlining Congress's findings of class action abuses that have "harmed class members with legitimate claims and defendants that have acted responsibly").

[40]*Id*. § 4.

[41]*Id*. § 5.

settlement of class actions, particularly certain settlements awarding coupons in lieu of damages.[43]

For better or for worse, however, the Class Action Fairness Act will have little impact on securities class action litigation. By its terms, the Act does not apply to claims that could not already be removed under SLUSA, suits relating to "internal affairs or governance of a corporation," and suits relating to breaches of fiduciary duties in the sale of a security.[44] As a result, securities fraud class actions remain susceptible to the very problems that Congress sought to redress in other forms of class action litigation.

Beyond Congress, some have promoted recent changes to the Federal Rules of Civil Procedure as ways to improve the class action mechanism. Like Congress's reforms, however, these recent rule changes simply do not address the fundamental problematic incentives and structures unique to securities litigation.

First, until its recent amendment, the decision whether to opt out of a Rule 23 class action frequently had to be made early in the case – often before the nature and scope of liability and damages could be fully understood. As amended, Rule 23(e)(3) now permits courts to refuse to

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[42] *Id*. § 4.

[43] *Id*. § 3. The Act also authorizes the Court to receive expert testimony on the valuation of a class settlement.

[44] *Id*. § 4.

approve a settlement unless it affords a new opportunity to request exclusion at a time when class members can make an informed decision based on the proposed settlement terms. Early experience, however, shows that few courts have permitted additional opt-out periods following settlement approval.[45] Critically, too, a second opt-out offers no protection where settlement occurs before a class is certified – yet such early settlements are the norm in securities class action litigation given the scope of damages they involve, and the fact that securities class actions are so frequently certified.[46]

Second, Rule 23(f) has been amended to encourage interlocutory appeals from district court class certification orders. Early reports indicate, however, that Rule 23(f) has been used modestly, resulting in approximately nine published opinions per year since the rule was adopted in 1998.[47] The discretionary nature of Rule 23(f), moreover, has led to a patchwork of standards and guidelines in the circuit courts, thus raising the possibility of

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[45]*See In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *3 (E.D. Pa. May 11, 2004) (finding "no significant developments since the original opt-out that would require . . . a second opt-out period"); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (declining to offer the class a second opt-out opportunity "in light of the infinitesimal number of objections" by class members).

[46]*See* Lawrence J. Zweifach & Samuel L. Barkin, *Recent Developments in the Settlement of Securities Class Actions*, 1279 PLI/Corp. 1329, 1339 (2001).

[47]Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, Washington Legal Foundation LEGAL BACKGROUNDER (Mar. 19, 2004).

inconsistent remedies depending on the forum.[48] And, once again, Rule 23(f) provides little assistance in cases where settlement occurs *before* class certification – and that is, again, the dominant practice in securities class actions.[49]

B. Toward Meaningful Reform in Securities Class Action Settlements

While the procedural fixes and patches enacted by Congress and in the federal rules may help, it seems clear that they have proven insufficient to the task of preventing unmeritorious securities fraud cases or deterring settlements that benefit lawyers more than their clients. Future reform efforts may be more effective if focused less on procedures and more directly on the underlying economic incentives. What does this mean? Here are some possibilities.

1. Enforce the PSLRA's Loss Causation Requirement

A majority of circuit courts have held that a securities fraud plaintiff must demonstrate that the price of the security at issue declined as the result of disclosure of previously concealed information, and have limited

[48] *See* Aimee G. Mackay, Comment, *Appealability of Class Certification Orders under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002) (collecting the various standards of the circuit courts).

[49] *See* Zweifach & Barkin, *supra* note 46, at 1339.

the plaintiff's damages to the amount of that decline.[50] As recently explained by the Second Circuit in an opinion affirming the decision of the late Judge Milton Pollack in *Lentell v. Merrill Lynch*, "to establish loss causation, a plaintiff must allege . . . that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered."[51] There, a class of investors in once high-flying Internet startups brought suit for losses suffered after the now-famous "irrational exuberance" that fueled investments in the late 1990s diminished and the Internet stock price bubble burst. Eager to find someone to blame for their losses, the plaintiffs filed suit against Merrill Lynch claiming the company issued false recommendations in its analyst reports – this despite the fact that the plaintiffs were not clients of Merrill Lynch and had not relied on, read, or even seen a copy of any of Merrill's reports. The Second Circuit rejected the plaintiffs' construction of the loss causation requirement and held that they failed "to account for the price-volatility risk inherent in the stocks they chose to buy" or plead any other facts showing that "it was defendant's fraud – rather than other salient factors – that proximately caused [their] loss."[52]

In contrast, the Ninth Circuit has held that a securities fraud plaintiff

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[50]*See Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003); *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997); *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990).

[51]*Lentell v. Merrill Lynch*, 396 F.3d 161, 173 (2d Cir. 2005).

[52]*Id.* at 177.

need only argue that the price of a security was "inflated" when he or she bought shares.[53] Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule thus permits liability to be found and damages to be awarded even when the plaintiff can point to *no actual market price reaction to a corrective disclosure at all.* Under this regime, a plaintiff can bring a class action simply on the allegation that a company's share price was once "inflated" because of the undisclosed accounting issue – and do so without ever having to establish a causal link between any price decline and the alleged misrepresentation. The Ninth Circuit's approach thus allows recovery where investors are *never hurt* by the alleged fraud, including in cases where the plaintiff sold before the alleged misrepresentation was exposed; where the misrepresentation was never exposed at all; or where the misrepresentation was exposed but the market did not respond negatively.

The facts of the Ninth Circuit case are illustrative. On February 24, 1998, Dura Pharmaceuticals announced a revenue shortfall for the following year, unrelated to any alleged fraud. By the next day, shares in Dura dropped from $39.125 to $20.75 for a one-day loss of 47%. Some *nine months later*, on November 3, 1998, Dura announced for the first time that the Food and Drug Administration had declined to approve its Albuterol

[53] *Broudo v. Dura Pharms, Inc.*, 339 F.3d 933 (9th Cir. 2003); *see also Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824, 831 (8th Cir. 2003).

Spiros product – an announcement that plaintiffs themselves contend constitutes the first public disclosure of the alleged fraud in this case. Following this announcement, however, Dura shares fell only slightly and briefly. Share prices initially dropped from $12.375 to $9.75, but, within 12 trading days, they recovered to $12.438, ultimately climbing to $14.00 within 90 days of the announcement. A claim of fraud on behalf of Dura investors followed.

But seeking to boost their recovery, the class plaintiffs never alleged damages based on the brief and shallow $2.625 stock price dip after the November 3 disclosure of the supposed fraud. Rather, they demanded recovery based on the much more significant February 24 stock price decline of $19. In other words, the plaintiffs sought damages based on a decline in share value that occurred nine months *before* the disclosure of the alleged fraud. The facts were as simple, and seemingly insufficient, as if Mrs. Palsgraf had filed suit for a headache she developed before ever leaving for the train station. The district court agreed and dismissed the action. The Ninth Circuit saw things differently, finding loss causation satisfied where the plaintiffs "have shown that the price *on the date of purchase* was inflated because of the misrepresentation."[54]

The economic implications of the Ninth Circuit's holding are

[54] *Broudo*, 339 F.3d at 938.

staggering. Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule permits liability to be found and damages to be awarded even when the plaintiff can point to no actual market price reaction to a disclosure of the supposed fraud. Denying courts any means for weeding out at the pleading stage suits where the alleged fraud had no empirical effect on share price, and thus imposed no demonstrable harm on class members, the Ninth Circuit's rule adds fuel to a fire in which virtually every case is settled, wealth is transferred away from current shareholders to former shareholders.

Recently, however, the Ninth Circuit's treatment of the loss causation requirement received a cool response when the Supreme Court granted certiorari and heard arguments in the *Dura* case – a case that gives the High Court its first chance to explain the loss causation doctrine.[55] The questions posed by the Justices at oral argument suggest a fundamental disagreement with the Ninth Circuit's logic, exemplified by Justice Ruth Bader Ginsburg's observation: "How could you possibly hook up your loss to the news that comes out later? There is no loss until somehow the bad news comes out."[56]

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[55]The Solicitor General had urged the Supreme Court to review the decision concluding that the Ninth Circuit's reasoning was "difficult to reconcile with the well-established principle that transaction causation and loss causation are distinct elements of a Rule 10b-5 cause of action." *See* Brief for the United States as Amicus Curiae at 12, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004).

[56]Hope Yen, *High Court Hears Securities Fraud Case*, SEATTLE POST-INTELLIGENCER, Jan. 12. 2005.

Justice Sandra Day O'Connor also summed up the problem: "The reason why loss-causation is used is because a 'loss' experienced by the plaintiff is 'caused' by the misrepresentation. You have to put pleadings that are clear, which you didn't do."[57]

The Court's skepticism is well-founded. The Ninth Circuit's holding introduces a new legal rule that only further encourages plaintiffs to file and companies to settle meritless claims by removing a key safeguard against such suits. Worse still, the Ninth Circuit's rule encourages risky investment behavior, effectively forcing issuers to insure against speculative losses having nothing to do with their own conduct. Under the Ninth Circuit's rule, an investor can file a claim and obtain recovery even when the disclosure of an allegedly fraudulent statement has absolutely *no effect* on the stock price. To estimate damages in the absence of any contemporaneous real world stock price movement, moreover, the Ninth Circuit's rule encourages, and in fact depends upon, a return to the use of "junk science" by allowing recovery where disclosures do *not* prompt any stock price decline – *i.e.*, any actual harm. Under this standard, the parties and courts are, by necessity, forced to rely on a grab-bag of speculative theories to estimate damages since no empirically verifiable proof of injury exists. Like *Daubert v. Merrell Dow Pharmaceuticals* and its progeny, the

[57] *Id.*

loss causation requirement arms courts with a tool to ensure that the legal system compensates fully for empirically confirmable losses, but not for "phantom losses" based on "cause-and-effect relationships whose very existence is unproven and perhaps unprovable."[58]

By contrast, the alternative loss causation rule endorsed by the Government, petitioners, and four other courts of appeals would avoid all of these problems while ensuring full recovery of real losses. Requiring plaintiffs to plead facts showing loss causation enables judges to separate investor losses stemming from actual fraud from those caused by mere market downturns. Allowing the theory of "fraud-on-the-market" to satisfy the plaintiffs' entire burden on causation risks overcompensating investors for stock losses unrelated to any specific action by a defendant. Where an alternative cause (such as the marketwide drop in Internet, technology, and telecommunications securities in early 2000) results in comparable losses across similarly situated investors, plaintiffs must logically allege some facts that tend to show that their particular losses were caused by the defendants' alleged wrongdoings. Only by requiring a specific causal nexus can courts achieve optimal deterrence against fraud without transforming the federal securities laws into a system of national investor insurance.

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[58]Kenneth R. Foster *et al.*, *Phantom Risk: Scientific Inference and the Law* 1 (1993).

2. Mandate Separate Fee Funds

The practice of paying plaintiffs' attorneys' fees from the settlement fund creates a powerful incentive to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation,"[59] and insulates the fee request from adversarial scrutiny. Paying fees out of the common settlement fund reduces the recovery available to consumers, and shifts the burden of paying the class counsels' fees to class members. In contrast, a regime that requires fee requests to be made separately from, and outside of, the class settlement fraud would help reintroduce the possibility that defendants might have some incentive to scrutinize fee requests and more closely monitor a regime that currently doles out 25% to 30% of every settlement to securities class action attorneys – many of whom do little or nothing to prosecute their cases and simply "free ride" on SEC or Justice Department investigations.

3. Revive the Lodestar Method for Calculating Fees

While the trend in federal courts has been toward using percentage of recovery methodology to determine fee awards, the lodestar method can provide a useful cross-check. The purpose behind any fee award from a

[59] *Bell Atlantic v. Bolger*, 2 F.3d 1304, 1308-09 (3d Cir. 1993) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial")).

common fund settlement is to compensate attorneys for the fair market value of their time in successfully prosecuting the class claims. While the lodestar method has been criticized as burdensome and fact intensive (it is both), strict adherence to the percent of recovery standard can also overlook inequitable fee awards. For instance, when Bank of America paid $490 million to settle a securities fraud class action in 2002, plaintiffs' lawyers pocketed $28.1 million dollars in fees. Although at first glance the fee award appears reasonable as a percentage of recovery, the plaintiffs' lawyers actually earned $2,007 per hour.[60] In such cases, the lodestar method can provide an important safeguard against attorney over-billing through a closer review of counsels' hours, rates, and other charges.

4. Employ Competitive Bidding to Select Class Counsel

A bidding process to determine class counsel would employ market forces to constrain the supra-competitive prices often charged by plaintiffs' attorneys. This concept was first employed by Judge Vaughn R. Walker of the Northern District of California.[61] There, the district court solicited sealed bids from law firms seeking to represent the lead plaintiff,

[60]Peter Shinkle, *Deal Was Just the Beginning in Class-Action Suit*, ST. LOUIS POST DISPATCH, Jan. 16, 2005.

[61]*See* District Judge Vaughn R. Walker, Remarks at the ABA National Securities Litigation Institute 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare. . . . This is no surprise. . . . [I]nstitutional investors have disincentives to becoming [parties]. . . . Lawsuits are costly in time, money and other resources.").

accompanied by a description of the firm's experience and qualifications in such actions. The court then selected the lead plaintiffs' lawyer from these submissions, and determined the attorneys' fees based on the firm's own bid.[62] In another approach to competitive bidding, the district court might interview each of the prospective class attorneys, and select the lead plaintiffs' counsel based on the judge's independent analysis of the attorneys' ability to monitor and represent the interests of the class. Although Judge Walker's innovative approach was initially rejected by the Ninth Circuit,[63] recent amendments to Rule 23 appear to have vindicated Judge Walker's experiment, allowing judges to conduct competitive auctions based in part on the fees class counsel will receive.[64]

5. Encourage Meaningful Oversight

Participation by the appropriate state and federal agencies in

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[62]*In re Oracle Sec. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990). Auctions for lead counsel have also been used in *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d 951 (N.D. Ill. 2001); *In re Commtouch Software Sec. Litig.*, No. C 01-00719, 2001 WL 34131835 (N.D. Cal. June 27, 2001); *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967 (N.D. Cal. 2001); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000); *In re Bank One Holders Class Actions*, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D. 137 (D.N.J. 2000); *Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 668 (S.D. Fl. 1999); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577 (N.D. Cal. 1999); *In re Network Assoc., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017; *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998); and *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996); *see also* John F. Grady, *Reasonable Fees: A Suggested Value-Based Approach Analysis for Judges*, 184 F.R.D. 131, 142 (1999).

[63]*See In re Quintus Sec. Litig.*, 201 F.R.D. 475 (N.D. Cal. 2001), *rev'd sub nom. In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002).

[64]FED. R. CIV. P. 23(g)(1)(C)(iii) permits district courts to direct class counsel "to propose terms for attorney fees and nontaxable costs." *See In re Copper Mountain Sec. Litig.*, 305 F. Supp. 2d 1124, 1129 (N.D. Cal. 2004) (Walker, J.) (noting changes to federal class action rule cast doubt on Ninth Circuit's rejection of competitive bidding).

reviewing and commenting on proposed settlements could also help expose and prevent collusive deals. In recent years, the FTC has launched an aggressive and admirable effort in this area.[65] For example, in *In re First Databank* the FTC successfully challenged the fees sought in a consumer class suit that largely relied on an earlier enforcement action brought by the Commission.[66] In *Databank*, the FTC obtained agreement on $16 million in consumer redress as part of an antitrust enforcement action. Soon after, a private class action settlement added $8 million to the consumer fund, for a total of $24 million. Despite this marginal increase, class counsel sought fees of 30% of the *entire* $24 million fund, or more than 90% of the additional value added by the private action. Based largely on the FTC's objection, the district court reduced the fee award to 30% of the $8 million dollar additional recovery noting that the settlement was reached after the FTC "had already expended substantial efforts to establish" liability.[67]

Other agencies – including the Justice Department, the SEC, and the state attorneys' general – should be encouraged to follow the instructive example of the FTC and begin their own oversight of class action settlements purporting to piggy-back on their own investigations. Indeed, the Class

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[65]*See* Thomas B. Leary, *The FTC and Class Action*, June 26, 2003, *available at* http://www.ftc.gov/speeches/leary/classactionsummit.htm; Remarks of R. Ted Cruz Before the Antitrust Section of the American Bar Association, Dec. 12, 2002, *available at* http://www.ftc.gov/speeches/other/tcamicus.

[66]209 F. Supp. 2d 96 (D.D.C. 2002).

[67]*Id*. at 101.

Action Fairness Act of 2005 imposes just such a reporting requirement for class action settlements *not* involving securities fraud. Under the Act, each settling defendant must notify both the Attorney General of the United States and the appropriate state officials no later than 10 days after any proposed class action settlement.[68] The Act further states that final approval of a settlement may not issue earlier than 90 days after notice to the governmental officials. It is unclear why securities class actions should be exempted from these requirements — especially given the federal government's strong and historic interest in the regulation of the securities industry.

The FTC previously sought to address the notice problem in 2002 in a way that would have helped in the securities context when it proposed an amendment to Rule 23 under which parties to any class action would be required to notify the court of any related actions by government agencies, and to notify the government agencies involved in those actions of the related private class action.[69] The advisory committee, however, somewhat astonishingly declined to adopt these suggestions. Until the committee or Congress recognizes the value of a hard, independent look at securities class action settlements and reverses course, no procedure exists to ensure the

[68]Class Action Fairness Act of 2005, Pub. L. 109-2, § 3.

[69]Federal Trade Commission, *Comments on Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure* (Feb. 15, 2002).

timely participation of interested governmental enforcement agencies.

6. Don't Duplicate Governmental Efforts

While agency oversight may help prevent collusive settlements, one well-intentioned feature of the Sarbanes-Oxley bill actually risks double recoveries. It is well known that actions by a federal regulatory agency frequently trigger parallel private class actions. Indeed, since the passage of the PSLRA in 1995, over 20% of all securities fraud actions have followed an SEC litigation release or administrative proceeding.[70] And more than half of recent SEC enforcement actions have produced parallel private civil actions.[71] The prevalence of these follow-on private actions is significant because Congress has recently granted the SEC the power to redress consumer harms directly. Section 308 of the Sarbanes-Oxley Act[72] allows the SEC to reimburse investors by depositing civil penalties for securities or accounting violations into a victim's compensation fund. And in the last couple years the SEC has exercised this authority with zeal, collecting hundreds of millions of dollars in compensation for affected shareholders.[73]

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[70] *See* Simmons & Ryan, *Post-Reform Study*, *supra* note 33.

[71] James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Study* 53 DUKE L.J. 737, 777 n.113 (2003).

[72] 15 U.S.C. § 7246.

[73] *See* Paul F. Roye, Director, Division of Investment Management, U.S. Securities and Exchange Commission, Keynote Address at the 22nd Annual Advanced ALI-ABA Conference on Life Insurance Company Products (Nov. 4, 2004), *available at* http:// www.securitiesmosaic.com

Where the SEC exercises this authority, therefore, a parallel shareholder class action may be simply unnecessary to deter the alleged wrongdoing and adequately compensate the investors.

To date, however, the SEC, Congress, and the courts have not given this question the attention it deserves and parallel class actions continue even in cases where the SEC has already acted to compensate victims. Permitting plaintiffs to receive damages through private civil suits in addition to disgorgement awards risks overcompensating both class investors and plaintiffs' attorneys who fail to account for the government's efforts in their fee requests. At a minimum, courts should insist that disgorgement awards be treated separately from any class action settlement to prevent plaintiffs' lawyers from "free riding" on the good will achieved by the government's enforcement actions.

7. Encourage Meaningful Oversight by Litigants

In the PSLRA, Congress sought to reign in non-meritorious suits by expressing a strong preference for having institutional investors appointed as class representatives.[74] Congress, not unreasonably, believed that

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(noting that as of 2004 the SEC had "brought 51 enforcement cases related to the mutual fund scandals and levied $900 million in disgorgement penalties").

[74]The PSLRA requires courts to appoint as "lead plaintiff" the class member "that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i), and creates a rebuttable presumption that the most adequate plaintiff is the party with the "largest financial interest in the relief sought by the class." *Id*. § 78u-4(a)(3)(B)(iii)(I)(bb).

"increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions," rather than leaving the responsibility to small individual holders, many of which were often repeat players closely aligned with specific plaintiff law firms.[75] Congress may have failed, however, to consider the magnitude of the task it asked institutional investors to assume. Although some are suitable candidates to lead class action litigation, many lack the staff, resources, funding, and experience to monitor independently the suits brought on their behalf.

For example, the trustees of the Louisiana Teachers' Retirement System recently brought a derivative suit against the majority shareholders of Regal Entertainment to stop the issuance of a $750 million dividend, despite holding only a $30,000 investment in the company. The court denied the Louisiana Teachers' application for a preliminary injunction, finding "'not a shred of evidence' that minority shareholder would be hurt," and the Teachers subsequently dropped their claims.[76] Notably, the court found the claims so doubtful, that it asked plaintiffs' counsel "[t]o what extent has the plaintiff thought about the claims they're asserting and have

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[75]H.R. Conf. Rep. No. 104-369, at 34, *reprinted in* 1995 U.S.C.C.A.N. at 733.

[76]Editorial, *Pension Fund Shenanigans*, WALL ST. J., Aug. 20, 2004, at A12 ("[W]hat we have here is a public fund whose risky practices have cost the taxpayer billions throwing mud at a profitable company's management . . . a company . . . that was one of the fund's better-returning investments."). By way of full disclosure, the authors represented Regal in this suit.

they really studied them?"[77] As it turned out, the Louisiana Teachers' Retirement System has been involved in 60 class action lawsuits in the last eight years.[78] Citing this substantial docket, one district court judge in the Eastern District of Tennessee declined to allow the Teachers to serve as a lead plaintiff in one of these class actions, concluding that "the Court cannot help but conclude the Louisiana Funds' resources are being spread too thin."[79]

To help institutional investors from becoming spread too thin, and the concomitant loss of meaningful oversight promised by the PSLRA, courts might consider greater enforcement of the PSLRA's "professional plaintiff" rule to bar actions repeating allegations already considered and rejected in a prior suit. The PSLRA prohibits a party from serving as lead plaintiff in more than five securities class actions brought during a three-year period.[80] Some courts have disregarded this rule with respect to institutional investors, relying on commentary contained in the Conference Report accompanying the PSLRA.[81] As other courts have properly noted, however,

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[77]Transcript of Oral Argument Before the Hon. William B. Chandler, *Teachers' Retirement Sys. of La. v. Regal Entm't Group*, No. 444-N, at 156 (Del. Ch. June 1, 2004).

[78]*Pension Fund Shenanigans, supra* note 76.

[79]*In re Unumprovident Corp. Secs. Litig.*, MDL Case No. 03-1552, No. 03-CV-049 (E.D. Tenn. Nov. 6, 2003).

[80]15 U.S.C. § 78u-4(a)(3)(B)(vi).

[81]*See* H.R. Conf. Rep. No. 104-369, at 35 (stating that "[i]nstitutional investors . . . may need to exceed this limitation and do not represent the type of professional plaintiff this legislation

the PSLRA's plain language "contains no express blanket exception for institutional investors" and automatically excusing institutional investors from the rule would undermine rather than further the PSLRA's purposes.[82] Institutional investors themselves might also consider the creation of neutral litigation oversight committees to help them review solicitations made by plaintiffs' lawyers to ensure that the cases brought are meritorious, that fee agreements are fair and reasonable, and that any settlement benefits shareholders overall and does not, for example, simply result in a transfer of assets from current shareholders (very often including institutional investors themselves) to former shareholders.

CONCLUSION

Congress intended the PSLRA to reform the abuses that dominated securities fraud litigation in the early 1990s. Despite the best of legislative intentions, virtually all securities fraud claims that survive initial motions practice will be settled. With little prospect that their claims will be fully tested by the adversarial process, plaintiffs' attorneys have a strong economic incentive to bring ever-more securities fraud class actions without regard to the underlying merit of the suit, or the ultimate recovery to the

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seeks to restrict").

[82] *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 443-44 (S.D. Tex. 2002); *see also In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 821 (N.D. Ohio 1999).

class. Faced with such daunting prospects, businesses are frequently forced to comply with all but the most outrageous of settlement demands. As a result, new corporate investments are deterred, the efficiency of the capital markets is reduced, and the competitiveness of the American economy declines. And class members, who often have absolutely no interest in the suit from filing to final judgment, literally wind up paying the bills.

The reforms attempted so far are steps in the right direction. But none directly addresses the underlying economic incentives that drive the filing of frivolous securities fraud class actions in the first instance. Meaningful reforms must move beyond procedure to address these incentives directly. Enforcing the PSLRA's loss causation requirement will empower judges to dismiss securities fraud suits stemming from mere market downturns. Utilizing a competitive bidding process for the selection of class counsel will help address the de facto cartel responsible for the vast majority of securities class suits. Requiring attorneys' fees to be paid from a separate fee fund will increase adversarial challenges to exorbitant requests, and reviving the loadstar method will provide a tool to guard against overbilling. And no fees should be awarded for suits that do not provide meaningful benefits to investors after an opportunity for review by the appropriate regulatory agency. While no single reform can guarantee that securities fraud class action settlements will always be fair and reasonable,

these proposals are just a few possible steps in the direction of helping to secure the full promise of the securities class action mechanism as the vehicle for consumer protection envisioned by Kalven and Rosenfield nearly six decades ago.

HIGH COURT CLERKS AND APPELLATE LAWYERS DECRY VANITY FAIR ARTICLE

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Court Watch

Letters

Response of Former Supreme Court Law Clerks and Supreme Court Practitioners to The Path to Florida, appearing in the October 2004 issue of Vanity Fair.

According to an article recently published in Vanity Fair magazine (David Margolick, Evgenia Peretz, and Michael Shnayerson, The Path to Florida, Vanity Fair, Oct. 2004, at 310), a number of former U.S. Supreme Court law clerks, who served during the Court's October 2000 term in which Bush v. Palm Beach County and Bush v. Gore were decided, intentionally disclosed to a reporter confidential information about the Court's internal deliberations in those cases. If true, these breaches of each clerk's duty of confidentiality to his or her appointing justice -- and to the Court as an institution -- cannot be excused as acts of courage or something the clerks were honor-bound to do. Contributors, Vanity Fair, at 102. To the contrary, this is conduct unbecoming any attorney or legal adviser working in a position of trust. Furthermore, it is behavior that violates the Code of Conduct to which all Supreme Court clerks, as the article itself acknowledges, agree to be bound.

Although the signatories below have differing views on the merits of the Supreme Court's decisions in the election cases of 2000, they are in their belief that it is inappropriate for a Supreme Court clerk to disclose confidential information, received in the course of the law clerk's duties, pertaining to the work of the Court. Personal disagreement with the substance of a decision of the Court (including the decision to grant a writ of certiorari) does not give any law

clerk license to breach his or her duty of confidentiality or justif[y] breaking an obligation [he or she would] otherwise honor.The Path to Florida, at 320.

Scott Ballenger, October Term 1997

Jan Baran

William P. Barr

John E. Barry, OT 91

Bradford A. Berenson, OT 92

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Stephanos Bibas, OT 97

Jeffrey Bleich, OT 90

Chris Bowers, OT 98

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Michael Carvin

Dan Collins, OT 91

Charles J. Cooper, OT 78

Douglas R. Cox

R. Ted Cruz, OT 96

Lee DeJulius, OT 03

Shay Dvoretzky, OT 01

Steven A. Engel, OT 01

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Peter D. Isakoff, OT 79

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Eric J. Kadel Jr., OT 98

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Charles R.A. Morse

Adam K. Mortara, OT 02

Kristin Linsley Myles, OT 89

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Patrick L. O'Daniel, OT 98

Michael E. O'Neill, OT 96

Theodore B. Olson

Mark A. Perry, OT 93

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Craig Primis, OT 95

Bert W. Rein, OT 66

Neil Richards, OT 98

Ellen Richey, OT 79

Nicholas Quinn Rosenkranz, OT 01

J.C. Rozendaal, OT 98

Peter B. Rutledge, OT 98

Margaret A. Ryan, OT 01

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Peter R. Taft, OT 64

Margaret Tahyer, OT 88

Richard Taranto, OT 83

Richard Thornburgh

John Thorne

Igor Timofeyev, OT 02

Emin Toro, OT 02

Helgi C. Walker, OT 95

Henry Weissmann, OT 89

Richard I. Werder, OT 83

Christopher S. Yoo, OT 97

Editor's note: The OT listing next to many of the names above refers to the Supreme Court October Term in which they served as law clerks. Names with no OT listed were not Supreme Court clerks. An article about the statement and the Vanity Fair article it refers to appears on Page 11.

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OVER 100 YEARS OF JOURNALISTIC EXCELLENCE

Justice White and judicial excellence

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NEIL GORSUCH, Special to UPI

WASHINGTON, May 3 (UPI) --

WASHINGTON, May 3 (UPI) -- In eulogizing Justice Byron White, Jack Miller, himself a lion of the bar, got it right. Quoting Shakespeare's Hamlet, Miller told the hundreds assembled that we "shall not look upon his like again."

Miller was right in two senses.

First and most obviously, Justice White accomplished more in one life than most could in three. He grew up on a sugar beet farm in the smallest of towns in Colorado, but finished first in his college class. At the same time, he led the NCAA in points scored -- 122 -- and all-purpose yards -- rushing, receiving, pass interceptions, as well as punt and kickoff returns.

Justice White set collegiate records that would stand over 50 years. He was the highest paid player of his day in the National Football League -- $15,000 a season in those days. But he was also a Rhodes scholar, a war hero, top of his class at Yale Law School, and a leading private practitioner.

As Attorney General Robert F. Kennedy's deputy at the Justice Department, Justice White defended the desegregation efforts of the "freedom riders" in Alabama. And then, of course, he served 31 years on the United States Supreme Court. As President John F. Kennedy remarked when announcing his nomination, Justice White excelled in everything he attempted.

There is another sense in which we shall not look upon the like of Justice White again. He was confirmed less than two weeks after his nomination; his hearing lasted 90 minutes.

He was selected not because of partisan ideology, but because of his integrity, accomplishment, and life experience. Justice White's subsequent tenure on the bench was characterized by an utter indifference to partisan agendas. He voted against Miranda warnings, against extending the First Amendment in novel ways to protect the media against meritorious libel charges, and against Roe vs. Wade.

At the same time, he voted for one-man, one-vote reforms, insisted on school desegregation even if it required raising taxes and busing, and supported Congress's use of racial preferences to remedy past discrimination.

If one theme ran through Justice White's jurisprudence, it was a confidence in the people's elected representatives, rather than the unelected judiciary, to experiment and solve society's problems, so long as the procedures used were fair and the opportunity to participate was open to all. But in each and every area, Justice White sought, as he put it often, to "decide the case," not to advance any ideology.

Despite his independence (or maybe because of it), many on both the left and right grudgingly came to respect the justice that they could never take for granted and whose vote they had to win in each and every case with their best legal arguments.

The judicial confirmation process today bears no resemblance to 1962.

Today, there are too many who are concerned less with promoting the best public servants and more with enforcing litmus tests and locating unknown "stealth candidates" who are perceived as likely to advance favored political causes once on the bench.

Politicians and pressure groups on both sides declare that they will not support nominees unless they hew to their own partisan creeds. When a favored candidate is voted down for lack of sufficient political sympathy to those in control, grudges are held for years, and retaliation is guaranteed.

Whatever else might be said about the process today, excellence plainly is no longer the dispositive virtue, as it was to President Kennedy.

The facts are undeniable. Today, half of the seats on the Sixth Circuit remain unfilled because of partisan bickering over ideological "control" of that circuit. The D.C. Circuit operates at just two-thirds strength. Almost 20 percent of the seats on the courts of appeals and nearly 100 judgeships nationwide are vacant. The administrative office of the U.S. Courts has declared 32 judicial vacancy "emergencies" in courts where filings are in excess of 600 cases per district judge or 700 cases per appellate panel.

Meanwhile, some of the most impressive judicial nominees are grossly mistreated. Take Merrick Garland and John Roberts, two appointees to the U.S. Court of Appeals in Washington, D.C. Both were Supreme Court clerks. Both served with distinction at the Department of Justice. Both are widely considered to be among the finest lawyers of their generation. Garland, a Clinton appointee, was actively promoted by Republican Sen. Orrin Hatch of Utah. Roberts, a Bush nominee, has the backing of Seth Waxman, President Bill Clinton's solicitor general. But neither Garland nor Roberts has chosen to live his life as a shirker; both have litigated controversial cases involving "hot-button" issues.

As a result, Garland was left waiting for 18 months before being confirmed over the opposition of 23 senators. Roberts, nominated almost a year ago, still waits for a hearing -- and sees no end to the waiting in sight. In fact, this is the second time around for Roberts: he was left hanging without a vote by the Senate at the end of the first Bush administration. So much for promoting excellence in today's confirmation process.

Justice White's passing is a deep loss. He lived a full life in service of his country and the rule of law. When he retired in 1993, he commented that it was time for others "to have a like experience." It would be a beneficent thing if Justice White's passing served as a wake-up call to both political parties that their responsibility in picking judges is to help the nation find objectively excellent public servants, not to turn the process into an ideological food fight where the most able are mistreated while trimmers and the mediocre are rewarded.

Responsibility for the current morass does not rest with any one party or group; ample blame can be doled out all around. But litmus tests, grudge matches and payback are not the ways forward. Excellence is.

As Lloyd Cutler, White House counsel to President Clinton, explained in testimony to the Senate Judiciary Committee last year, "to make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken the public confidence in the courts."

Though we will never see the like of Justice White again, here's hoping we again see a time in which the excellence he so richly embodied serves as the essential standard for picking and confirming our nation's judges.

(Neil Gorsuch is a litigation partner at Kellogg, Huber, Hansen, Todd & Evans in Washington, and a former law clerk to White.)

THE RIGHT TO ASSISTED SUICIDE AND EUTHANASIA

NEIL M. GORSUCH*

* Columbia, B.A. 1988; Harvard, J.D. 1991; Marshall Scholar, University College, Oxford, 1992-1995; Partner, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. I wish to thank John Finnis, Christian Mammen, Bernadette Murphy, Jessica Bartlow, and especially Louise Gorsuch.

I. INTRODUCTION

Whether to permit assisted suicide and euthanasia is among the most contentious legal and public policy questions in America today. The American public consciousness became galvanized on June 4, 1990, with the news that Dr. Jack Kevorkian had helped Janet Adkins, a fifty-four-year-old Alzheimer's patient, take her life.[1] It was later disclosed that Dr. Kevorkian had neither taken the medical history nor made an examination of Ms. Adkins, and that he had never consulted Ms. Adkins's primary care physician.[2] Dr. Kevorkian had

1. *See* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).

2. *See* Isabel Wilkerson, *Prosecutors Seek to Ban Doctor's Suicide Device*, N.Y. TIMES, Jan. 5, 1991, at A6. Dr. Murray Raskind, one of the physicians who cared for Ms. Adkins in the early stages of her disease, later stated that she was physically fit and in good spirits at the time of her death. Dr. Raskind added in

simply agreed to meet Ms. Adkins in a Volkswagen van he had outfitted with a "suicide machine" consisting of three chemical solutions fed into an intravenous line needle. It took Dr. Kevorkian several attempts to insert the needle into Ms. Adkins, but he eventually succeeded.[3] Ms. Adkins then pressed a lever releasing lethal drugs into her body.

While the media often uses the term "assisted suicide" to describe Dr. Kevorkian's practices, it is a misnomer. Dr. Kevorkian seeks to legalize not only the practice of aiding another in taking his or her life (assisting suicide), but also the practice of intentionally killing another person motivated by feelings of compassion or mercy (euthanasia). Indeed, in 1999 Dr. Kevorkian performed an act of euthanasia for a nationwide television audience on *60 Minutes*, with the express desire of provoking debate over legalizing that practice too. (He was later convicted of second-degree murder after a trial in which he chose to act as his own counsel).[4]

Since Ms. Adkins's death made national headlines, Dr. Kevorkian claims to have assisted more than 130 suicides.[5] While Dr. Kevorkian is perhaps the most notorious proponent of assisted suicide and euthanasia, he is hardly without allies. Derek Humphry, founder of The Hemlock Society, a group devoted to promoting the legalization of euthanasia, has praised Dr. Kevorkian for "breaking the medical taboo on euthanasia."[6] The American Civil Liberties Union has taken up his legal defense.[7]

In 1984, the Netherlands became the first country in the world to give legal sanction to some forms of assisting suicide and euthanasia. The Dutch Supreme Court declared that although killing a patient remains a criminally punishable offense under the nation's Penal Code, physicians can claim an "emergency defense" under certain circumstances.[8]

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court testimony that Ms. Adkins was probably not mentally competent at the time of her death. *See id.*

3. *See* Pamela Warrick, *Suicide's Partner*, L.A. TIMES, Dec. 6, 1992, at E1.

4. *See* Brian Murphy, *Kevorkian Silent, Starts Prison Term*, DETROIT FREE PRESS, (Apr. 14, 1999) <http://www.freep.com/news/xtra2/qkevo14.htm>.

5. *See id.*

6. Derek Humphry, *Law Reform*, 20 OHIO N.U. L. REV. 729, 731 (1993).

7. *See* Charlie Cain, *Key Events in the History of Michigan's Debate Over Abortion and Assisted Suicide*, DETROIT NEWS, Mar. 2, 1997, at A8.

8. As developed by Dutch courts, the emergency defense applies when (a) a patient requests assistance freely and voluntarily; (b) the request is well-

In a 1991 issue of *The New England Journal of Medicine*, Dr. Timothy Quill, a University of Rochester professor, defended his decision to prescribe barbiturates to a cancer patient even though she admitted that she might use them at some indefinite time in the future to kill herself.[9] A New York grand jury was convened but declined to bring an indictment for assisting suicide. The State's Board for Professional Medical Misconduct considered pressing disciplinary charges but declined, reasoning that Dr. Quill had written a prescription for drugs that had a legitimate medical use for his patient (as a sleeping aid for her insomnia) and that he could not have definitively known she would use the medication to kill herself. Ruling, in essence, that the evidence was too equivocal to conclude that Dr. Quill intended to cause the death of his patient, charges were dropped.[10]

In 1992, a gynecology resident submitted an anonymous article to the *Journal of the American Medical Association* that sparked a long-running debate in the most prominent American medical journals. Entitled *It's Over Debbie*, the article described how the author administered a lethal injection to a terminal cancer patient (an act of euthanasia, not assisted suicide) that he had never met before after her demand to "get this over with."[11]

After its publication in the early 1990s, The Hemlock Society's book, *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying*,[12] rocketed to the New York Times' best-seller list. The book provides step-by-step instructions (in easy to read large print) on various methods of

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considered, durable, and persistent; (c) the patient is experiencing intolerable suffering with no prospect of improvement; (d) other alternatives to alleviate the patient's suffering have been considered and found wanting; (e) any act of euthanasia is performed (only) by a physician; and (f) the physician has consulted an independent colleague. *See* John Keown, *Some Reflections on Euthanasia in the Netherlands*, *in* EUTHANASIA, CLINICAL PRACTICE AND THE LAW 197 (Luke Gormally, ed. 1994) [hereinafter *Some Reflections*].

9. *See* Timothy Quill, *A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691-94 (1991).

10. *See* The New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (May 1994) (visited June 4, 2000) <http://www.health.state.ny.us/nysdoh/provider/death.htm> [hereinafter *New York Task Force*].

11. Anonymous, *It's Over Debbie*, 259 JAMA 272 (1988).

12. DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING (1991).

"self-deliverance."[13] On January 18, 2000, its sales on Amazon.com ranked 4,347 among all titles (very high indeed).[14] Chapter titles range from "Self-Deliverance by Plastic Bag" (a recommended method) to "Bizarre Ways to Die" (discussing the relative merits of guns, ropes, and firecrackers) and "Going Together" (ideas for double suicides).[15] A *New England Journal of Medicine* study found that instances of asphyxiation by plastic bag, a method highly touted in *Final Exit*, measurably increased after the book's publication.[16]

The growing debate over assisted suicide and euthanasia has produced increasing political and legal activism. In 1988, an early voter referendum campaign in California aimed at toppling the State's law banning assisted suicide failed to secure a spot on the ballot after collecting "only 129,776 valid signatures of the required 372,178."[17] Another effort four years later not only secured a spot on the ballot, but also garnered 48 percent of the vote. A similar 1991 effort in Washington State obtained 46.4 percent of the vote.[18] By 1994, the referendum campaigns bore their first fruit when Oregon voters narrowly approved the legalization of assisted suicide, 51 percent to 49 percent, though subsequent legal challenges delayed implementation for three years.[19]

Since 1992, bills have been introduced to legalize assisted suicide or euthanasia in various state legislatures, including

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13. *See id.*

14. *See* Amazon.com (visited Jan. 18, 2000) <http://www.amazon.com/exec/obidos/ASIN/0440507855/o/qid=948234548/sr=8-1/002-3669652-9325855>.

15. HUMPHRY, *supra* note 12, at 98-99, 51-57, 100-02.

16. *See* Peter M. Marzuk et al., *Increase in Suicide by Asphyxiation in New York City After the Publication of* Final Exit, 329 NEW ENG. J. MED. 1508, 1508-10 (1993). Though the book was billed as providing "self-deliverance" information for the terminally ill, the study found that of the fifteen suicides who had probably been exposed to the book during the study period, most were not terminally ill and fully six suffered from no illness whatsoever. *See id.* at 1509.

17. Myrna Oliver, *Controlling the End: Right-to-Die Laws Take on New Life*, L.A. TIMES, May 10, 1988, at 1, correction appended; *see also* Allan Parachini, *Bringing Euthanasia to the Ballot Box*, L.A. TIMES, Apr. 10, 1987, at 1.

18. *See* Jan Gross, *The 1991 Election: Euthanasia: Voters Turn Down Mercy Killing Idea*, N.Y. TIMES, Nov. 7, 1991, at B16; *see also* Sandi Dolbee, *Right to Die Measure Rejected by State Voters*, SAN DIEGO UNION-TRIB., Nov. 4, 1992, at A3.

19. *See* Spencer Heinz, *Assisted Suicide: Advocates Weigh In*, OREGONIAN, Dec. 9, 1994, at A1. Implementation did not occur until October 27, 1997. *See* Oregon Health Division, *Oregon's Death With Dignity Act: The First Year's Experience* (visited Sept. 15, 1999) <http://www.ohd.hr.state.or.us/cdpe/chs/pas/ar-intro.htm>.

Alaska, Arizona, Colorado, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Mexico, Rhode Island, Vermont, and Washington.[20] All have failed—so far. Some states have actually strengthened or reaffirmed their laws prohibiting assisted suicide. Dr. Kevorkian's home State of Michigan is an example.[21] In New York, a blue-ribbon panel was convened to consider revamping or repealing its laws banning assisting suicide, but the panel ultimately rejected any change by a unanimous vote.[22] Maryland passed a statute for the first time codifying that state's common law ban on assisted suicide.[23] In the last four years, Iowa, Oklahoma, and Virginia also strengthened their laws against the practice.[24] Congress has gotten into the net, too; it is currently considering legislation that would effectively overrule Oregon's referendum permitting assistance in suicide.[25]

Perhaps frustrated by the results of their early referendum and legislative efforts, in the mid-1990s euthanasia proponents turned to the courts in Washington and New York, seeking to have laws against assisting suicide declared unconstitutional.[26] Wildly disparate lower court rulings resulted. One federal district court found a constitutional right to assisted suicide; another found that no such right exists.[27] The appellate courts reviewing these decisions produced even more fractured opinions.[28] Eventually the cases culminated in argument before

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20. *See* Julia Pugliese, *Don't Ask—Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1319 (1993); AMERICAN MEDICAL NEWS, May 1, 1995, at 5; *Catholic Groups Effectively Kill Bill to Legalize Assisted Euthanasia*, PROVIDENCE J., May 8, 1995, at 1C.

21. *See* NBC News, *Doctor-Assisted Suicide, State by State* (visited June 4, 2000) <http://www.msnbc.com/modules/statebystate/state.asp?state=Michigan&ST=MI&2w=no#marker>.

22. *See New York Task Force*, *supra* note 10.

23. *See Doctor-Assisted Suicide—A Guide to WEB Sites and the Literature* (visited June 4, 1999) <http://web.lwc.edu/administrative/library/suic.htm>.

24. *See* Hemlock Society, *Physician Assistance in Dying: Legislation by State*, (visited June 3, 2000) <http://www.hemlock.org/states_12.html>; *see generally* Marzuk, *supra* note 16.

25. *See* Hemlock Society, *supra* note 24.

26. Dr. Kevorkian also filed a losing state court challenge to the Michigan law banning assisted suicide. *See* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).

27. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994) (finding constitutional right); Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994) (rejecting constitutional right).

28. *See* Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995),

the United States Supreme Court. The Court's 9-0 decisions upheld the Washington and New York laws banning assisted suicide and were hailed as a major victory for assisted suicide opponents.[29] Few noticed at the time, however, that critical concurring Justices viewed the cases as raising only *facial* challenges to laws against assisting suicide and reserved the right to consider in later cases whether those laws are unconstitutional *as applied* to terminally ill adults who wish to die.[30] Thus, far from definitively resolving the issue, the Court's decisions only assure that the coming decade will witness even more debate over assisted suicide and euthanasia than the last.

Part II of this Article discusses the Washington and New York cases. These cases identify the turf where scholars, courts, and legislatures will fight future battles over assisted suicide and euthanasia. Specifically, they suggest that debate will focus on four issues: history, fairness, autonomy, and utility. The central questions will likely be whether historical precedent supports legalization; whether concerns of equal protection or fairness dictate that, if we permit patients to refuse life-sustaining care like food and water, we must also allow assisted suicide and euthanasia; whether respect for personal autonomy and self-determination compels legalization of these other practices; and whether legalization represents the solution that would provide the greatest good for the greatest number, even if some people might be harmed or offended.

With that background, the Article then discusses in turn each of these questions. Part III reviews the legal history of assisted suicide and euthanasia and concludes that little historical antecedent supports treating them as "rights." Part IV argues that many efforts to distinguish assisted suicide and euthanasia from the refusal of life-sustaining care are unsound but that at least one rational distinction does exist. As a result, principles of fairness and equal treatment do not require legalization of one practice merely because we allow the other. Part V

vacated en banc, 79 F.3d 790 (9th Cir. 1996); Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996).

29. *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997); *see also* Joan Biskupic, *Unanimous Decision Points to Tradition of Valuing Life*, WASH. POST, June 27, 1997, at A1.

30. *See* discussion *infra* Part II.C.

addresses the claim that principles of autonomy compel legalization. As developed by many moral-legal philosophers, faithful adherence to principles of personal autonomy would compel legalization but also would result in an overbroad euthanasia right few would sanction. Part VI confronts utilitarian arguments for assisted suicide and euthanasia and concludes that they are both practically and analytically flawed.

Having addressed the major moral-legal arguments raised in the assisted suicide and euthanasia debate to date, the Article then argues in Part VII that a basic moral and common law principle has been largely overlooked. Whatever the claims of fairness or autonomy or utility may be, this principle holds that the intentional taking of human life by private persons is always wrong. Part VII also examines the roots of the principle and its application. It argues that the principle explains and makes sense of the current legal distinctions between cases where treatment may be withdrawn and where it may not, where potentially lethal care may be given and where it may not, as well as why assisted suicide and euthanasia should not be permitted. It suggests that, whether the venue is judicial or legislative, the appropriate line society should draw—and today largely does draw—is between acts intended to kill and acts where no such intention exists.

II. THE COURTS

A. *The Washington Due Process Litigation*

1. *The Trial Court*

In 1994, a group of Washington State physicians and patients along with a non-profit organization dedicated to the legalization of euthanasia filed suit in federal district court. They sought a declaratory judgment that the state statute forbidding a physician from knowingly assisting a patient's suicide was unconstitutional.[31]

31. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994). The statute in question read, "[a] person is guilty of promoting a suicide attempt when he knowingly causes or aides another person to attempt suicide." WASH. REV. CODE § 9A.36.060(1) (1994).

Federal District Judge Barbara Rothstein agreed. Under the Fourteenth Amendment, no state may "deprive any person of life, liberty, or property, without due process of law."[32] Despite the procedural tone of the Fourteenth Amendment's language, Judge Rothstein observed that, "through a long line of cases," the Supreme Court has interpreted the Amendment's "liberty" component to contain certain "substantive" rights that the states may not abridge except for the most compelling reasons, including rights pertaining to "marriage, procreation, contraception, family relationships, childrearing, and education."[33]

For guidance, Judge Rothstein turned to the then-most recent major exposition of substantive due process jurisprudence, *Planned Parenthood v. Casey*,[34] in which the Court reaffirmed the right to abortion. Judge Rothstein observed that, while discussing abortion, the three-justice plurality in *Casey* suggested that matters

> involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of the liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[35]

Judge Rothstein found this reasoning "highly instructive."[36] "Like the abortion decision, the decision of a terminally ill person to end his or her life involves the most intimate and personal choices a person may make in a lifetime and constitutes a choice central to personal dignity and autonomy."[37]

Judge Rothstein also found instructive the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*.[38] There, the Court assumed without deciding that the liberty component of the Fourteenth Amendment embraces the right of a competent adult to refuse life-sustaining medical

32. *Compassion in Dying*, 850 F. Supp. at 1459 (citing U.S. CONST. amend. XIV).
33. *Id.* at 1459 (citing Planned Parenthood v. Casey, 505 U.S. 833, 851(1992)).
34. 505 U.S. 833 (1992).
35. *Id.* at 851.
36. *Compassion in Dying*, 850 F. Supp. at 1459.
37. *Id.* at 1459-60 (internal citations omitted).
38. 497 U.S. 261 (1990).

treatment.[39] From this apparent right, Judge Rothstein posed the question whether there is "a difference for purposes of finding a Fourteenth Amendment liberty interest between refusal of unwanted treatment which will result in death and committing physician-assisted suicide in the final stages of life."[40] Judge Rothstein concluded that there is not, because both are "profoundly personal," and at "the heart of personal liberty."[41]

2. *The Ninth Circuit Panel Decision*

A divided panel of the Ninth Circuit reversed.[42] Judge Noonan, a noted Catholic legal thinker before and after ascending to the bench, wrote a stinging decision stressing three points.

First, Judge Noonan argued that *Casey*'s discussion of autonomy was a mere "gloss" on substantive due process jurisprudence, one that was later "implicitly controverted by *Cruzan*."[43] Judge Noonan pointed out that *Cruzan* had relied upon an examination of history and tradition—not abstract conceptions of "personal liberty"—to determine whether a constitutional right exists.[44] Turning to the historical record, Judge Noonan concluded that "in the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction. Unless the federal judiciary is to be a floating constitutional convention, a federal court should not invent a constitutional right unknown to the past."[45]

Second, Judge Noonan suggested that taking *Casey*'s personal liberty "gloss" so seriously would lead to absurd results. If "personal dignity and autonomy" is the touchstone of constitutional analysis, he reasoned, every man and woman in the country must enjoy them.[46] Thus, "[t]he depressed

39. *See id.* at 278 (this right "may be inferred from our prior decisions"); *id.* at 279 ("the logic of the cases . . . would embrace such a liberty interest").
40. *Compassion in Dying*, 850 F. Supp. at 1461.
41. *Id.*
42. *See* Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995).
43. *Id.* at 591.
44. *Id.*
45. *Id.*
46. *Id.*

twenty-one year old, the romantically devastated twenty-eight year old, the alcoholic forty year old who choose suicide are also expressing their views of the existence, meaning, the universe, and life."[47]

Third, Judge Noonan rejected any attempt to analogize refusing medical care and affirmatively seeking assistance in suicide on the grounds that one involves an omission of care and the other an affirmative act: "When you assert a claim that another . . . should help you bring about your death, you ask for more than being let alone. . . . You seek the right to have a second person collaborate in your death."[48]

3. *The En Banc Court*

Two and a half years after the suit was filed, an *en banc* panel of the Ninth Circuit vacated Judge Noonan's decision and affirmed the trial court's judgment by a vote of 8 to 3.[49] The majority opinion was written by Judge Reinhardt, as well known for his expansive view of the Constitution as Judge Noonan is for his conservative views.

The *en banc* court's exhaustive 50-page opinion tracked Judge Rothstein's analysis. It rejected Judge Noonan's assertion that history is "our sole guide" in substantive due process inquiries.[50] Indeed, the Court argued that if history were the only guide, the Supreme Court never would have declared anti-miscegenation laws unlawful in *Loving v. Virginia*[51] because such laws were commonplace at the time the Fourteenth Amendment was adopted.[52] Neither would the Supreme Court have recognized a right to an abortion; more than three-quarters of the states restricted abortions when the Fourteenth Amendment was passed.[53]

Further, the *en banc* panel argued that the historical record concerning suicide itself is "more checkered" than Judge

47. *Id.*
48. *Id.* at 594.
49. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).
50. *Id.* at 805.
51. 388 U.S. 1 (1967).
52. *See Compassion in Dying*, 79 F.3d at 805 (en banc).
53. *See id.* at 806.

Noonan had suggested.[54] Judge Reinhardt pointed to the fact that Socrates and Plato sanctioned suicide under some circumstances, the Stoics glorified it, and Roman law sometimes permitted it.[55] While conceding that assisted suicide was unlawful under English and American common law, Judge Reinhardt stressed that the majority of states has not treated suicide or attempted suicide as criminal since at least the turn of the century.[56]

Turning to *Casey* and *Cruzan*, Judge Reinhardt argued that Judge Rothstein's analysis had been right all along. Basic life decisions are constitutionally protected, and "[l]ike the decision of whether or not to have an abortion, the decision how and when to die is one" of them.[57] In responding to Judge Noonan's assertion that, under this logic, a right to assisted suicide would have to be extended to the desperate or depressed, the *en banc* court argued that the state has a legitimate interest "in preventing anyone, no matter what age, from taking his own life in a fit of desperation, depression, or loneliness or as a result of any other problem, physical or psychological, which can be significantly ameliorated."[58] But, the court stressed, "the state's interest in preserving life, is substantially diminished in the case of terminally ill, competent adults who wish to die."[59] Likewise, the *en banc* court rejected Judge Noonan's proffered act-omission distinction, stating that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognizes a liberty interest in hastening one's own death."[60]

In one critical respect, the *en banc* court went even further than the trial court. Judge Reinhardt virtually admitted that approving an assisted suicide right would necessarily lead to approving a right to euthanasia, though he strained to point

54. *Id.*
55. *See id.* at 807-08.
56. *See id.* at 808-10.
57. *Id.* at 813.
58. *Id.* at 820.
59. *Id.* In so holding, the court at least tacitly left open whether assisted suicide should be available to persons who are merely depressed or suffering other psychological problems that *cannot* be "significantly ameliorated." *Id.*
60. *Id.* at 816.

out that the formal recognition of the latter right would have to await another day:

> We agree that it may be difficult to make a principled distinction between physician-assisted suicide and the provision to terminally ill patients of other forms of life-ending medical assistance, such as the administration of drugs by a physician. . . . The question whether that type of physician conduct may be constitutionally prohibited must be answered directly in future cases, and not in this one. We would be less than candid, however, if we did not acknowledge that for present purposes we view the critical line in right-to-die cases as the one between the voluntary and involuntary termination of an individual's life.[61]

While the Washington litigation progressed through the trial and appellate processes, a similar effort was being waged on the other side of the country.

B. *The New York Equal Protection Litigation*

1. *The Trial Court*

The New York litigation, filed June 20, 1994, was led by Dr. Timothy Quill, author of the *New England Journal of Medicine* article defending his decision to prescribe barbiturates to a terminally ill patient.[62] Like the Washington plaintiffs, Dr. Quill and his fellow physician-plaintiffs challenged New York's law prohibiting the intentional assistance or promotion of suicide.[63] Like the Washington plaintiffs, they contended that New York's law violated the substantive component of the Fourteenth Amendment Due Process Clause.[64]

Chief Judge Griesa of the Southern District disagreed. Judge Griesa rejected any attempt to rely on *Casey*, dismissing its discussion of personal autonomy as "too broad" to ordain the outcome of this case: "The Supreme Court has been careful to explain that the abortion cases, and other related decisions on

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61. *Id.* at 831-32.

62. *See* Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994).

63. *See id.* at 79-80. Section 125.15(3) of the New York penal code provides in pertinent part that "A person is guilty of manslaughter in the second degree when: . . . 3. He intentionally . . . aids another person to commit suicide." Section 120.30 provides that "[a] person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." *Id.* at 80-81.

64. *See id.* at 82-83.

procreation and child rearing, are not intended to lead automatically to the recognition of other fundamental rights on different subjects."[65] Like Judge Noonan, Judge Griesa treated the due process claim as depending upon an examination of history.[66] Again like Judge Noonan, Judge Griesa concluded (with little explanation) that the plaintiffs had failed to prove "that physician assisted suicide, even in the case of terminally ill patients, has any historic recognition as a legal right."[67]

Dr. Quill and his fellow physician-plaintiffs contended that, even if no due process right exists, the Equal Protection Clause of the Fourteenth Amendment renders assisted suicide statues unlawful.[68] Specifically, they noted that under New York statutory law a competent person may refuse medical treatment—even if doing so certainly will result in death.[69] To treat like persons alike, they argued, assisted suicide must also be permitted.[70] "To certain ways of thinking, there may appear to be little difference between refusing treatment in the case of a terminally ill person and taking a dose of medication which leads to death."[71]

In response, Judge Griesa held that New York State needed to present only a "reasonable and rational" basis for the distinction in its law, nothing more.[72] He found such a distinction exists on the grounds that a patient refusing treatment is merely "allowing nature to take its course" while the act of suicide involves "intentionally using an artificial death-producing device."[73]

2. *The Second Circuit*

The Second Circuit reversed.[74] It did not address the due process theory advanced by Dr. Quill below and adopted by the *en banc* Ninth Circuit court. Instead, it adopted the

65. *Id.* at 83.
66. *See id.*
67. *Id.*
68. *See id.* at 84-85.
69. *See id.*; N.Y. PUB. HEALTH LAW §§ 2960-2980, §§ 2980-2994 (McKinney 1994 & Supp. 1997).
70. *See Quill*, 870 F. Supp. at 84.
71. *Id.*
72. *Id.*
73. *Id.*
74. *See* Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996).

plaintiffs' Equal Protection theory. Rejecting the trial court's natural-artificial distinction, the court argued that

> there is nothing "natural" about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure. . . . It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or the condition from which the patient suffers.[75]

New York responded by proffering another distinction between assisting suicide and refusing treatment, claiming (as Judge Noonan had) that one involves an affirmative act while the other is only an omission. But the Second Circuit rejected this too. "[T]he writing of a prescription to hasten death . . . involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation, and/or dehydration."[76] Quoting Justice Scalia's concurrence in *Cruzan*, the court held that the act-omission distinction is "'irrelevan[t]'" because "'the cause of death in both cases is the suicide's conscious decision to pu[t] an end to his own existence.'"[77]

C. *The Supreme Court*

By mid-1996, the Ninth and Second Circuit cases were ripe for the Supreme Court's review. The Court consolidated the cases and heard argument on January 8, 1997. On June 26, 1997, the Chief Justice delivered two opinions for the Court, overruling both the Ninth and Second Circuits.[78] He was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

While widely portrayed in the media as a conservative Rehnquist Court victory for enemies of euthanasia,[79] the little-reported truth is that any such "victory" may well prove pyrrhic. Largely unnoticed in the Court's fractured opinions is

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75. *Quill*, 80 F.3d at 729.

76. *Id.*

77. *Id.* (citing Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring)).

78. Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).

79. *See* Biskupic, *supra* note 29.

the fact that several Justices believed *Glucksberg* and *Quill* presented only the question whether laws against assisting a suicide are *facially* constitutional, *not* whether they are constitutional *as applied* to any particular class of persons.[80] In their various opinions, moreover, each of these Justices variously hinted, suggested, or at least kept the door open to the possibility that prohibitions against assisting suicide and euthanasia are unconstitutional as applied to competent and terminally ill adults.

1. *The Majority Opinion*

Due Process. The Chief Justice began his opinion for the Court on the substantive due process question by expressing open skepticism about the Ninth's Circuit *en banc* Court's reliance on *Casey* and *Cruzan*'s discussions of personal autonomy: "We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."[81]

Unlike Judge Reinhardt's historical analysis, however, Chief Justice Rehnquist did not consult the views of ancient philosophers. He did not look at Roman law or practice. Instead, he began with English common law experience. Even there, the Chief Justice began and ended his analysis in a single paragraph, summarily concluding that suicide and its assistance were never sanctioned in English common law.[82]

The Chief Justice devoted more attention to American legal history.[83] While conceding Judge Reinhardt's point that the sanctions associated with suicide were eventually repealed by all American jurisdictions, the Chief Justice declined the Ninth Circuit's invitation to read much into that: "[T]hough States moved away from Blackstone's treatment of suicide [as a

80. *See, e.g., Quill*, 521 U.S. at 809 (O'Connor, J., concurring); *id.* at 809-10 (Stevens, J., concurring); *id.* at 750 (Ginsburg, J., concurring). *But see Glucksberg*, 521 U.S. at 735 n.24 (Souter, J., concurring) (arguing that cases pose as-applied, not facial, challenges). A facial challenge to a legislative act is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). By contrast, an as-applied challenge requires the challenger to establish only that the Act is unconstitutional with respect to his or her particular set of facts. *See id.* at n.3.

81. *Glucksberg*, 521 U.S. at 708.

82. *See id.* at 710-11.

83. *See id.* at 712-18.

crime], courts continued to condemn it as a grave public wrong."[84] Of more direct significance, the Chief Justice held, is the fact that American jurisdictions have always treated assisting suicide as a felony.[85] Having found that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it," the Chief Justice "conclude[d] that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[86]

Turning directly to *Cruzan* and *Casey*, the Chief Justice rejected the respondents' claim that the Due Process Clause creates a constitutional guarantee of "self-sovereignty" including all "basic and intimate exercises of personal autonomy."[87] *Cruzan* "was not simply deduced from abstract concepts of personal autonomy."[88] Rather, the Chief Justice saw its result as dictated by a purely historical analysis: "[G]iven the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions."[89]

The Chief Justice brushed aside, too, reliance on supposedly "highly instructive" or "prescriptive" passages in *Casey*: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise."[90]

Equal Protection. The Chief Justice's equal protection analysis was even more succinct than his due process discussion. New York's distinction between refusing life-sustaining medical treatment and suicide, he wrote, survives rational basis review because it "comports with fundamental legal principles of

84. *Id.* at 714.
85. *See id.* at 713-16.
86. *Id.* at 728.
87. *Id.* at 724.
88. *Id.* at 725.
89. *Id.*
90. *Id.* at 727-28 (internal citations omitted).

causation."[91] When a patient refuses treatment, "he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication."[92] While essentially adopting Judge Griesa's natural-unnatural distinction, curiously the Chief Justice nowhere addressed the Second Circuit's argument that inducing death by withdrawal of life-sustaining care is no more "natural" than inducing death by active means.

Instead, the Chief Justice proceeded on, holding that the distinction between refusing care and assisting suicide is further justified on grounds of intent. "The law has long used actors' intent or purposes to distinguish between two acts that may have the same result."[93] For example, the common law of homicide distinguishes "between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life."[94] And, in this case, a physician who withdraws care pursuant to an express patient demand "purposefully intends, or may so intend, only to respect his patient's wishes."[95] By contrast, a doctor assisting a suicide "must necessarily and indubitably, intend primarily that the patient be made dead."[96]

2. *The Concurrences*

The Chief Justice's opinions spoke for the Court only by virtue of Justice O'Connor's fifth vote. Justice O'Connor, however, filed a separate statement joined by Justices Ginsberg and Breyer that substantially limits the precedential effect of the Chief Justice's opinions.[97] Justice O'Connor argued that the only question presented in the cases before the Court was whether the New York and Washington laws that outlaw

91. Vacco v. Quill, 521 U.S. 793, 801 (1997).

92. *Id.*

93. *Id.* at 802 (internal citation omitted).

94. *Id.* (citing Morissette v. United States, 342 U.S. 246, 250 (1952)).

95. *Id.* at 801.

96. *Id.* at 802 (quoting *Assisted Suicide in the United States: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 2d Sess., 369 (1996) (testimony of Dr. Leon R. Kass)).

97. Justice Ginsburg cryptically indicated that she "concurr[ed] in the Court's judgment substantially for the reasons stated in" Justice O'Connor's separate opinion, yet nowhere explained where exactly she differed (or agreed) with Justice O'Connor's (or the Court's) reasoning. *Id.* at 789. Justice Breyer joined Justice O'Connor's opinion "except insofar as it joins the majority." *Id.*

assisting suicide are facially unconstitutional—i.e., invalid in *all* possible applications. On this question, Justice O'Connor conceded that laws against assisting suicide have at least *some* constitutional applications. For instance, to Justice O'Connor, the fear "that a dying patient's request for assistance in ending his or her life would not be truly voluntary justifies" at least some governmental restrictions.[98] But Justice O'Connor expressly left open the possibility that laws against assisting suicide also have some unconstitutional applications and hinted that a dying patient whose request is "truly voluntary" might present just such a case.[99]

Justices Souter and Stevens also filed separate concurrences. Justice Souter focused on attacking the Chief Justice's contention that substantive due process analysis turns on an examination of history or tradition. To him, substantive due process analysis is incapable of "any general formula," except to say perhaps that it should be "like any other instance of judgment dependent on common-law method," with arguments "being more or less persuasive according to the usual canons of critical discourse."[100] In the end, however, Justice Souter concluded that, even using his mode of analysis, states have rational reasons for refusing to permit at least some forms of assisted suicide.[101] However, he also stressed that states are in the process of reconsidering their assisted suicide laws.[102] He strongly suggested that such reconsideration is a good idea and that legalization of assisted suicide in some circumstances should be its result.[103] Indeed, he added that he would not tolerate "legislative foot-dragging" in the area and noted that "[s]ometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims."[104]

Justice Stevens stated openly that he viewed *Glucksberg* and *Quill* as raising only facial challenges. Moreover, he heavily hinted how he would rule in an as-applied challenge limited to

98. *Id.* at 737.
99. *Id.*
100. *Id.* at 769.
101. *See id.* at 782-89.
102. *See id.* at 788.
103. *See id.* at 788-89.
104. *Id.* at 788.

terminally ill adult patients and raised the specter of the Court's decades-long battle over capital punishment through case after case:

> [J]ust as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid.[105]

Justice Stevens went on to argue that, while *Cruzan* and *Casey* are not "prescriptive" of a right to assistance in suicide as Judge Reinhardt had suggested, they "did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death."[106] Lest any doubt remain about how he would rule in an as-applied challenge brought by a competent, terminally ill patient, Justice Stevens added that "[t]he liberty interest at stake in a case like this differs from, *and is stronger than* . . . the common-law right to refuse medical treatment" underlying the *Cruzan* decision.[107]

On the equal protection question, Justice Stevens claimed that the Court's distinction between refusing care and assisting suicide based on intent was "illusory."[108] A doctor discontinuing treatment "could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death—rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes."[109] The "illusory" nature of the distinction is further proved, Justice Stevens submitted, by the fact that the American Medical Association ("AMA") endorses administering pain-killing medication to terminally ill patients even when it results in death: "The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes."[110] This same intent,

105. *Id.* at 741.
106. *Id.* at 745.
107. *Id.* (emphasis added).
108. *See id.* at 750-51.
109. *Id.* at 751.
110. *Id.*

Justice Stevens argued, "may exist when a doctor complies with a patient's request for lethal medication."[111]

While rejecting a distinction based on intent, Justice Stevens concurred in the Court's Equal Protection decision overruling the Second Circuit. He accepted, without discussion, the Court's distinction based on causation.[112] Unfortunately, like the Court, he declined to address the Second Circuit's provocative criticisms of this distinction.

D. *The Consequences of* Glucksberg *and* Quill

The most immediate consequence of the Supreme Court's decision was to return the assisted suicide and euthanasia issue to the states and the political process. A less obvious, but perhaps even more important, consequence is the fact that five votes on the Court appear to be leaning *in favor* of recognizing a constitutional right to assistance in suicide for competent, terminally ill persons suffering severe pain.

Whether the assisted suicide and euthanasia issue is resolved in the legislative or judicial arena, *Glucksberg* and *Quill* make clear that only the opening salvo has been fired in what is likely to be a lengthy war analogous to the fight over capital punishment. They also expose the sort of moral-legal arguments we can expect to hear on both sides of the debate in any legislative chamber or judicial proceeding. Four central issues emerge:

First, there is a division between those who see no historical precedent for permitting assisted suicide and euthanasia and those who question whether history so clearly condemns the practices. The Chief Justice (like Judge Noonan) stands on one side of this debate while Judge Reinhardt is firmly on the other.

Second, there is a difference of opinion over whether principles of fairness (equal protection) require us to permit assisting suicide and euthanasia if we allow patients to refuse life-sustaining medical care. The Second Circuit thought principles of fairness so required. Justice Stevens came close to agreeing with the Second Circuit, disputing any distinction based on intent. The New York trial court disagreed, as did a majority of the (present) Supreme Court.

111. *Id.*
112. *See id.* at 750.

Third, there are those, like Judges Rothstein and Reinhardt and Justice Stevens, who are convinced that the themes of self-determination, personal choice and autonomy underlying *Casey* and *Cruzan* provide grounds for a right to assistance in suicide and euthanasia. Meanwhile, others such as Chief Justice Rehnquist, find such principles completely unavailing.

Finally, many are curious whether society would be bettered or worsened by legalization. Justices O'Connor and Souter expressed open interest in what "experimentation" in the states might "prove" about the utility of assisted suicide and euthanasia.

These four issues represent axes around which debate has so far revolved. Although all four issues emerged in the judicial arena, each will surely be hotly debated in the legislative arena. Is euthanasia antithetical to our Nation's tradition? Is it only fair to legalize assisted suicide and euthanasia as we allow patients to refuse life-sustaining care? Are rights to assistance in suicide and euthanasia essential to personal choice and identity? Would the recognition of these rights do more good or harm for most people? All of these are questions that principled legislators will ask, and they are questions that will reemerge in the next case to reach the Supreme Court. The following several Parts of this Article are devoted to developing potential answers to these questions.

III. ARGUMENTS FROM HISTORY

A. *Which History?*

The relevance of history to the constitutional debate over assisting suicide and euthanasia is the subject of much dispute. Some—such as Chief Justice Rehnquist—see history as critical to any substantive due process analysis. Others—such as Justice Souter—think it bears little or no relevance.[113] Even among those agreeing that history is relevant, methodological disputes quickly arise. Joined by Chief Justice Rehnquist, several years ago Justice Scalia included a controversial

113. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 62 (1981) (questioning reliance on past majorities to give meaning to the Fourteenth Amendment when it was added in the aftermath of the Civil War to protect minority rights).

footnote in his opinion for the Court in *Michael H. v. Gerald D.*,[114] asserting that courts conducting substantive due process inquiries should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[115] In *Glucksberg*, the Court appeared to follow this dictum, focusing only on the narrow question whether history supports a right to assistance in suicide, and eschewing more general historical discussions about autonomy and "self definition."[116]

Justices O'Connor and Kennedy filed a separate statement in *Michael H.* to register their view that the Court had not always examined—and need not always rely on—the most specific level of tradition available.[117] Sometimes, they argued, the Court has legitimately examined history at a more "general" level.[118] Justice Souter seemed to take this tack in the assisted suicide cases, pointing to the fact that individuals have settled rights to refuse unwanted medical care and procure abortions as evidence of a more general tradition permitting "'[e]very human being of adult years and sound mind . . . to determine what shall be done with his own body.'"[119] Similarly, Judge Reinhardt placed stress on the general legal history of suicide rather on the more specific history of assisting suicide and euthanasia.[120]

It is unclear, however, whether Justices O'Connor and Kennedy meant to suggest in *Michael H.* that a court actually may disregard an on-point "specific" tradition in favor of a contrary "general" one. The primary case they cited for support, *Eisenstadt v. Baird*,[121] certainly does not suggest such license. There, relying on prior cases suggesting a general right to "reproductive privacy" for married couples, the Court declared that laws prohibiting the sale of contraception to

114. 491 U.S. 110 (1989).
115. *Id.* at 127 n.6.
116. *Glucksberg*, 521 U.S. 702, 710-19 (1997).
117. *See* 491 U.S. at 132.
118. *See id.*
119. *Glucksberg*, 521 U.S. at 777 (quoting Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (1914)).
120. *See* Compassion in Dying v. Washington, 79 F.3d 790, 806-10 (9th Cir. 1996) (en banc).
121. 405 U.S. 438 (1972).

unmarried persons violated the Due Process Clause.[122] Yet, at the time *Eisenstadt* was decided, a long-standing and more specific tradition existed in many states outlawing the sale of contraceptives to unmarried persons.[123] Justices O'Connor and Kennedy neglected to mention that the Court in *Eisenstadt* did not consider or even identify this more specific tradition;[124] the fact that *Eisenstadt* overlooked a "specific" tradition in favor of a more general one does not offer much of a reasoned basis for sanctioning the practice. Neither did Justices O'Connor and Kennedy in *Michael H.* (or Justice Souter in *Glucksberg*) provide any reason why more general traditions should be permitted to trump more on-point traditions. Besides, *Eisenstadt*'s result itself can be defended fully without resort to any contortions concerning historical "levels." Indeed, the case is best understood not as a substantive due process case at all, but as an equal protection case simply requiring equal access to contraceptives for married and unmarried persons alike.

Just as scholars and decisionmakers disagree over the level of historical abstraction to apply, they also disagree on what history is relevant. In due process cases, the Supreme Court has frequently looked not only to this Nation's history, but also to English common law. But why stop there? Why not resort to Roman or Greek precedent? Chief Justice Burger did in his concurrence in *Bowers v. Hardwick*.[125] So did Justice Blackmun in his opinion for the Court in *Roe v. Wade*.[126] If Ancient Greece and Rome are relevant, why not survey other, non-Western traditions? Even if agreement can be reached on how far back in history to look and whose history is relevant to the constitutional analysis, the question remains how far forward to go. When interpreting the Fourteenth Amendment, should the analysis include only pre-ratification history, or more recent history as well? In *Glucksberg*, the Court focused primarily on United States history but strayed briefly into the history of English common law,[127] while Judge Reinhardt

122. *Id.* at 453-55.
123. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).
124. *See id.*
125. 478 U.S. 186, 196-97 (1986).
126. 410 U.S. 113, 130 (1973).
127. *See* 521 U.S. 702, 708-15 (1997).

devoted pages of the federal reports to ancient suicide practices.[128]

All of the methodological questions that plague the substantive due process doctrine's reliance on history—whether history should be consulted at all, at what "level" a court must operate, how far back and how far forward to look, and whose history should be examined or eschewed—would also confront any legislator seriously interested in examining history as a potential guide to statutory reform. This Article suggests, however, that only one fair conclusion may be reached on the historical record, no matter what methodology is employed. History provides remarkably little support for the sort of assisted suicide right that Justices O'Connor, Souter, and Stevens suggested they might consider or that our legislatures might sanction.

B. *The Ancients*

Judge Reinhardt claimed that ancient Greek and Roman suicide practices support—or at least are not antithetical to—a right to assistance in suicide. In fact, Athenian law treated suicide as a crime, "punishing" the "guilty" by amputating the corpse's right hand and denying traditional burial rituals.[129] Plato defended this practice on multiple occasions. In *Phaedo*, Plato (through Socrates) argued that a philosopher should embrace natural death when it comes because it will free him from the shadowy cave of human existence and bring him into contact with truth.[130] But, he added, to seek out death is wrong, and suicide is akin to "run[ning] away" from one's assigned post and duties.[131] In *Laws*, Plato condemned suicide on the grounds that he who commits the act "from sloth or want of manliness imposes upon himself an unjust penalty [of death]."[132]

To his general support of Athenian law, Plato did add three exceptions. Suicide might be permissible when compelled by

128. *See* Compassion in Dying v. Washington, 79 F.3d 790, 807-09 (9th Cir. 1996) (en banc).

129. A.W. Mair, *Suicide* (Greek and Roman), *in* 12 ENCYLOPEDIA OF RELIGION AND ETHICS 26-30 (J. Hastings ed., 1992).

130. *See* PLATO, PHAEDO 73 (Benjamin Jowett trans., 2000).

131. *Id.* at 74.

132. PLATO, LAWS 220 (Benjamin Jowett trans., 2000).

(1) judicial order; (2) excruciating misfortune; or (3) moral disgrace.[133] The first category, however, is not properly a category of suicide at all. Here, Plato acknowledged merely that the subject of state execution who is ordered to serve as his own executioner is not really a "suicide" (as in the case of Socrates accepting the hemlock as his sentence after trial). Likewise, in the second category, Plato did not endorse (or even appear to contemplate) rationally chosen suicide, but instead expressed compassion for deaths compelled (*anankastheis*) by misfortune—the result perhaps of depression or mental illness. Only in his third category did Plato provide any form of approval for rational, intentional acts of self-killing, but even this was limited to persons killing themselves as the result of intense moral disgrace or embarrassment, not because of a physical ailment. Antony, Brutus, Cornelia, and Cleopatra provide a few examples of the sort of suicide Plato may have had in mind.

In *The Republic*, Plato argued that patients should be permitted to refuse intrusive medical treatments that may lengthen their lives, while making them very unpleasant and useless to the state.[134] However, this is an argument for a right to refuse unwanted treatment, not one explicitly directed at a right to commit (or assist) suicide. As this Article will discuss later, there is a significant legal and moral distinction between these two practices.[135] Further, Plato's claim here was less that a person has a right to choose whether to discontinue intrusive medical treatment and more the absolutist, and distinctly illiberal claim, that persons dependent on such care are objectively better off dead than alive.[136]

Aristotle used suicide to raise the larger question whether self-regarding acts that impose no harms on third parties can be considered "unjust."[137] Acts of injustice, Aristotle contended, require and depend in large measure on the degree of the actor's intent.[138] Involuntary acts are "neither unjust[]

133. *See id.* at 202, 220.
134. *See* PLATO, REPUBLIC 84-89 (Allan Bloom ed., 1991).
135. *See* discussion *infra* Part III.G.
136. *See* PLATO, REPUBLIC, *supra* note 134, at 86-87.
137. *See* ARISTOTLE, NICHOMACHEAN ETHICS 142-45 (Martin Ostwald trans., Macmillan 1962).
138. *See id.* at 132-39.

nor just[]."[139] Acts "performed in ignorance" or as a result of negligence (e.g., "if (a dueler) did not intend to wound but only to prick") and those done "in full knowledge but without previous deliberation" (e.g., the acts "due to anger or [other passions]") do not mitigate the consequence of the act, but are sometimes "excusable."[140] By contrast, acts done "from choice" are premeditated and conscious and, thus, matters for which humans are always responsible: "[I]f a man harms another by choice, he acts unjustly; and it is this kind of unjust act which makes the agent an unjust man . . . ."[141]

Having focused the question on intentional acts, as opposed to merely negligent or foreseen ones, Aristotle conceded that choosing one's own death may not impose any injustice on third persons: "for he [who commits suicide] suffers voluntarily, but no one voluntarily accepts unjust treatment."[142] Nonetheless, Aristotle saw the act of intentional self-killing as "surely" harmful "towards the state," in that it is contrary "to right reason; and that the law does not permit."[143] Though the passage is unclear, arguably Aristotle gives vent to the view that the state has a legitimate interest in the preservation of human life, and that its preservation is a basic good and feature of justice—"right reason."[144]

Other Greek (and Roman) thinkers were more varied in their thinking. Stoics, self-declared champions of enduring adversity without complaint, ironically considered suicide an acceptable response to physical adversity.[145] Pythagoras, meanwhile, strongly opposed suicide.[146] Epicurus, often cited as an advocate of comfort in life and death, was less concerned with the liberty to commit suicide than he was skeptical that

139. *Id.* at 133.
140. *Id.* at 134.
141. *Id.* at 135.
142. *Id.* at 143.
143. *Id.*
144. *Id.*
145. *See, e.g.*, 3 CICERO, DE FINIBUS 60-61 (Rackham trans., 1914) ("When a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive; when he possesses or sees in prospect a majority of the contrary things, it is appropriate for him to depart from life.").
146. *See* CICERO, DE SENECTUTE xx (J.W. Allebn & J.B. Greenough trans. & ed., 1866) (stating Pythagoras's view that people should not "depart from their guard or station in life without the order of their commander, that is, of God").

suicide could ever be the product of rational choice: "He is of very small account who sees many good reasons for ending his life."[147]

Under Roman law, criminals committing suicide to avoid punishment (e.g., the death penalty) or their worldly obligations (e.g., deserting soldiers and runaway slaves) were regularly punished.[148] Their corpses were abused and their fortunes forfeited to the state, leaving wives, children, and other heirs penniless.[149] Other forms of suicide, however, were permitted,[150] and Roman law offered no basis for limiting suicide to the terminally ill, or even to the consequence of rational and voluntary decision. The physically healthy and mentally ill were as free to kill themselves as the sick or competent.

Suicide was also treated as a form of entertainment or as a profitable venture. After publicly promising to do so and amid much fanfare, Peregrinus threw himself into a pyre at the Olympic Games to achieve fame.[151] After losing a battle, Sardanapalus, King of Nineveh and Assyria, apparently gathered his wife and concubines, set himself on a luxurious couch, and ordered slaves to set them all on fire.[152] During the Punic Wars, "it was easy to recruit individuals . . . who would offer themselves to be executed for rather small amounts of money, which would be given to their heirs. And for a higher price, others could be found to be slowly beaten and mangled to death, which created an even greater spectacle."[153]

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147. EPICURUS, LETTERS, PRINCIPAL DOCTRINES, AND VATICAN SAYINGS 68 (Russell Geer trans., 1997).

148. *See* DIG. 48.21.3 (Marcian, Accusers).

149. *Id.*

150. *See id.* The text states that

> where persons who have not yet been accused of crime, lay violent hands on themselves, their property shall not be confiscated by the Treasury; for it is not the wickedness of the deed that renders it punishable, but it is held that the consciousness of guilt entertained by the defendant is considered to take the place of a confession.

Id.

151. *See* Robert Barry, *The Development of the Roman Catholic Teachings on Suicide*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449, 464 (1995).

152. *See* E. COBHAM BREWER, BREWER'S DICTIONARY OF PHRASE AND FABLE 954 (Adrian Room ed., Harper Collins 1995) (1894).

153. Barry, *supra* note 151, at 464.

In the end, Judge Reinhardt correctly noted that suicide sometimes was tolerated by ancient Greeks and Romans.[154] Often, however, it was not. When suicide was tolerated, there is little evidence that toleration was linked in any way to concern for terminally ill persons. Indeed, it is hard to see what contemporary society would wish to emulate in recorded ancient suicide norms and practices.

C. *Early Christian Thinkers*

Although the Bible nowhere explicitly forbids suicide or its assistance, from almost the earliest moments of Christian society these acts were judged serious sins. Addressing the question in the fifth century, Augustine argued that intentional self-destruction not committed on direct instructions from God constituted a violation of the Sixth Commandment's instruction, "Thou shalt not kill."[155]

Augustine, however, emphasized the distinction between intentional and unintentional self-killing. At the time of his writing, powerful schismatic forces threatened the unity of the Catholic Church, including the Donatists, who even attempted to murder Augustine himself.[156] Augustine opposed the Donatists' tactic of deliberately provoking their own arrests and execution to draw attention to their cause.[157] While the Donatists claimed that they were martyrs, Augustine argued that true Christian martyrs would be willing to *accept* execution rather than forsake God, but would never *deliberately volunteer* for death:

> [O]bserve carefully and learn in what sense Scripture says that any man may give his body to be burned. Certainly not that any man may throw himself into the fire when he is harassed by a pursuing enemy, but that, when he is compelled to choose between doing wrong and suffering wrong, he should refuse to do wrong rather than to suffer wrong, and so give his body into the power of the

154. *See* Compassion in Dying v. Washington, 79 F.3d 790, 806-07 (9th Cir. 1996).

155. AUGUSTINE, THE CITY OF GOD 26 (Marcus Dods trans., Random House 1950).

156. *See* Possidius, *Vita Augustini*, *in* 1 SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH ¶ 185.3.12 (Philip Schaff ed., Eerdmans 1977) (131) [*hereinafter* LIBRARY].

157. *See id.*

> executioner, as those three men did who are being compelled to worship in the golden image, while he who was compelled threatened them with the burning fiery furnace if they did not obey. They refused to worship the image: they did not cast themselves into the fire, and yet of them it is written that they "yielded their bodies, that they might not serve nor worship any god except their God."[158]

Deliberately seeking self-destruction would, Augustine feared, lead down a dangerous and slippery slope. If seeking death to avoid temporal troubles were acceptable, then why not suicide to avoid any risk of future sin or other degradation? "For if there could be any just cause of suicide, this were so."[159] In fact, during the sacking of Rome, Christian virgin women committed suicide in order to avoid rape and, they thought, sin. Early Christians revered these women. But Augustine disagreed: "Why, then, should a [person] who has done no ill do ill to [herself], and, by killing [herself] kill the innocent [person] to escape another's guilty act, and perpetrate upon [herself] a sin of [her] own, that the sin of another might not be perpetrated upon [her]?"[160]

Aquinas echoed and built upon foundations laid by Augustine (and Aristotle), submitting that suicide is (1) contrary to the natural inclination of self-preservation and charity whereby everyone should love himself; (2) an injury to the community as well as the individual; and (3) an insult to the Creator's rights over man.[161] Aquinas's third argument is an expressly religious appeal, and while he never fully developed his second argument, his first argument forms part of a larger, more developed moral theory.

To Aquinas, certain irreducible, basic human goods are knowable to all persons by practical reasoning; human life is among them.[162] To reject such basic human goods by intentional and deliberate choice is morally wrong—a categorical sin. Thus, to Aquinas all acts of intentional killing are morally wrong, whether performed against another or to oneself.

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158. *Id.* ¶ 173.5.

159. AUGUSTINE, THE CITY OF GOD, *supra* note 155, at 32.

160. *Id.* at 22.

161. *See* THOMAS AQUINAS, SUMMA THEOLOGICA 70 (Paul E. Sigmund ed. & trans., 1988).

162. *See id.* at 48-50.

Despite this strong reproof, Aquinas, like Aristotle and Augustine, asserted that acts done as the result of deliberate rational choice differ in kind from those unintended or involuntary. Intentional choices are ones we embrace, rationally accept, and control; as such, they necessarily define us and our character. Unintended and involuntary actions, while not devoid of moral character, are not always within our control, and thus speak less to who we are. Accordingly, Aquinas argued, self-defense undertaken with the *intent* not to kill the aggressor but to stop the aggression can be a morally upright action. The victim may *know* that the aggressor will die as the (unintended) result of his gunshot or blow, but he commits no categorical wrong in merely acting with the intent to take steps necessary to stop an aggression.[163] So, too, Aquinas would contend in the suicide context: The act is adverse to the natural inclination of self-love and harmful to the basic good of human life insofar as it is undertaken rationally and deliberately. Unintended suicides, ones resulting from mental illness, depression, duress, fear, grief, or anger, fall into a different moral category.

Augustine and Aquinas's teachings on suicide influenced all subsequent Christian thinking. By 562, the Council of Braga denied funeral rites to suicides; in 693, the Council of Toledo held that anyone attempting suicide should be excommunicated. In England, the Council of Hertford in 672 adopted a canon denying suicides normal Christian burials; a canon dating from King Edgar's time (c. 1000) reaffirmed this position. Christianity continues to teach against suicide to this day. In 1980, the Vatican issued a Declaration on Euthanasia; the Pope has continually written against suicide, including in his encyclicals, "Veritatis Splendor" and "Evangelium Vitae."[164]

163. *See id.* at 70-71.

164. *See* Pope John Paul II, *Veritatis Splendor*, 23 ORIGINS 297, 321 (1983); Pope John Paul II, *Evangelium Vitae* (visited June 4, 2000) <http://listserv.american.edu/catholic/church/papal/jp.ii/jp2.evanv.html> (condemning assisted suicide as "*a grave violation of the law of God*, since it is the deliberate and morally unacceptable killing of a human person"); *see also* National Conference of Catholic Bishops Committee for Pro-Life Activities, *Nutrition and Hydration: Moral and Pastoral Reflections*, 15 J. COMTEMP. HEALTH L. & POL'Y 455 (1999).

The American Lutheran Church and the Episcopal Church also condemn suicide as an ethical wrong.[165]

D. *English Common Law*

Early Christian history is of particular relevance because, from its outset, the common law followed Christian teachings on suicide and its assistance. Writing in the mid-thirteenth century, Bracton, one of the common law's earliest lawgivers,[166] endorsed the Roman statute holding that a felon intentionally taking his life to escape punishment by the state was subject to having both his movable goods and real property confiscated.[167] In contrast to Roman statutes, however, Bracton added that one who deliberately kills himself "in weariness of life or because he is unwilling to endure further bodily pain" should also suffer confiscation of his movable goods.[168] Only suicides induced by insanity—undertaken by persons incapable of appreciating the significance of their actions (and, thus, incapable of forming an intent to kill)—escaped punishment.[169]

Though Bracton's formulation imposed a lesser penalty for suicides committed due to weariness with life or abhorrence of pain, all acts of intentional self-destruction were condemned from the earliest days of the English common law. This is particularly notable given that Bracton had otherwise permitted Roman statutes to guide his views of English suicide law. Whether Bracton abandoned Roman guidance in this

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165. *See New York Task Force, supra* note 10, at 91 (reporting views of American Lutheran Church, the Episcopal church, and all branches of Judaism). Respect for human life is also deeply rooted in Eastern thought. *See* DAMIEN KEOWN, BUDDHISM AND BROTHERS 44-45 (1995).

166. *See* 1 FREDERIC POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 206 (2d ed., 1952) (calling Bracton "the crown and flower of English medieval jurisprudence").

167. *See* 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 424 (Samuel E. Thorne ed., 1968).

168. *Id.* ("He does not lose his [real property] inheritance, only his movable goods.")

169. *See id.* Historians Michael MacDonald and Terence Murphy claim that Bracton included "sheer weariness with life along with the mental defects that excused self-slaying." MICHAEL MACDONALD & TERENCE MURPHY, SLEEPLESS SOULS: SUICIDE IN EARLY MODERN ENGLAND 22 (1990). This is, however, simply wrong. "Sheer weariness" reduced the penalty for suicide to the confiscation of movable goods rather than all real and personal property. But, the act was *not* excused along with suicides induced by mental deficits. *See* 2 BRACTON, *supra* note 167, at 424.

single respect "because forfeiture of goods in such a case ha[d] already become customary in England, or because the Church ha[d] set her seal of disapproval on the practice, or because he judge[d] that the English [would] not subscribe to the frank doctrine of the Roman law that suicide is justifiable in such a case" remains "a matter for speculation."[170]

What is not a matter for speculation, however, is that in this one instance in which he forsook Roman guidance, Bracton wrote "what was destined to survive in English law."[171] Five centuries later, the penalty associated with suicide had changed slightly (suicides of any kind forfeited only their movable goods), but the principle remained the same: The law treated any intentional suicide as a wrongful act.[172] Likewise, unintentional acts of self-killing, such as by the mentally ill, remained no crime.[173] Blackstone even went so far as to decry "the pretended heroism, but real cowardice of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure."[174]

E. *Colonial American Experience*

Pre-revolutionary American suicide law generally followed contemporary English common law and norms. The American colonies in the seventeenth and eighteenth centuries practiced forfeiture. They also followed the ancient pagan practice, never formally endorsed in English common law, of dishonoring the suicide's corpse, often by burying it at a crossroads:

> An obvious explanation of the choice of the crossroads is that they also helped to lay the ghost by making the sign of the cross; but though this may have contributed to the survival of the custom into the Christian era, it has a much earlier ancestry. In early times and among primitive peoples even honorable burial was frequently performed at crossroads, but this spot was specifically chosen for

170. William Meskill, *Is Suicide Murder?*, 3 COLUM. L. REV. 379, 380 (1903).

171. *Id.* at 381.

172. Both Hale and Coke so held. *See* 1 MATTHEW HALE, PLEAS OF THE CROWN 411 (London, E. & R. Nutt 1736) (1680); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 54 (London, E. & R. Brooke 1797) (1644).

173. Coke provided an example of such excused unintentional conduct: if a person were to "cut off a limb to prevent the spread of gangrene," but bleed to death as the unintended result, this would not constitute suicide. 3 COKE, *supra* note 172, at 54.

174. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *189.

> murderers and suicides. Among the reasons that have been suggested for the practice are that the constant traffic over the grave would help to keep the ghost down; or that the number of roads would confuse it and so prevent it from finding its way home . . . .[175]

Virginia recorded cases of ignominious burial in 1660 and 1661; in the latter instance, the coroner's jury explicitly held that the suicide was "to be buried at the next cross as the Law Requires with a stake driven through the middle of him in his grave."[176] The colony practiced forfeiture in the colony as late as 1706 and 1707, though it appears that the colony's Governor sometimes interceded to protect the heirs' inheritance.[177]

Massachusetts abandoned forfeiture as early as 1641, though maltreating the suicide's body apparently retained its appeal for some time.[178] The 1672 compilation of the "General Laws and Liberties" of the Massachusetts colony intones that

> considering how far Satan doth prevail . . . [it is] therefore order[ed], that from henceforth if any person . . . shall at any time be found by any Jury to . . . be willfully guilty of their own Death . . . [he] shall be Buried in some Common Highway where . . . a Cart-load of Stones [shall be] laid upon the Grave as a Brand of Infamy and as a warning to others to beware of the like Damnable practices.[179]

In 1647, what was to become Rhode Island also passed a statute condemning all intentional suicide and applying traditional common law penalties:

> Self-murder is by all agreed to be the most unnatural . . . wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor . . . his goods and chattels are the king's custom, but not his debts nor land; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing.[180]

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175. GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 259 (1957) [*hereinafter* SANCTITY OF LIFE].

176. 16 W. AND M. QUART. 181 (Aug. 26, 1661).

177. *See* ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 108 n.193 (1930).

178. *See* Commonwealth v. Mink, 123 Mass. 422, 425-26 (1877).

179. THE COLONIAL LAWS OF MASSACHUSETTS OF 1672, at 137 (William H. Whitmore ed., 1887).

180. THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719, at 19 (John D. Cushing ed., 1977).

South Carolina appears to have proscribed suicide as early as 1706, instructing coroner juries to return a felony verdict "against the Peace of our Sovereign Lady the Q[u]een, her Crown and Dignity" in cases where the decedent "voluntarily and feloniously . . . of himself did kill and murder himself."[181] In 1715, North Carolina adopted English common law and, with it, the traditional suicide proscription.[182]

F. *The Modern Consensus: Suicide*

By the late 1700s and early 1800s, enforcement of the common law's forfeiture penalty began to fade in England, though formal abolition of the forfeiture penalty did not occur until 1870.[183] The ancient pagan practice of dishonoring the corpse also faded, though it, too, was not formally outlawed until much later.

Like England, eighteenth-century America witnessed a change in attitude regarding the criminal penalties associated with suicide. Pennsylvania led the way in 1701 when it rejected penalties for suicide in its new "Charter of Privileges to the Province and Counties."[184] By the opening of the nineteenth century, New Hampshire, Maryland, Delaware, New Jersey, North Carolina, and Rhode Island had followed suit, passing statutory or constitutional provisions repealing criminal sanctions associated with suicide.[185]

British Law Lord Hoffman has suggested that the common law's gradual decriminalization of suicide amounted to recognition of a *right* to commit the act: "[I]ts decriminalisation was a recognition that the principle of self-determination should in that case prevail over the sanctity of life."[186] American ethicist Dan Brock has offered a similar reading of

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181. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692-1734, at 192 (John D. Cushing ed., 1978).

182. *See id.* at 322.

183. *See* MACDONALD & MURPHY, *supra* note 169, at 233.

184. THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681-1713, at 209 (John D. Cushing ed., 1978) ("If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural Death.").

185. *See* N.H. CONST. pt. 2, art. 89 (1783); MD. CONST., decl. of rts. § 24 (1776); DEL. CONST. art. 1, § 15 (1792); N.J. CONST. art. 17 (1776); N.C. CONST. (1778); R.I. PUB. LAWS § 53, at 604 (1798).

186. Airedale N.H.S. Trust v. Bland (C.A.), 2 W.L.R. 316, 351-52 (1993).

the historical record: "That suicide or attempted suicide is no longer a criminal offense in virtually all states indicates an acceptance of individual self-determination in the taking of one's own life."[187] Judge Reinhardt expressed a similar opinion in *Compassion in Dying*.[188]

Hoffman, Brock, and Reinhardt misread the historical record. Dragging the suicide's body around town, driving stakes through it, and leaving grieving families penniless had lost its appeal, but that development hardly signaled a new endorsement or acceptance of suicide. In fact, states that had repealed penalties for suicide continued to describe it in their statute books as a "grave public wrong"[189] or "unlawful and criminal as *malum in se*."[190] Even Glanville Williams, an avid euthanasia proponent, has conceded that "[n]o appreciable volume of opinion against the traditional attitude to suicide appeared . . . until the present century."[191]

Rather than the result of some new social approval of suicide, the elimination of criminal penalties was the result of an enlightened realization that they hurt the wrong person. With the "wrong-doer" dead and gone, seizure of the suicide's worldly goods hurt only the surviving spouse and orphans. Zephaniah Swift, an early American treatise writer and later Chief Justice of the Connecticut Supreme Court, explained that "[t]here can be no greater cruelty, than the inflicting of a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender."[192] Thomas Jefferson, drafting a bill to reform Virginia laws, wrote that the law should "not add to the miseries of the party by punishments or forfeiture."[193] While penalties for suicide had been enforced in

187. Dan Brock, *Voluntary Active Euthanasia*, HASTINGS CTR REP. 22, Mar.-Apr. 1992, at 19.

188. Compassion in Dying v. Washington, 79 F.3d 790, 810 (9th Cir. 1996) (en banc).

189. *See New York Task Force*, *supra* note 10, at 55.

190. *See* Commonwealth v. Mink, 123 Mass. 422, 429 (1877); *see also* WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 7.8 (1986) ("When common law crimes have been retained, suicide has been characterized as a 'criminal' or 'unlawful' act, though, not being punishable, not strictly-speaking a crime.").

191. WILLIAMS, SANCTITY OF LIFE, *supra* note 175, at 239.

192. 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 304 (Windham, Conn., John Byrne 1796).

193. 2 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 275 (Julian P. Boyle ed., 1952) [hereinafter JEFFERSON PAPERS].

"barbarous times," with forfeiture the product of a greedy crown acting out of a "spirit of rapine and hostility . . . toward [its] subjects," such penalties were "inconsistent with the principles of moderation and justice which principally endear a republican government to its citizens."[194] The Massachusetts Supreme Judicial Court explained the state legislature's decision to repeal suicide's criminal penalties as one that "may well have had its origin in consideration for the feeling of innocent surviving relatives."[195]

The change in attitude toward criminal penalties was also the result of a growing modern consensus that suicide is an essentially medical problem. Jefferson recognized suicide early on "as a disease."[196] Study after study in our own century by physicians and psychiatrists confirms that as many as 90 percent of all suicides are the result of a diagnosable medical disorder.[197] In its commentary to the Model Penal Code, the American Law Institute has summed up the modern view that

> [t]here is scant reason to believe the threat of punishment will have deterrent impact upon one who sets out to take his own life. . . . Moreover, it is clear that the intrusion of the criminal law into such tragedies is an abuse. There is a certain moral extravagance in imposing criminal penalties on a person who has sought his own self-destruction, who

194. 6 JEFFERSON PAPERS, *supra* note 193, at 255.

195. *Mink*, 123 Mass. at 429.

196. 6 JEFFERSON PAPERS, *supra* note 193, at 492-507.

197. *See* Yeates Conwell & Eric Caine, *Rational Suicide and the Right to Die: Reality and Myth*, 325 NEW ENG. J. MED. 1100, 1101 (1991) (noting that 90 to 100 percent of suicides suffer from "diagnosable psychiatric illness"); *see also* Herbert Hendin & Gerald Klerman, *Physician-Assisted Suicide: The Dangers of Legalization*, 150 AM. J. PSYCHIATRY 143 (1993) (expressing similar opinion); E.S. Schneidman, *Rational Suicide and Psychiatric Disorders*, 326 NEW ENG. J. MED. 889 (1992) (same); ELI ROBINS, THE FINAL MONTHS 10, 12 (1981) (94 percent of suicides studied had a mental disorder); E.S. SHNEIDMAN ET AL., THE SUICIDE PREVENTION CENTER IN THE CRY FOR HELP 13 (1981) (a "majority" of those committing suicide suffer from a mental disorder); Brian Barraclough et al., *A Hundred Cases of Suicide: Clinical Aspects*, 125 BRIT. J. PSYCHIATRY 355, 356 (1974) (93 percent of suicides studied suffered from a mental disorder); ERWIN STENGEL, SUICIDE AND ATTEMPTED SUICIDE 52 (1964) (arguing that one-third of people committing suicide suffer from "a neurosis or psychosis or severe personality disorder"). This includes even elderly patients. *See* Conwell & Caine, *supra* note 197, at 1101 (finding that two-thirds of suicides committed by persons in their late sixties, seventies, and eighties are not terminally ill, but "in relatively good physical health and that most suffer instead from depression or other psychiatric illness").

> has not attempted direct injury to anyone else, and who more properly requires medical or psychiatric attention.[198]

Reinforcing the conclusion that the common law had come to recognize suicide as a medical problem, rather than an accepted right, is the fact that an exception to traditional battery doctrine evolved providing both the state and all private individuals with a common law privilege to forcibly detain "a person disordered in his mind who seems disposed to do mischief to himself or to any other person, the restraint being necessary both for the safety of the lunatic and the preservation of the public peace."[199] Most American states now have codified this extraordinary exception to ancient battery doctrine. New York's statute is typical, allowing detention for one "who appears to be mentally ill and is conducting himself in a manner which poses substantial risk of physical harm to himself as manifested by threats or attempts at suicide."[200] In California, "any person [who], as a result of a mental disorder, is a danger . . . to himself or herself" can be committed involuntarily to a mental health facility for a period.[201]

G. *The Modern Consensus: Assisting Suicide and Euthanasia*

The Hoffman-Brock-Reinhardt hypothesis that elimination of suicide's criminal penalties signaled some endorsement or acceptance of the practice is further belied by development in the law regarding assisting suicide and euthanasia. Originally, the common law drew a formal distinction between different acts of assisted suicide. Assistants present at the suicide's death could be held guilty of murder or manslaughter, but those clever enough to slip out while the suicide drank the poison they supplied or used the gun they provided were held innocent of any crime. Under ancient common law doctrine, a court could not try assistants before the fact for *any* crime until the principal criminal actor was convicted. Because the suicide

198. MODEL PENAL CODE § 210.5, cmt. 2 (1980).

199. 2 G.C. ADDISON, TORTS § 819, at 708 (3d ed. 1870).

200. N.Y. MENTAL HYG. LAW § 9.41 (McKinney Supp. 1983-84).

201. CAL. WELF. & INST. CODE § 5250 (West 1984); *see also* Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 934 n.36 (1987) (compiling citations to similar statutes in most states).

was unavailable for prosecution, courts (syllogistically) reasoned that they simply could not try any accessory before the fact.[202]

So went the common law in England and in most American jurisdictions until around 1861 when statutes were enacted abolishing the distinction between accessories before and after the fact.[203] Although this change in general criminal law doctrine was made without specific reference to assisted suicide, courts on both sides of the Atlantic soon concluded that accessories before the fact to suicide could now be held liable for murder or manslaughter.[204] Thus, almost 100 years after the abolition of penalties for suicide itself, common law courts were in the process of *expanding* criminal liability for its assistance.

Glanville Williams has charged that this new development of liability for accessories before the fact was a "good example[] of the purely mechanical manufacture of criminal law, with no reference to penal policy."[205] That historical interpretation is dubious. Applying the same rule to the canny suicide assistant who exited the room at a propitious moment and the

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202. *See, e.g.*, Rex v. Russell, 1 Moody C.C. 356 (1832) (ruling that a person who gave poison to someone who later committed suicide with the poison is not liable as an accessory if not present for the suicide); Regina v. Ledington, 9 Car. & P. 79 (1839) (ruling that a person who incites someone to commit suicide is not liable as an accessory if not present for the suicide); 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 31-32 (7th ed., Philadelphia 1874) (same). Arguably, some tension exists between this rule and the common law's decision to punish suicide. On the one hand, the common law deemed the deceased beyond the reach of legal process for the purposes of inquiring whether he was a principal in his own murder so that his accessory might be tried. On the other hand, the law considered the deceased within legal process for the purposes of investing a coroner's jury to inquire into whether the deceased was competent and an adult when he took his own life (and to determine that he did, in fact, kill himself), as well as for the purposes of "punishing" him by forfeiture.

203. *See* 24 & 25 Vict. c. 23, 94; 2 WHARTON, *supra* note 202, at 33 (noting that by 1874 the "old technical rule" that an accessory before the fact could not be convicted before the principal had been "corrected by statute" in "many of the states").

204. *See, e.g.*, Rex v. Croft, K.B. 295 (C.C.A. 1944) (upholding the conviction of the survivor of a suicide pact); People v. Roberts, 178 N.W. 690 (Mich. 1920) (the court avoided accessory before the fact questions altogether); Commonwealth v. Hicks, 82 S.W. 265, 266 (Ky. 1904) ("In this case, it would be impossible to punish the principal; but it is not believed that under any sound reasoning the accessory [before the fact] would thereby go scot free."); Burnett v. People, 68 N.E. 505 (Ind. 1903) ("[I]t becomes immaterial what was the character of the crime committed by the principal or whether there was any crime . . . ."); Regina v. Gaylor, 169 Eng. Rep. 1011 (C.C.R. 1857) (upholding conviction).

205. WILLIAMS, SANCTITY OF LIFE, *supra* note 175, at 265.

unsophisticated assistant who remained brought the common law into harmony—eliminating (rather than creating) a mechanical distinction; indeed, it was hailed at the time as an equitable and enlightened change in penal policy.[206] Williams's complaint seems less an attack on the logic of the law's progression than the direction it took.

As statutes supplanted the common law, assisted suicide was codified as a crime in most American jurisdictions. By the time the Fourteenth Amendment was ratified in 1868, nine of the then thirty-seven states had adopted statutes making assisting suicide a crime.[207] The Field Code, a reformist codification project that influenced legislative efforts in state after state during the nineteenth century, included a specific prohibition of assisted suicide.[208] These laws have remained on the books for more than a century.

The law of euthanasia runs an even straighter course. Euthanasia is a form of intentional homicide motivated by a sense of mercy. At common law and by statute, it is treated as murder.[209] Courts have refused to treat the victim's consent or the killer's motive as a defense or a reason to accede to defendants' requests for a jury instruction on assisted suicide as a lesser included offense.[210] Instead, courts have treated the victim's consent and the killer's motives at most as reasons to mitigate the defendant's punishment.[211]

While the proscription against assisting suicide and euthanasia has been virtually absolute in America, one exception to this rule existed for a short time. In 1902, the

206. *See* Richard Wolfrom, *The Criminal Aspect of Suicide*, 39 DICK. L. REV. 47 (1934-35).

207. *See* People v. Kevorkian, 527 N.W.2d 714, 731 (Mich. 1994).

208. *See* DAVID DUDLEY FIELD, PENAL CODE OF THE STATE OF NEW YORK § 231 (1865) ("Every person, who willfully, in any manner, advises, encourages, abets or assists another person in taking his own life, is guilty of aiding suicide.").

209. *See, e.g., State v. Fuller*, 278 N.W.2d 756, 761 (Neb. 1979) ("Murder is no less murder because the homicide is committed at the desire of the victim.") (internal citation omitted); *Turner v. State*, 108 S.W. 1139, 1141 (Tenn. 1908); *Martin v. Commonwealth*, 37 S.E.2d 43 (Va. 1946); N.Y. PENAL LAW § 125.25 (McKinney 1987) (euthanasia falls under definition of second-degree murder).

210. *See, e.g., State v. Cobb*, 625 P.2d 1133, 1136 (Kan. 1981) (rejecting defendant's claim that the court should have instructed the jury on assisted suicide rather than homicide where the defendant "was a direct participant in the overt act of shooting [the victim], which caused his death").

211. *See* MODEL PENAL CODE, § 210.5, commentary at 106 (1980); N.Y. PENAL LAW §§ 125.20(2), 125.25(1)(a) (McKinney 1987).

Texas Court of Criminal Appeals in *Grace v. State*[212] reasoned that because suicide and its attempt were no longer crimes, assisting the act should not be illegal either: "So far as the law is concerned, the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law."[213]

Grace is logically unsound. The rationales for decriminalizing suicide—fairness to the suicide's innocent family and recognition of the medical causes of suicide—do not apply to assisting suicide. The penalty for that crime falls on the actor himself, not his family, and there is no reason to presume that the suicide assistant suffers from any form of mental illness. Moreover, if *Grace* were right, euthanasia or "consensual homicide" would have to be decriminalized as well. Even Texas courts, however, did not follow *Grace* to that conclusion; instead, they continued to hold euthanasia illegal.[214] The Texas state legislature removed any lingering questions by overruling *Grace* and adopting a statute criminalizing the assistance of suicide.[215]

While statutes banning assisted suicide and euthanasia date back a century or more in many states, they are hardly "dead-letters." Many jurisdictions have expressly reconsidered these laws in recent years and reaffirmed them. In 1980, the American Law Institute conducted a thorough review of state laws on assisting suicide in the United States and acknowledged the continuing widespread support for criminalization.[216] Accordingly, it endorsed two criminal provisions of its own.[217] In the 1990s, both New York and Michigan convened blue-ribbon commissions to consider the

212. 69 S.W. 529 (Tex. Crim. App. 1902).

213. *Id.* at 530.

214. *See* Aven v. State, 277 S.W. 1080 (Tex. Crim. App. 1925).

215. *See* TEX. PENAL CODE ANN. § 22.08 (1999).

216. *See* MODEL PENAL CODE § 210.5 cmt. 5, n.23 (discussing state statutes).

217. *See id.* § 210.5(1), (2). The language of the provision follows:

> (1) *Causing Suicide as Criminal Homicide.* A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress, or deception. (2) *Aiding or Soliciting Suicide as an Independent Offense.* A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Id.

possibility of legalizing assisted suicide and euthanasia.[218] The New York commission issued a thoughtful and detailed report unanimously recommending the retention of existing laws against assisting suicide and euthanasia.[219] The Michigan panel divided on the issue, but the state legislature subsequently chose to enact a statute strengthening its existing common law ban against assisted suicide.[220] Other states have followed suit.[221]

In recent years, too, virtually every state in the country has passed statutes establishing living wills or durable powers of attorney in health-care situations, and many of these laws contain language expressly restating the state's disapproval of assisting suicide.[222] Meanwhile, repeated efforts to legalize the

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218. *See* NBC News, *supra* note 21; *New York Task Force, supra* note 10.

219. *See New York Task Force, supra* note 10.

220. *See* NBC News, *supra* note 21.

221. *See* Hemlock Society, *supra* note 24; *see also Doctor-Assisted Suicide, supra* note 23 (discussing Iowa, Maryland, Oklahoma, and Virginia).

222. *See* ALA. CODE § 22-8A-10 (1990); ALASKA STAT. § 18.12.080(a), (f) (1996); ARIZ. REV. STAT. ANN. § 36-3210 (Supp. 1996); ARK. CODE ANN. §§ 20-13-905(a), (f), 20-17-210(a), (g) (1991 & Supp. 1995); CAL. HEATH & SAFETY CODE ANN. § 7191.5(a), (g) (West Supp. 1997); CAL. PROB. CODE ANN. § 4723 (West Supp. 1997); COLO. REV. STAT. §§ 15-14-504(4), 15-18-112(1), 15-18.5-101(3), 15-18.6-108 (1987 & Supp. 1996); CONN. GEN. STAT. § 19a-575 (Supp. 1996); DEL. CODE ANN., tit. 16, § 2512 (Supp. 1996); D.C. CODE ANN. §§ 6-2430, 21-2212 (1995 & Supp. 1996); FLA. STAT., ch. 765.309(1), (2) (Supp. 1997); GA. CODE ANN. §§ 31-32-11(b), 31-36-2(b) (1996); HAW. REV. STAT. § 327D-13 (1996); IDAHO CODE § 39-152 (Supp. 1996); ILL. REV. STAT., ch. 755, para. 35/9(f), 40/5, 40/50, 45/2-1 (1992); IND. CODE §§ 16-36-1-13, 16-36-4-19, 30-5-5-17 (1994 & Supp. 1996); IOWA CODE §§ 144A.11.1-144A.11.6, 144B.12.2 (1989 and West Supp. 1997); KAN. STAT. ANN. § 65-28, 109 (1985); KY. REV. STAT. ANN. § 311.638 (Baldwin Supp. 1992); LA. REV. STAT. ANN. tit. 40, § 1299.58.10(A), (B) (West 1992); ME. REV. STAT. ANN., tit. 18-A, § 5-813(b), (c) (West Supp. 1996); MD. CODE ANN., HEALTH, § 5-611(c) (1994); MASS. GEN. L., ch. 201D, § 12 (Supp. 1997); MICH. COMP. LAWS ANN. § 700.496(20) (West 1995); MINN. STAT. §§ 145B.14, 145C.14, (Supp. 1997); MISS. CODE ANN. §§ 41-41-117(2), 41-41-119(1) (Supp. 1992); MO. REV. STAT. §§ 459.015.3, 459.055(5) (1992); MONT. CODE ANN. §§ 50-9-205(1), (7), 50-10-104(1), (6) (1995); NEB. REV. STAT. §§ 20-412(1), (7), 30-3401(3) (1995); NEV. REV. STAT. § 449.670(2) (1996); N.H. REV. STAT. ANN. §§ 137-H:10, 137-H:13, 137-J:1 (1996); N.J. STAT. ANN. §§ 26:2H-54(d) (e), 26:2H-77 (West 1996); N.M. STAT. ANN. § 24-7A-13(B)(1), (C) (Supp. 1995); N.Y. PUB. HEALTH LAW § 2989(3) (1993); N.C. GEN. STAT. §§ 90-320(b), 90-321(f) (1993); N.D. CENT. CODE §§ 23-06.4-01, 23-06.5-01 (1991); OHIO REV. CODE ANN. § 2133.12(A), (D) (Supp. 1996); OKLA. STAT. ANN., tit. 63, §§ 3101.2(C), 3101.12(A), (G) (West 1996), 20 PA. CONS. STAT. § 5402(b) (Supp. 1996); R.I. GEN. LAWS §§ 23-4.10-9(a), (f), 23-4.11-10(a), (f) (1996); S.C. CODE ANN. §§ 44-77-130, 44-78-50(A), (C), 62-5-504(O) (Supp. 1996); S.D. CODIFIED LAWS §§ 34-12D-14, 34-12D-20 (1994); TENN. CODE ANN. §§ 32-11-110(a), 39-13-216 (Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. §§ 672.017, 672.020, 672.021 (West 1992); UTAH CODE ANN. §§ 75-2-1116, 75-2-1118 (1993); VT. STAT. ANN., tit. 18, § 5260 (1987); VA. CODE ANN. § 54.1-2990 (1994); V.I. CODE ANN., tit. 19, § 198(a), (g) (1995); WASH. REV. CODE §§ 70,122.070 (1), 70.122.100 (Supp. 1997); W. VA. CODE §§ 16-30-10, 16-30A-16(a), 16-

practice—in state legislatures and by popular referenda—have met with near-total failure.[223] Nor are American jurisdictions alone in this pattern of open reconsideration and express rejection. In 1993-1994, Britain commissioned a special panel to review its 1961 law against assisting suicide; after lengthy hearings where ethicists, physicians, and philosophers were heard, the panel vigorously argued in favor of retaining current law.[224]

Whether one looks to the specific issues of assisting suicide and euthanasia, or to the issue of suicide more generally; whether one examines only American history, or expands the inquiry to embrace English common law history, history does not support a right to assistance in suicide or euthanasia "right." To the contrary, there is a long-standing modern consensus aims at preventing suicide and punishing those who assist it. Only when we expand the focus back to ancient Greek and Roman practices do we find any arguable precedent for recognition of a suicide right—and, even then, it is a "precedent" few in modern society would actually endorse.

IV. ARGUMENTS FROM FAIRNESS

While the historical record offers little basis for a right to assistance in suicide or euthanasia, over the last twenty years virtually every American jurisdiction has come to recognize a right to refuse medical treatment based upon common law battery principles that bar nonconsensual touchings.[225]

30B-2(b), 16-30B-13, 16-30C-14 (1995); WIS. STAT. §§ 154.11(1)(6), 154.25(7), 155.70(7) (Supp. 1996); WYO. STAT. §§ 3-5-211, 35-22-109, 35-22-208 (1994 & Supp. 1996); *see also* 42 U.S.C. §§ 14402(b)(1)(2)-(b)(1)(4) ("Assisted Suicide Funding Restriction Act of 1997").

223. *See supra* notes 17-25 and accompanying text (discussing failed efforts in over fifteen states).

224. *See* HOUSE OF LORDS, REPORT OF THE SELECT COMMITTEE ON MEDICAL ETHICS, H.L. PAPER NO. 21-I (1993-1994) [*hereinafter* HOUSE OF LORDS REPORT]. In 1961, the British Parliament enacted a statute holding that "[a] person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction to imprisonment for a term not exceeding fourteen years." Suicide Act, ch. 60 (1961). If anything, this represented another expansion of criminal liability, with Parliament holding not only aiding and abetting suicide criminal, but also that the mere *counseling* of suicide could be punishable, thus throwing into question the legality of distributing books like Derek Humphry's *Final Exit*, at least in the United Kingdom.

225. *See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 279-80 (1990) (holding that competent adult may refuse life-saving medical care); *In re* Conroy, 486 A.2d 1209 (N.J. 1985) (retreating from prior holding that right is

Debate persists, however, over many aspects of this new right, including whether and how to extend this right to *incompetent* persons. Increasingly, "living wills" and "advance directives" are used to instruct family members and physicians on a patient's wishes in the event he or she becomes incompetent. But what of infants or adult persons who have never been competent or persons who have left behind no such instructions? Some states have tried to extend the right to refuse treatment to these persons by "substituting the judgment" of a competent, court-designated, person for the judgment of the incompetent person.[226] Others have developed a "best interest test" whereby courts themselves purport to decide what is in the incompetent's best interests.[227] Both of these doctrines attempt to give meaning to a right to refuse that depends utterly on choice to persons incapable of choosing and to do so through an agent never selected by the patient.

Since the New Jersey State Supreme Court decided the first right-to-refuse case in 1976,[228] virtually every state in the Nation has recognized the right of at least competent adults to refuse even basic, life-sustaining medical care, like tubes supplying food and water. Given the widespread acceptance of such a right, the question follows whether assisted suicide and euthanasia must also be accepted. If patients have a right to tell their doctors to remove respirators or feeding tubes, in fairness should they also have a right to tell their doctors to administer lethal injections?

The Second Circuit answered this question in the affirmative, as did the federal district court in the Washington State litigation. The Supreme Court disagreed, but only over Justice Stevens's vigorous dissent and only in the context of a facial challenge. No majority ruling has decided whether a right to euthanasia and assistance in suicide exists *as applied* to rational, terminally ill patients. Justice O'Connor left ample room for us to speculate that she (and Justices Ginsburg and Breyer) might find equal protection arguments more availing in such a case.

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founded on Constitution and arguing instead that it is based on common law); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (right to refuse stems from common law battery doctrine).

226. *See Cruzan*, 497 U.S. at 280-81; ALAN MEISEL, THE RIGHT TO DIE § 9.7 (1989 & Supp. 1992).

227. *Cruzan*, 497 U.S. at 280-81.

228. *See In re* Quinlan, 359 A.2d 862 (N.J. 1976).

Neither have legislatures yet fully considered arguments whether their own laws codifying the right to refuse treatment embrace a larger principle allowing assistance in suicide and euthanasia.

In what follows, the Article considers three potential bases for distinguishing between the established right to refuse, on the one hand, and the proffered right to assistance in suicide or euthanasia, on the other. It concludes that two of these potential distinctions—based on causation and the act/omission distinction—do not work, but that the potential third—the one (wrongly) rejected by Justice Stevens—is rational and significant. Assisting suicide and euthanasia differ in kind from the right to refuse because they necessarily entail both an intent to kill and a moral judgment that the patient's life is no longer worth living. That intent and judgment is not necessarily part of any decision to refuse treatment.

A. *Causation*

The Supreme Court (like the New York trial court before it) concluded that refusing life-sustaining care and suicide are distinguishable because one merely "allow[s] nature to take its course," while the other involves an "unnatural" act. This "natural-unnatural" distinction ultimately boils down to an argument over causation. According to this view, rejecting treatment allows "nature" to cause death, but accepting a lethal injection is "unnatural" because it introduces a new, human causal agent into the picture.

Causation, however, is a notorious chameleon. "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of opinion," as causation doctrine.[229] To illustrate the problem, suppose that a driver operates a car over miles of highway at an excessive speed and arrives at a street corner just as a child darts from the curb. Do we say that the driver's excessive speed "caused" the death?[230] Suppose we change the hypothetical: The driver knows in advance that the child will dash into the street and nonetheless drives the car at a

229. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984).

230. *See id.* at 264 & n.6.

calculated speed in order to arrive at the precise moment the child enters the street. Does that fact not change or strengthen our view about the "cause" of the child's death?[231] Simply put, what we perceive as a responsible or causal force may be determined less by a mechanical review of the physical evidence than by an assessment of someone's mental state, our sense of justice, or common sense.[232]

Consider the case of Shirley Egan. On March 8, 1999, Ms. Egan's forty-two-year-old daughter raised the prospect of putting the sixty-eight-year-old Ms. Egan into a nursing home. Ms. Egan responded by shooting her daughter, paralyzing her from the neck down. When Ms. Egan's daughter declined life support and died, prosecutors were left wondering whether to charge Ms. Egan with murder, as the causal agent of her daughter's death, or with attempted murder, in effect conceding that the daughter's death was "caused" by her refusal of extraordinary life-sustaining measures.[233]

The slipperiness of causation arguments is reflected in *Quill* itself. The Supreme Court argued that "nature" is the "cause" of death when patients refuse or discontinue unwanted treatment. Meanwhile, three judges of the Second Circuit argued just the opposite, viewing the "naturalness" of a death caused by the withdrawal of life-sustaining measures quite skeptically.[234] What qualifies as a "natural" or "unnatural" death may be, at least in some measure, open to the eye of the beholder.

Though never explicitly addressed by the Supreme Court, the Second Circuit's causation analysis is subject to a convincing attack. The opinion does not fully account for the patient who refuses life-sustaining care *before* its introduction: such patients appear to let nature take its course even under the Second Circuit's understanding. With regard to patients who *withdraw* previously accepted life-sustaining care, one could argue that their action allows "nature" to resume its course after a temporary detour.

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231. *See id.*

232. *See id.* at 263-64 and citations therein.

233. *See* Deborah Sharp, *Web-Wired Courtroom Lets World Attend Florida Trial*, USA TODAY, Aug. 17, 1999, at 3A.

234. *See* Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996).

Susceptible though its argument might be, the Second Circuit nonetheless has a point. When patients decide to forgo or withdraw basic care such as food and water, the claim that death is "caused" as much by that human choice as any death by lethal injection has some undeniable appeal. Saying "nature" is responsible for deaths in right-to-refuse cases is something like saying that "speed" is responsible for the death of the child crossing the street when the driver set off knowing the child would dart in front of his car and die. It is a causal factor, but certainly not the only one.

B. *Act-Omission*

The New York trial court proffered another distinction between assisting suicide and refusing treatment, arguing that the former involves an affirmative act while the later amounts only to an omission. The Second Circuit rejected this act-omission distinction, reasoning that "[t]he writing of a prescription to hasten death . . . involves a far less active role for the physician than is required to bring about death through asphyxiation, starvation, or dehydration."[235] The Supreme Court never addressed the act-omission distinction, but the Second Circuit had it about right.

The act-omission distinction is entrenched in American doctrinal law. But here, as with causation, the distinction readily is subject to manipulation. Refusing to eat can be cast as "omitting" food or "actively" starving. Removing food and water tubes can be painted as "actively" pulling the plug or merely "omitting" the provision of advanced medical care. Even if the act-omission distinction were not so manipulable, it is unclear whether the distinction holds much moral force worth honoring, at least when it comes to life-taking.[236]

Some of the problems with the act-omission distinction in this area are illustrated by *Airedale N.H.S. Trust v. Bland*.[237] Tony Bland, a British teenager, was crushed while standing in the

235. *Id.*

236. For example, why would we "say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing"? *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring).

237. 2 W.L.R. 316 (1993).

spectators' pen at an English soccer match. His injuries left him in a so-called "vegetative" state. That is, he was not dying of his underlying maladies, but required food and water tubes so that he could live in a comatose state. His doctors eventually sought to discontinue the food and water tubes. The case came to the House of Lords, raising the right-to-refuse issue in Britain's highest court for the first time. The Lords assented to the removal of Bland's tubes on the grounds that ceasing treatment would amount only to "omitting care" and not to an "active" taking of life.[238] The Lords, however, nowhere explained why they viewed the *removal* of Bland's many tubes as an "omission," rather than an "active" step.

Even if the Lords had offered some convincing explanation for this classification, they failed to offer any reason why it makes a moral or legal difference. In Anglo-American common law (unlike many other legal systems), no general duty requires a passerby to render a stranger affirmative assistance,[239] but where a special relationship exists—and the patient-physician setting is a paradigmatic example—omissions of ordinary care are as punishable as affirmative misdeeds. Indeed, a physician's "omission" of readily available treatment is the textbook definition of professional malpractice. Thus, merely classifying Bland's case as an "omission" rather than an "act" does nothing to explain its acceptability under traditional Anglo-American legal principles. As one dissenting Lord commented, it leaves the law "morally and intellectually misshapen."[240] And so it does: Even medical practitioners in the Netherlands (where

238. *Id.* at 368 (judgment of Lord Goff) ("[T]he law draws a crucial distinction between cases in which a doctor decides to not . . . prolong life, and those in which he decides . . . actively to bring his patient's life to an end.").

239. French officials spent months investigating whether to pursue criminally various paparazzi alleged to have photographed a dying Princess Diana rather than come to her assistance. Despite our contrary legal tradition, many in America and England passionately argued that anyone who failed to render assistance should be prosecuted. Some American states, including Vermont, Minnesota, and Rhode Island, have adopted statutes requiring strangers to provide affirmative assistance to persons in distress when they can do so without harm to themselves. *See* Ernest S. Weinreb, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Study*, 14 AM. J. COMP. LAW 630 (1967).

240. *Airedale N.H.S. Trust*, 2 W.L.R. at 891 (Mustill, J.)

euthanasia is most tolerated) recognize that euthanasia embraces "all activities *or non-activities* with the purpose to terminate a patient's life."[241]

C. *Intention*

The Supreme Court concluded that refusing care and assisted suicide differ not only in their causes, but also in the intentions behind them. A physician who withdraws care pursuant to a patient's request "purposefully intends, or may so intend, only to respect his patient's wishes."[242] By contrast, a doctor assisting a suicide "must necessarily and indubitably, intend primarily that the patient be made dead."[243] The Court's distinction, quickly drawn and explained in little detail, was criticized at length by Justice Stevens. In fact, however, profound intent-based moral and legal distinctions *do* exist.

Intention v. Side Effect. An *intentional* action (or omission) is different in character, both morally and legally, from an unintended consequence. Our intentional actions say something about us and our character that no unintended side-effect possibly can. Unlike unintended consequences, our intentional conduct is *always* within our control. An intentional act is one of *choice.* An intended act "*remains,* persists, . . . [and] is synthesized into one's will, one's practical orientation and stance in the world."[244] As Charles Fried has put the point:

> [I]t is natural that the most stringent moral judgments should relate to intentional acts . . . . Morality is about the good and the right way of our being in the world *as human beings.* And the way we relate to the world as human beings is as we pursue our purposes in the world, *i.e.,* as we act intentionally. . . . This primacy of intention explains why in law and morals a sharp line is drawn between the result, which is intended[,] . . . and the certain concomitant, which [is not] intended. . . . To see a paradox in this distinction assumes that because the result in the world is the same in

241. John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?, in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES 261, 290 (John Keown ed., 1995) (emphasis added).

242. Vacco v. Quill, 521 U.S. 793, 802 (1997).

243. *Id.* at 802 (quoting *Assisted Suicide in the United States: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary,* 104th Cong., 2d Sess., 367 (1996) (testimony of Leon R. Kass)).

244. John Finnis, *Allocating Risks and Suffering: Some Hidden Traps,* 38 CLEV. ST. L. REV. 193, 202 (1990) [*hereinafter Allocating Risks*].

> the two cases the judgment in them must be too. In short, it ignores the element of purpose. . . .[245]

Though a sometimes utilitarian critic of relying on intent, Oliver Wendell Holmes put the point in its plainest terms: "Even a dog distinguishes between being stumbled over and being kicked."[246]

Intended acts differ in kind even from merely foreseen consequences. For example, when one person in an office goes on vacation (with the intention of getting some rest) remaining coworkers may have to work overtime and spend less time with their families. The vacationer may even *foresee* that result as absolutely inevitable. Still, foreseeing that consequence differs from *intending* that coworkers will spend less time with their spouses and children.

Commentators often overlook this distinction, collapsing intention with foresight.[247] But the law reflects the distinct moral force of intention that we understand through our common experience. A crime committed intentionally receives greater punishment than the same act done unintentionally. We recognize differing "degrees" of homicide (and countless other crimes) depending upon whether the act was done intentionally, knowingly, recklessly, or negligently. Such differentiation continues through sentencing. Thus, the law treats the driver who speeds recklessly but harms the darting child accidentally differently than the depraved killer who deliberately plans to harm the child.

The United States Supreme Court has repeatedly recognized the importance of intent in judging human action. When Congress fails to supply a mens rea requirement in criminal statutes, the Supreme Court habitually implies one rather than hold defendants strictly liable,[248] explaining that "[t]he

245. Charles Fried, *Right and Wrong—Preliminary Considerations*, 5 J. LEGAL STUD. 165, 199 (1976); *see also* Finnis, *supra* note 246, at 195 n.24.

246. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Dover 1991) (1881).

247. *See, e.g.*, John Finnis, *On the Practical Meaning of Secularism*, 73 Notre Dame L. Rev. 491, 511 (1998) (identifying how Benthamite utilitarian theory tended to collapse the distinction between intended and foreseen action).

248. *See, e.g., Morissette v. United States*, 342 U.S. 246 (1952) (implying element of intent into crime of converting government property); *Staples v. United States*, 511 U.S. 600 (1994) (implying mens rea element into unlawful firearms possession statute); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (collecting cases).

contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and duty of the normal individual to choose between good and evil."[249]

The element of intent is also central to our understanding of suicide, assisting suicide, and euthanasia. Self-destruction *without* an intent to die—even when death is *foreseen*—does not qualify in our minds (or law) as suicide. The soldier who landed on a D-Day beach may have known his "number was up," but he hardly intended to commit suicide by volunteering for the duty. Augustine's true Christian martyr may have seen death as a certainty for refusing to renounce his faith, but he did not seek it out. Death is, at most, an accepted side effect of such decisions.

In fact, Augustine and Aquinas (and arguably Aristotle) based their condemnation of suicide in part on the fact that it represents an *intentional* rejection of human life. Augustine endorsed the true Christian martyr's *acceptance* of death, but not the Donatists' deliberate *choice* to seek death out. Aquinas endorsed lethal acts where the intent is to stop aggression (self-defense), but not where the intent is to kill. At common law, Edmund Wingate explained in the seventeenth century, to be "*felo de se* [i.e., a felon of himself, a person must] destroy himself out of premeditated hatred against his own life."[250] Blackstone said that, to qualify as suicide, the act has to be "deliberate[]" or part of an "unlawful malicious act."[251] Hale held that suicide encompasses only one who "voluntarily kill[s] himself."[252] The Model Penal Code confirms that the crime of

249. *Morissette*, 342 U.S. at 250; *see also id.* at 251 ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."); Roscoe Pound, *Introduction* to FRANCIS SAYRE, CASES ON CRIMINAL LAW xxxvi-vii (1927) ("Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.").

250. EDMUND WINGATE, JUSTICE REVIVED: BEING THE WHOLE OFFICE OF A COUNTRY JP BRIEFLY, AND YET MORE METHODICALLY AND FULLY THAN EVER YET EXTANT 61, 88 (1644).

251. 4 BLACKSTONE, *supra* note 174, at *189.

252. 1 HALE, *supra* note 172, at 411.

suicide "consist[ed] of the intentional self-destruction by person of sound mind and sufficient age."[253]

The same holds true for assisting suicide and euthanasia. When General Eisenhower ordered the D-Day invasion,

> he *knew* that he was sending many American soldiers to certain death, despite his best efforts to minimize casualties. His purpose, though, was to liberate the beaches, liberate France, and liberate Europe from the Nazis. . . . Knowledge of an undesired consequence does not imply that the actor intends that consequence.[254]

Unless the assisting party shares the same mental element as the would-be suicide—i.e., an intent to see the patient dead—the common law does not recognize the act as one of aiding or abetting a suicide.[255] The same holds true of euthanasia—which is prosecuted at common law as murder. Thus, if a patient knowingly accepts death to avoid the pain and perceived indignity of continued invasive medical care, he does not commit suicide, and the doctor who takes actions to implement the patient's wishes does not commit assisted suicide or euthanasia.[256]

Intended Means and Ends. It is important to clarify what we mean when we say that an act is "intentional." One may, of course, intend something as an end unto itself—the final object or purpose of one's behavior. But, one may also intend something as a *means* to some further purpose or end.[257] I

253. MODEL PENAL CODE § 210.5, cmt. 1 (1980).

254. Compassion in Dying v. Washington, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting) (emphasis added). Chief Justice Rehnquist adopted Judge Kleinfeld's reasoning as his own in *Vacco v. Quill*. *See* 521 U.S. 793, 802 (1997).

255. MODEL PENAL CODE § 210.5(2) (1980); *see also* CAL. PENAL CODE § 401 (1999) (assistance must be "deliberate"); N.Y. PENAL CODE § 125.15(3) (act must be "intentional[]"). As the drafters of the Model Penal Code have put it, "a requirement of less than purposeful conduct" for assisted suicide, "would run the serious risk of over inclusiveness, perhaps applying, for example, to the case of one who sells readily available goods to another who states that he intends to kill himself." MODEL PENAL CODE § 210.5, cmt. 2.

256. *See* DANIEL CALLAHAN, THE TROUBLED DREAM OF LIFE: LIVING WITH MORTALITY 77-78 (1993) ("To call these judgments [to refuse treatment] 'intending' death distorts what actually happens. . . . [I]f I stop shoveling my driveway in a heavy snowstorm because I cannot keep up with it, am I thereby intending a driveway full of snow?").

257. *See* John Finnis, *Allocating Risks*, *supra* note 244, at 195 (discussing intended ends and means); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 117 (1968) (distinguishing between "intentionally doing something" as an ends and "doing something with a further intention" as a means).

intend, as an end, to get some rest. As a means of accomplishing that object, I intend to go on vacation. Not to achieve my intended means would be as much a frustration of my designs and aims as failing to achieve my intended ends.

Thus, suicide and its assistance involve an element of intending death as *either* an end, in and of itself, *or* as a means to some further purpose. Dr. Kevorkian illustrates the significance of intended means in this area. As his final object or end, Dr. Kevorkian claims only to seek to relieve the suffering of his "patients." But to accomplish this goal, he indubitably intends to use the means of killing. For Dr. Kevorkian to fail to achieve his means would represent a frustration of his purposes. Accordingly, in a case where the potassium chloride drip failed to kill his patient, Dr. Kevorkian ran off to find a canister of carbon monoxide.[258]

Dr. Kevorkian's 1994 acquittal on assisted suicide charges (he was found guilty of murder in a 1999 euthanasia case) further amplifies the significance of intended means. The trial judge correctly held that assisted suicide is a specific-intent crime, but she adopted a novel interpretation of the proof necessary to establish specific intent. The court instructed the jury that it could find Dr. Kevorkian guilty only if it found he "intended *solely* to cause" death.[259] Thus, the jury was obligated to acquit Dr. Kevorkian if it found that he intended to kill as a *means* to some other purpose, such as relieving suffering.

This instruction contains patent error. Under the court's rule, an assisted-suicide conviction would never be possible as long as the assistant intends to cause death as means to *any* further end. Thus, the Roman entertainer who assists volunteers in taking their lives in order to amuse his audience would go free, as he intends death merely as a means to some other end. Jim Jones, of Jonestown Massacre fame, would go free on the grounds that he intended to kill his followers only as a *means* of making a political point to protest the conditions of an inhumane world.[260] Those who help kill off Grandpa as a

258. *See* People v. Kevorkian, 527 N.W.2d 714, 733-34 (Mich. 1994).

259. Jon Kerr, *Kevorkian Takes Stand in Assisted Suicide Trial*, WEST'S LEGAL NEWS CRIM. JUST., Mar. 4, 1996, *available in* 3-4-96 WLN 1117.

260. *See* JIM JONES, THE JONESTOWN MASSACRE: THE TRANSCRIPT OF THE FINAL SPEECH OF REVEREND JIM JONES (Karl Eden ed., 1993) (using this rationale in his

means to the end of cashing in on his life insurance policy would also have a good defense. Obviously, the court's rule does not comport with what we naturally understand to be assisting suicide, an act which embraces the act of intending to help someone else die *either* as an end in itself, or as a means to some further purpose.

Intention and the Right to Refuse. In his separate concurrence in *Glucksberg*, Justice Stevens claimed that any distinction between suicide and refusing life-saving care based on intent is "illusory."[261] As proof, Justice Stevens suggested that a physician discontinuing care could do so with an intent to kill that patient and a doctor who prescribes lethal medication "may seek simply to ease the patient's suffering and to comply with her wishes."[262] Put more simply, Justice Stevens apparently views the right to refuse as a species of suicide and assisted suicide (i.e., intentional killing) that the state already has sanctioned; having endorsed assisted suicide by omission in this fashion, he sees no reason not to permit assisted suicide by commission.

This Article takes issue with the premise of Justice Stevens's syllogism. While an intention to kill—either as an end or as a means—is an element of assisted suicide and euthanasia, it is not a part of the practice of refusing medical care either as a matter of logical necessity or historical development.

Patients decline care for many reasons that in no way implicate an intention to die. They may wish to avoid further pain associated with the invasive treatments and tubes and the poking and prodding of modern medical care. They may wish to avoid the sense of indignity that dependence on medical machinery sometimes can bring. They may wish simply to go home from the hospital, to be with loved ones, and to restore their privacy. None of these decisions—or any of the other countless reasons for refusing care expressed every day by persons confronting an inevitable death—involves an intent to die even when death is foreseen. Likewise, those persons who assist patients in declining unwanted treatment need not necessarily intend death as either a means or as an end. They

final speech to his 900 followers). It is clear that many who died with Jones did not intend to die as either a means or an end, but were coerced—i.e., murdered.

261. Washington v. Glucksberg, 521 U.S. 702, 750 (1997).

262. *Id.*

may intend only to discontinue treatment to permit the patient to go home, to live without intrusive assistance, to avoid further pain associated with treatment. They may foresee death as a result of their actions without ever purposefully seeking it out. As the AMA has put the point, the "withdrawing or withholding of life-sustaining treatment is not inherently contrary to the principles of beneficence and nonmalfeasance," while assisted suicide is "contrary to the prohibition against [intentionally] using the tools of medicine to cause a patient's death."[263]

Consistent with this point, the AMA has concluded that physicians may prescribe death-inducing dosages of palliative medicines where "they can point to a concomitant pain-relieving *purpose*."[264] As Judge Kleinfeld has put it, "[a] physician who administers pain medication with the purpose of relieving pain, doing his best to avert death, is no murderer, despite his knowledge that as the necessary dosage rises, it will produce the undesired consequence of death."[265] Where, however, the doctor prescribes such treatment "for the *purpose* of causing death," the AMA holds that "the physician . . . exceed[s] the bounds of ethical medical practice."[266] Moreover, the AMA's view of purposeful killing applies whether the physician intends death as an end or as a means to some further purpose, such as relieving suffering; intentional killing is out-of-bounds "regardless of what other purpose the physician may point to."[267]

Historically, the judicial decisions creating the common law right to refuse unwanted medical care took great pains in making clear that they did *not* endorse the intentional taking of

263. American Medical Association, Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2230-31, 2233 (1992).

264. Motion for Leave to File Brief as *Amicus Curiae* and Brief of the American Medical Association, the California Medical Association, and the Society of Critical Care Medicine as *Amicus Curiae* in Support of Petitioners, on Petition for Writ of Certiorari at 15, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110) (Aug. 19, 1996) (emphasis added).

265. Compassion in Dying v. Washington, 79 F.3d 790, 858 (9th Cir. 1996) (en banc) (Kleinfeld, J., dissenting).

266. *Id.* (emphasis added).

267. *Id.* Dr. Quill avoided criminal charges and professional disciplinary action after prescribing barbiturates to an ailing patient and describing his actions in the *New England Journal of Medicine* precisely because of uncertainty over whether he *intended* to kill his patient or merely sought to provide legitimate treatment for her insomnia. *See supra* notes 10-11 and accompanying text.

life. For instance, in *McKay v. Bergstedt*[268] the Nevada Supreme Court recognized the right to refuse treatment but carefully distinguished it from suicide because it does not necessarily involve "the act or an instance of taking one's own life voluntarily and intentionally . . . ."[269] In *Satz v. Perlmutter* in the Florida Court of Appeals likewise held that:

> As to suicide, the facts here unarguably reveal that Mr. Perlmutter would die, but for the respirator. . . . The testimony of Mr. Perlmutter . . . is that he really wants to live, but do so, God and Mother Nature willing, under his own power. This basic wish to live, plus the fact that he did not self-induce his horrible affliction, precludes his further refusal of treatment being classed as attempted suicide.[270]

When Georgetown University's hospital sought to compel a Jehovah's Witness to accept a simple life-saving blood transfusion on the grounds that it did not want to be an accomplice to suicide, Judge Skelly Wright distinguished away the hospital's concerns along the same lines:

> The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously-commanded goal, but an unwanted side effect of a religious scruple.[271]

The Washington federal district court in *Compassion in Dying* suggested that in recognizing the right to refuse the State had "carved out" a form of permissible suicide.[272] Yet, the Washington state court decision creating the right to refuse expressly held that the State's interest in "the prevention of" suicide was not implicated by the new right because a "death

268. 801 P.2d 617 (Nev. 1990).

269. *Id.* at 625.

270. 362 So.2d 160, 162-63 (Fla. App. 1978). In *Eichner v. Dillon*, 426 N.Y.S.2d 517, 544 (N.Y. App. Div. 1980) the New York Court of Appeals recognized the right to withdraw a life-sustaining respirator, but specifically added that, on the facts before it, the withdrawal of the respirator involved no "*intent to die.*" *Id.*

271. Applications of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir. 1964).

272. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994).

which occurs after the removal of life sustaining systems is . . . no[t] intended by the patient."[273]

State after state has implicitly recognized this intent-based distinction by continuing to hold assisted suicide and euthanasia unlawful even after recognizing a new right to refuse care.[274] Many have also adopted living will and health care power of attorney laws while expressly indicating that none is meant to endorse the practice of assisting suicide.[275] Scores have laws that continue to privilege efforts to detain persons attempting suicide.[276] And some, like New York, have included language in statutes codifying the right to refuse that expressly instructs that the law is "not intended to permit or

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273. *In re* Colyer, 660 P.2d 738, 743 (Wash. 1983). Former Surgeon General C. Everett Koop has labeled *Bouvia v. Superior Court (Glenchur)*, 225 Cal. Rptr. 297 (Cal. App. 2d 1986), as "the most forthright judicial acknowledgment yet of a 'right' to undergo euthanasia by omission." C. Everett Koop & Edward R. Grant, *The "Small Beginnings" of Euthanasia: Examining the Erosion in Legal Prohibitions Against Mercy-Killing*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 585, 629 (1986). In that case, a twenty-eight-year-old woman suffering from cerebral palsy sought a writ of mandamus forbidding her doctors from feeding her through a nasogastric tube. The trial court heard evidence from Ms. Bouvia that suggested serious emotional trouble: She had suffered a recent miscarriage; her husband had left her; her parents had asked her to leave home; and she had repeatedly expressed her intent to commit suicide. *See Bouvia*, 225 Cal. Rptr. at 300; *see also* Michael R. Flick, *The Due Process of Dying*, 79 CAL. L. REV. 1121, 1128 (1991) (physician arguing that Ms. Bouvia's demand to die was the product of mental illness). After hearing the evidence, the trial court refused the writ on the grounds that Ms. Bouvia had "formed an intent to die," and thus, her refusal of care would constitute an (unlawful) suicide. *Bouvia*, 225 Cal. Rptr. at 305 (quoting trial court).

An intermediate trial court reversed, holding that

> we find no substantial evidence to support the trial court's conclusion [that Ms. Bouvia had formed an intent to die]. Even if petitioner had the specific intent to take her life [at one point], she did not carry out the plan. . . . [I]t is clear that she has now merely resigned herself to accept an earlier death, if necessary, rather than live by feedings forced upon her by means of a nasogastric tube.

Id.

What is remarkable about the appellate decision is its narrowness. The court of appeals did *not* hold that Ms. Bouvia's right to refuse encompassed the right to intentional self-killing by omission (i.e., suicide). It did *not* hold that Ms. Bouvia had a right to assistance in suicide or euthanasia. Instead, the court took the unusual step of reversing the trial court's factual findings and simply disputing that Ms. Bouvia had an intention to kill herself. Thus, even in *Bouvia*, the court blinked at the prospect of extending the right to refuse into the terrain of intentional killing. And, in fact, after losing her two-year wrangle in court, Ms. Bouvia changed her mind and opted to continue living. *See* Nat Hentoff, *Elizabeth Bouvia and the ACLU: I Used to Go to the ACLU for Help, Now They're Killing Us*, VILLAGE VOICE, July 30, 1996, at 10.

274. *See supra* notes 20-25, 216-21, 223-24 and accompanying text.

275. *See supra* note 222 and accompanying text.

276. *See supra*, notes 199-201 and accompanying text.

promote suicide, assisted suicide, or euthanasia."[277] Justice Stevens would simply ignore the intent-based line the AMA, case law, and state legislatures have all drawn.[278]

The line between foreseeing and intending death is a moral Rubicon. Once society moves from accepting death to permitting intentional killings, it crosses into as-yet uncharted territory, forced to determine *which* persons may be intentionally killed. We are forced to consider whether we will permit a new defense to any claim of murder based on the consent of the victim. Such a result would not cohere with our common law heritage that has outlawed consensual duels, sadomasochist killings, and the sale of one's life—like the Roman slave offering his up for circus entertainment, or the peasant in Graham Greene's *Tenth Man* who is willing to stand in a Nazi firing line in the stead of a wealthy lawyer in return for the promise of his family's financial security.[279] If society will not create an absolute consent-based defense to murder, *when* will we allow people to kill themselves with assistance? May the healthy, able, and young do so? Should the right be limited to the lives of the old and terminally ill? What criteria will society establish and enforce in determining which lives may be ended and which may not? Almost necessarily, this project in turn depends on raw assessments of "quality of life," leaving different human lives with different moral and legal status and protection based on perceptions of their "quality."[280]

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277. N.Y. PUB. HEALTH LAW § 2989(3) (McKinney 1994).

278. *Cf.* John Finnis, *On the Practical Meaning of Secularism*, 73 NOTRE DAME L. REV. 491, 511 (1998) (criticizing philosophers filing *amicus* brief in the Supreme Court in *Glucksberg* and *Quill* on the grounds that they ignored the distinction between foreseen and intended killings, resulting in a "very poor fit with reality, law, and professional ethics").

279. *See generally* GRAHAM GREENE, THE TENTH MAN (1985).

280. This Article pursues these issues further in Part VII. Justice Stevens is not the only one to question relying upon intention to distinguish assisted suicide from the right to refuse. A student note in the *Harvard Law Review* claims that such reliance is misplaced for three reasons:

> First, many patients who want treatment discontinued know that they will die without it and often clearly express a desire to end their suffering. Second, conditioning a patient's rights on their intentions and motivations undermines their right of self-determination because it enables physicians or judges to override the patient's decision if it does not comport with the physicians' or judges' values. Finally, claims that a patient is not committing suicide because he wants only a natural death, not self-destruction, assume that the discontinuation of life-sustaining treatment does not "cause" a patient's death . . . [t]his argument fails to distinguish objectively the withdrawal of life-sustaining treatment from

Some of the proffered distinctions between the right to refuse and assisted suicide have flaws. The act-omission distinction and the natural/unnatural (causation) distinction cannot differentiate entirely between the right to refuse and the proposed right to assisted suicide. However, intent does provide a rational basis for distinguishing between the right to refuse and assisting suicide. Persons exercising the right to refuse can do so without any *intent* to die—and, indeed, the right is exercised everyday by individuals who have no such intent. By contrast, a right to suicide, assistance in suicide, or euthanasia would necessarily embrace intentional acts of homicide. Opening the door to intentional acts of homicide also brings with it new and profoundly difficult moral questions—questions about whose lives are worth absolute legal protection and whose lives may no longer worth living—that are not present when death is merely foreseen.

V. ARGUMENTS FROM AUTONOMY

If history and fairness cannot sustain an assisted suicide or euthanasia right, some would invite us to look next to principles of "autonomy." Judges Rothstein and Reinhardt found the argument persuasive that all persons have an inherent (Fourteenth Amendment) right to choose their own "destinies." Justices Stevens and Souter suggested as much, while Justice O'Connor declined to reveal her cards. These voices (and votes) assure that autonomy arguments will be heard again when the inevitable as-applied legal challenge wends its way to the Court. Likewise, many legislative advocates contend that proper respect for autonomous individual choice compels legalization.

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physician-assisted suicide because it is laden with policy judgments, not simply based on objective facts.

Note, *The Right to Die and Physician-Assisted Suicide*, 105 HARV. L. REV. 2030 (citations omitted).

All of these objections fail on inspection. First, patients "who want treatment discontinued" may well "*know* that they will die without it" (emphasis added). *Id.* But this is not the same thing as *intending* death. It is the act of the soldier marching into battle and the martyr refusing to recant—not the act of a suicide. Second, the assertion that conditioning the right to assisted suicide on the patient's intent interferes with a "right of self-determination" assumes the (significant) premise that a right of self-determination exists, a question we shall confront in the next chapter. Finally, the author asserts that some controversial view of causation is at work. But an intent-based analysis presupposes no particular view of causation or what constitutes a "natural" death.

This Part first addresses the doctrinal question whether *Casey* or *Cruzan* embraces a constitutionally protected "autonomy" interest that might offer grounds for an assisted suicide and euthanasia right. It concludes that the majority in *Glucksberg* and *Quill* got it right—that the law should recognize no such right—and notes further doctrinal grounds supporting and strengthening the majority's conclusion.

Next, it addresses whether autonomy provides a persuasive analytical basis for legalization. This question is not only pertinent for legislators, but it also has relevance for lawyers and jurists who disagree with this Article's position on the reach of *Casey* and *Cruzan* and find that a constitutional "autonomy" interest does exist. This Part explores theories of autonomy offered by three different moral-political theorists and concludes that two of these theories would permit assisted suicide and euthanasia, but in a form that lacks appeal.

A. Casey *and* Cruzan

Chief Justice Rehnquist summarily dismissed the notion that *Casey* and *Cruzan* might form the basis for a constitutional right to assistance in suicide.[281] While his analysis was sufficient for three other members of the Court who joined the opinion, it apparently was insufficient for the remaining justices. Given that the Supreme Court will likely revisit the issue of assisting suicide, determining the reach of *Casey* and *Cruzan* is critical.

Casey. The argument from *Casey* begins with a single paragraph in a thirty-page plurality opinion discussing the constitutional significance of "intimate and personal choices . . . central to personal dignity and autonomy."[282] From this, the Ninth Circuit *en banc* panel (and Justice Stevens) suggest that an "almost prescriptive" mandate exists requiring recognition of a fundamental liberty interest in assisted suicide.[283]

The Court never intended such a broad reading of *Casey.* First, though Chief Justice Rehnquist never addressed the point, the *Casey* plurality opinion at heart rests upon *stare decisis* principles, upholding the abortion right because of the

281. Washington v. Glucksberg, 521 U.S. 702, 723-27 (1997).

282. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

283. Compassion in Dying v. Glucksberg, 79 F.3d 790, 813 (9th Cir. 1996) (en banc) (citations omitted).

need to protect and respect prior court decisions in the abortion field extending back twenty years to *Roe v. Wade*.[284] Indeed, *Casey*'s reliance on *stare decisis* in Section III of its opinion was the narrowest grounds for decision offered by the plurality and was sufficient to decide the controversy before the Court. Consequently, the single-paragraph autonomy discussion upon which the Ninth Circuit so heavily relies is not only the view of a three-justice plurality, but arguably *dicta* even to that plurality's decision.

Second, the Ninth Circuit and Justice Stevens' reading of *Casey*'s autonomy discussion proves too much. If the Constitution protects as a fundamental liberty interest every "intimate" or "personal" decision, the Court would have to support future autonomy-based constitutional challenges to laws banning any private consensual act of any significance to the participants in defining their "own concept of existence." As Judge O'Scannlain queried in dissent in the Ninth Circuit's proceedings: "If physician-assisted suicide is a protected 'intimate and personal choice,' why aren't polygamy, consensual duels, prostitution, and, indeed, the use of illicit drugs?"[285] Such a result would fly in the face of Justice O'Connor's statement in *Casey* that abortion is "unique" in American constitutional jurisprudence.[286]

Finally, the Ninth Circuit's argument obscures a basic difference between abortion and assisted suicide. As the Court has conceived it, only *one* person has an autonomy interest at risk in the abortion context: the woman. To the Court in *Roe*, a fetus does not qualify as a human being.[287] By contrast, there are "autonomy" interests on *both* sides of the assisted suicide issue—the interest of those persons who wish to control the timing of their deaths *and* the interest of those vulnerable individuals whose lives may be taken without their consent

284. *See Casey*, 505 U.S. at 854-58 (discussing Roe v. Wade, 410 U.S. 113 (1973)).

285. Compassion in Dying v. Glucksberg, *denial of reh'g en banc*, 85 F.3d 1440, 1444 (1996) (O'Scannlain, J., dissenting).

286. *See Casey*, 505 U.S. at 852.

287. *See* Roe v. Wade, 410 U.S. 113, 158 (1973) (emphasizing that the fetus is not a protected "person" under the Fourteenth Amendment). *But see* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 791-92 (1986) (White, J., dissenting) (arguing that the right to terminate a pregnancy differs from the right to use contraceptives because the former involves the death of a human being while the latter does not).

due to acts of mistake or abuse.[288] In *Roe*, the Court expressly held that, had it found the fetus to be a person, it could not have sanctioned a right to abortion because no constitutional basis exists for preferring the mother's liberty interests over the child's life.[289] That reasoning applies here: No basis exists for preferring the autonomy interests of those who seek to die over the liberty interests of those who fear inadvertent or wrongful death at the hands of an assisted suicide regime.

Cruzan. In *Cruzan*, the Court recognized that its prior decisions supported "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[290] Under common law battery doctrine, every individual has a right to "bodily integrity" — to be free of any physical intrusion without consent. Out of this common law right has grown a "logical corollary," that a patient "generally possesses the right not to consent, that is, to refuse treatment."[291] Accordingly, the Court assumed, without deciding, that, "under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest."[292] In other words, the Court assumed that the right to refuse treatment includes the right to decline treatment necessary to sustain life.

Buoyed by this assumption, the Ninth Circuit and Justice Stevens asserted that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognizes a liberty interest in hastening one's own death."[293] From there, they found that, if an individual has a right to commit suicide, he must have a right to assistance in committing suicide. Otherwise, "the state's prohibition on assistance [would] unconstitutionally restrict[] the exercise of that liberty interest."[294] From a right to assisted suicide, the Ninth Circuit—acknowledging that the

288. *See* discussion *infra* Parts VI.A-VI.D.
289. *See Roe*, 410 U.S. at 158.
290. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278 (1990).
291. *Id.* at 269, 270; *see also supra* note 225.
292. *Cruzan*, 497 U.S. at 279.
293. Compassion in Dying v. Glucksberg, 79 F.3d 790, 816 (9th Cir. 1996).
294. *Id.* at 801 (citing *Roe*, 410 U.S. at 151-52).

question was not even before it, but apparently unable to contain its momentum—proceeded to find a right to physician-administered suicide (i.e., voluntary euthanasia).[295]

By this series of steps, the Court's holding in *Cruzan* is upended. The ultimate basis for the right to decline medical treatment recognized in *Cruzan* lies in the common law of battery.[296] Unwanted medical care is an unconsented-to touching, and it may implicate the liberty interest protected by the Due Process Clause,[297] but assisted suicide and euthanasia have nothing to do with an unconsented-to touching. Because neither unwanted touching (i.e., the actual administration of medicine) nor a lack of consent is involved, the protection of bodily integrity from unwanted physical invasions simply is not implicated.

B. *Autonomy as a Moral-Political Argument*

Despite the strength of contrary arguments, some jurists may find a constitutional "autonomy" interest. Merely recognizing the existence of an "autonomy" interest, however, does not end the analysis; it only raises the question of what autonomy means in this context. If autonomy is a constitutional value, what kind of assisted suicide or euthanasia right follows? Unconstrained by constitutional doctrine, legislators likewise will have to face moral-political arguments for legalization based on patient "autonomy" and "choice." In the following section, the Article briefly outlines three of the most prominent theories of personal autonomy in contemporary moral-political theory, then turns to consider their potential application to the assisted suicide and euthanasia debate.[298]

Joseph Raz has identified three preconditions for the exercise of personal autonomy. First, Raz states that autonomy presupposes an individual capable of understanding his options and choosing between them:

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295. *See id.* at 831.

296. *See supra* notes 225, 291 and accompanying text.

297. *See supra* note 293.

298. This Article will not capture—and does not seek to capture—every subtlety in the growing debate over autonomy in moral theory. It aims solely to outline this debate in its most general terms in order to assess its application to a discrete legal question, seeking to keep a potentially vast topic within manageable, yet useful bounds.

> If a person is to be a maker or author of his own life then he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties to plan actions, etc. For a person to enjoy an autonomous life he must actually use these faculties to choose what life to have.[299]

Second, Raz argues that one must have a sufficient number of options to choose among for choice to be meaningful. Raz illustrates two aspects of this point. A woman left on a desert island with a carnivorous animal that constantly hunts her may be capable of making autonomous choices, but she has no time to do so. Her thoughts are only concerned with survival. Conversely, a man fallen into a pit with enough food and water to survive for the rest of his natural life may have the means necessary for survival but his available choices leave little room for autonomy. "His choices are confined to whether to eat now or a little later, whether to sleep now or a little later, whether to scratch his left ear or not."[300]

The third precondition Raz posits is that, for a decision to be autonomous, it must be free from "coercion and manipulation."[301] For an individual's choice to be his own, it must be *his* choice and not one dictated by another. This assertion of moral theory, like the question of what constitutes a "sufficient" number of options among which to choose, quickly takes us into a question of political theory: When must the state forswear coercion and manipulation in order to assure adequate respect and room for individual choice?

Contemporary autonomy theorists answer this question in different ways. Some hold that the state must remain neutral between competing conceptions of the good life. Others maintain the state need not remain neutral, but may legislate coercively when harm to others is threatened. Still others challenge the necessity of either the neutrality or harm principle to autonomy.

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299. JOSEPH RAZ, THE MORALITY OF FREEDOM 371 (1988).
300. *Id.* at 374.
301. *Id.* at 373.

C. *The Neutrality Principle*

In simple terms, neutralists argue that respect for individual autonomy means that the state cannot promote any particular moral objective or end, but must leave individuals to choose their own values. The state has no role to play in making men and women moral, no role in "perfecting" persons; to the contrary, the state should aspire to an *anti*-perfectionist ideal.

The familiar brief for state neutrality is John Rawls's defense of equal liberty in *A Theory of Justice*. Rawls hypothesizes an original position, a moral vacuum where individuals have not yet established any religious or moral identity or commitments.[302] Rawls argues that, in the original position, rationally self-interested persons would demand the freedom to define and pursue their own views of what constitutes a good life without state interference.[303] Ignorant of, say, what religion one would profess in society, a rational person would not permit the state authority to prefer one religion over another. People in the original position

> cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs.[304]

Accordingly, the state is left free to pursue only those policies and norms that evince equal respect for all competing conceptions of the good.[305]

An array of contemporary theorists have sought to supplement and strengthen Rawls's thesis in various ways,[306]

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302. *See* JOHN RAWLS, A THEORY OF JUSTICE 11 (1989).

303. *See id.* at 327-31.

304. RAZ, *supra* note 299, at 207.

305. In the end, even Rawls sanctions at least *one* deviation from strict neutrality. His theory presupposes individuals of equal means and ability pursuing their notions of the good, but not all people start off life on equal terms materially. Rawls would, thus, permit (pursuant to his difference principle) the state to deviate from equal distribution of primary goods to enable the worst-off sufficient means to pursue their own conceptions of the good. *See* RAWLS, *supra* note 302, at 76.

306. *See, e.g.*, Ronald Dworkin, *Foundations of Liberal Equality*, *in* THE TANNER LECTURES ON HUMAN VALUES 60-70 (Grethe B. Petersen ed., 1990); Jeremy

but, critical for our purposes, all agree that state neutrality is an essential ingredient to personal autonomy. For example, David Richards argues that neutrality alone ensures "respect [for] the moral sovereignty of the people themselves, the ideal of the sovereign ethical dignity of the person against which the legitimacy of the contractarian state must be judged."[307] Should the state pursue non-neutral ends, it would "degrade [individuals'] just equal liberty to define their ultimate philosophical and moral aims."[308] Ronald Dworkin similarly submits that government "must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning this sense of his equal worth" nor should it "enforce private morality."[309]

Although anti-perfectionists like Rawls, Richards, and Dworkin view state neutrality as the guarantor of individual autonomy, not all liberal moral theorists agree. Raz, for one, agrees that for individual autonomy to mean anything the individual must have a "large number of greatly differing pursuits among which [he is] free to choose."[310] Autonomous individuals cannot be left with too few options like the hypothetical Man in the Pit or with too little time to make any meaningful decisions like the Hounded Woman. But, to say that a wide range of choices is a precondition to autonomy does not, to Raz, mean that *all* conceivable options must be available to the individual. A non-neutral perfectionist state might rule out certain ways of life as bad, but, Raz argues, no

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Waldron, *Autonomy and Perfectionism in Raz's* Morality of Freedom, 62 SO. CAL. L. REV. 1097, 1127-30 (1989); LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 231-54 (1987); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 386-89 (1980); H.L.A. HART, LAW, LIBERTY, AND MORALITY 30-43 (1963). The neutrality principle advocates, also have, unsurprisingly, sought to claim Kant as one of their own. *See, e.g.*, David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457 (1987); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 8 (1982) [*hereinafter* SEX, DRUGS, DEATH]. But the merits of this claim have come under fire from several quarters. *See, e.g.*, ROBERT GEORGE, MAKING MEN MORAL 147-54 (1993) [*hereinafter* MAKING MEN MORAL]; John Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433 (1987); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 94-97 (1989).

307. DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 252 (1989) [*hereinafter* TOLERATION].

308. David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457, 464 (1987).

309. RONALD DWORKIN, A MATTER OF PRINCIPLE 205-06 (1985).

310. RAZ, *supra* note 299, at 381.

reason exists to suppose it would leave individuals with insufficient options. To the contrary, because there are many "forms and styles of life which exemplify different virtues and which are incompatible" with each other, even in a perfectionist state, ample choices will remain for freedom and autonomy to flourish.[311]

Not only can a perfectionist state foreclose evil options without seriously infringing on individuals' opportunities for self-creation, Raz argues it *should* do so because autonomy is valuable only when exercised in pursuit of a morally upright way of life. A person may be autonomous even when choosing bad ways of life, but Raz argues that

> autonomously choosing the bad makes one's life worse than a comparable non-autonomous life is. Since our concern for autonomy is a concern to enable people to have a good life it furnishes us with reason to secure that autonomy which could be valuable. Providing, preserving or protecting bad options does not enable one to enjoy valuable autonomy.[312]

As for the Rawlsian claim that rationally self-interested individuals would never choose a state that could rule out some competing conceptions of the good, Raz simply disagrees. Individuals in the original position might well permit a perfectionist state to act non-neutrally and rule out bad choices and lifestyles, provided that it does so in accord with a methodology all can see and accept as fair. Rather than demanding a neutralist state, Raz thinks rationally self-interested persons might just as easily reach "an agreement to establish a constitutional framework most likely to lead to the pursuit of well-founded ideals, given the information available at any given time."[313]

D. *The Harm Principle*

Just as the neutrality principle divides some moral theorists over autonomy's meaning and prerequisites, a debate over whether the state must respect the harm principle divides others. The harm principle holds that each person must be afforded the right to exercise self-control "[o]ver himself, over

311. *Id.* at 395.
312. *Id.* at 412.
313. *Id.* at 126.

his own body and mind," and that the "only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others."[314]

The harm principle differs from the neutrality principle in one significant respect. Where neutrality bars government from promoting any particular version of morality, the harm principle is concerned with the means used to enforce morality. One may accept that government has a role to play in (non-neutrally) encouraging good choices and discouraging evil ones, but also take the view that it may use coercive means (e.g., criminal sanctions) only to prevent those choices that result in harm to others. Thus, assuming bigamy to be immoral but harmless to others, the non-neutral harm principle adherent would hold that the state could *teach* against bigamy and attempt to *discourage* it (e.g., by refusing to recognize bigamous marriages), but the state could not make bigamy a crime.

Introducing a harm principle necessarily begs the question what constitutes "harm." Must there be a *physical* invasion before the state can intercede? Most adherents to the harm principle recognize the possibility of non-physical harm. Yet they also seek to rule out definitions of harm that expand it so far as to permit the state to "criminalize conduct solely because the mere thought of it gives offense to others."[315] However, their attempts to a narrower definition are opaque, as Raz's effort illustrates: "[O]ne harms another when one's action makes the other person worse off than he was, or is entitled to be, in a way which affects his future well-being."[316] Many neutralists, including Rawls, Dworkin, and Richards, also adhere to some form of the harm principle,[317] but Raz

314. JOHN STUART MILL, ON LIBERTY 9 (E. Rappaport ed., 1978).

315. RICHARDS, TOLERATION, *supra* note 307, at 239.

316. RAZ, *supra* note 299, at 414.

317. *See, e.g.*, GEORGE, MAKING MEN MORAL, *supra* note 306, at 140 n.24 (1993). Rawls says that "justice as fairness requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted." Inasmuch as, for Rawls, "obligations" are obligations of fairness and "natural duties" are owed to others, it seems reasonable to conclude that Rawls himself understands his theory to imply a version of the harm principle that would, at minimum, exclude moral paternalism.

illustrates that one can reject neutralism and still endorse the harm principle. While Raz rejects neutrality as unnecessary to ensure personal autonomy, he argues that to disregard the harm principle would be to violate autonomy in two ways:

> First, it [would] violate[] the condition of independence and express[] a relation of domination and an attitude of disrespect for the coerced individual. Second, . . . there is no practical way of ensuring that the coercion will restrict the victims' choice of repugnant options but will not interfere with their other choices.[318]

Simply put, the harm principle allows individuals all the freedom they want to pursue their own views of the good life—up to the point where they could harm an unwilling person. Our freedom ends where the next person's nose begins. Thus, while the state may teach and promote good behavior, allowing it to punish bad conduct that results in no harm to others would trench unduly on individual choice. Worse still, coercive state power is an indiscriminate and unwieldy tool; using it to snuff out bad but purely self-regarding choices may incidentally foreclose other, good choices. Thus, for instance, when the state tries to ban pornography, it almost inevitably infringes upon legitimate artistic expression.[319]

E. *"Pure" Perfectionism*

Some reject not only the neutrality, but even the harm principle as an essential precondition of individual autonomy. Patrick Devlin argued that the state should be allowed to pursue any moral ends it wishes in the name of social cohesion, regardless of whether the morality pursued is true.[320] More

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Id. (quoting RAWLS, *supra* note 302, at 331, 112, 115). Joel Feinberg and Robert Nozick are among the principle's most eloquent and powerful exponents. *See, e.g.*, FEINBERG, HARM TO SELF, *supra* note 306; JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1987); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974) (the state violates individuals' rights if it uses its "coercive apparatus . . . to prohibit activities for their *own* good or protection"). Whether Nozick is an anti-perfectionist, however, is not altogether evident. *See* NOZICK, ANARCHY, STATE, AND UTOPIA, at 48-51.

318. RAZ, *supra* note 299, at 418-19.

319. *See id.* at 418.

320. For an interesting discussion of Devlin and his relationship to perfectionist moral theory, see GEORGE, MAKING MEN MORAL, *supra* note 306, at 48-82.

recently, Robert George has taken the position that anyone (like Raz) who rejects state neutrality must also, as a matter of logic, reject the harm principle; George insists that ample room remains for meaningful individual choice without adherence to either principle. Like Raz, George argues that individuals should be free to choose from the many and varied ways of living a morally upright life without state interference.[321] However, autonomy is only an instrumental value, not an absolute one. Individual choice deserves respect only to the extent that it is employed toward ends recognized as morally good: "The value of autonomy is . . . conditional upon whether or not one uses one's autonomy for good or ill,"[322] and should be permitted only "in so far as [it is an] important means and condition[] for the realization of human goods . . . and the communities they form."[323]

To Raz's claim that the state's use of coercion in the absence of harm to others expresses disrespect for the coerced individual, George offers two replies:

> First, such laws do not, except in the most indirect or implausible senses, deprive the morals offender of any sort of valuable *choice*. . . . [I]t is difficult to perceive violations of autonomy in the legal prohibition of victimless wrongs if we join Raz . . . in a perfectionist understanding of autonomy as valuable only when exercised in the pursuit of what is morally good. And this raises the suspicion that Raz smuggles into this argument a non-perfectionist notion of autonomy.[324]

Thus, George asserts that coercing an individual to avoid bad choices does not really deprive him of any meaningful options at all.

This argument, however, glosses over the possibility, latent in the harm principle, that choice itself is a meaningful societal good; that permitting and encouraging people to make—and learn from—bad choices offers some real social benefit. Certainly most parents and teachers would accept this truism.

George advances a more serious argument when he disputes that the use of coercive measures to prevent victimless bad

321. *See* GEORGE, MAKING MEN MORAL, *supra* note 306, at 173-75.
322. *Id.* at 177.
323. *Id.* at 215.
324. *Id.* at 185.

choices does not display disrespect for the coerced *individual*, but only disrespect for the bad end chosen. The state seeks to condemn the sin, not the sinner. Whatever the intent of such coercive laws, George's point does not address Raz's claim concerning their effects, namely that coercion (however well-intended) is an indiscriminate tool that may not only foreclose the victim's repugnant choice, but may also incidentally interfere with other legitimate choices.

When George eventually comes to grips with this claim, he provides perhaps his strongest argument against the harm principle. Using the pornography example, George notes that harm principle adherents fear that coercive suppression of pornography may result in the accidental suppression of legitimate forms of art. But this, he argues, does not demonstrate that the use of coercion is wrong as a matter of moral or political theory, only that we should use it sparingly and prudently:

> The danger of interfering with morally acceptable choices is a consideration that counts against anti-pornography legislation in the practical reasoning of prudent legislators. But it may not be a conclusive reason. In the circumstances, the good to be achieved *may* reasonably be judged as worthy of the risks.[325]

Even this argument, however, does not unseat the harm principle as at least a rule of thumb. Indeed, George concedes the imprecision of coercive penalties and the practical dangers of accidental suppression of upright choices in using coercive remedies to suppress immoral choice; thus, he at least implicitly acknowledges the value of the harm principle even in his theory of autonomy and perfectionism.

F. *Autonomy, Assisting Suicide, and Euthanasia?*

In applying the concept of autonomy to assisting suicide and euthanasia, it is immediately evident that George's view hardly commands recognition of any new right. Evaluating whether persons should have the right to receive assistance in suicide or euthanasia devolves into an inquiry into the moral uprightness of the acts themselves. Indeed, George expressly admits that a right to choose a way of life (or death) arises if, but only if, it is

325. *Id.* at 188.

consistent with the realization of human goods and the communities they form.[326] "The saving of souls is the whole reason for the law."[327] George's instrumental view of autonomy, thus, is literally devoid of independent content and cannot be said to require respect for assisted suicide, euthanasia, or any other substantive right.

By contrast, adherents to the neutrality and harm principles claim that their conceptions of autonomy do have independent substantive content, and many argue that they can provide definitive answers to the assisted suicide and euthanasia question.

Neutralism. Relying on the language of neutralism, Ronald Dworkin has testified before the British Parliament that "[p]eople disagree about what kind of a death is meaningful for them," and, precisely because of that disagreement, a neutralist state must permit assisted suicide and euthanasia:

> What sort of a death is right for a particular person and gives the best meaning to that person's life, largely depends on how that life has been lived, and that the person who has lived it is in the best position to make that decision.... [It] is not that we collectively think [assisted suicide or euthanasia] is the decent thing to do, but that we collectively want people to act out of their own conviction.[328]

Richards similarly submits that

> it is an open question, consistent with the neutral theory of the good, how persons with freedom and rationality will define the meaning of their lives, and no externally defined teleological script is entitled to any special authority or weight in such personal self-definition. Once we see the issue in this way, we can see that the fact of one's own death frames the meaning one gives one's life in widely differing ways.[329]

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326. *See id.* at 215.

327. *Id.* at 34.

328. 1 HOUSE OF LORDS REPORT, *supra* note 224, at 23, 28 (statement of Ronald Dworkin).

329. RICHARDS, SEX, DRUGS, DEATH, *supra* note 306, at 248-49; *see also* DAN BROCK, LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS 206 (1993) ("If self-determination is a fundamental value, then the great variability among people on this question [of when consensual homicide might be justified] makes it especially important that individuals control the manner, circumstances, and timing of their dying and death.").

Despite the claims of self-avowed neutralists, neutrality hardly commands (or is even compatible with) the assisted suicide or euthanasia right commonly advocated in public policy and judicial circles. Virtually every proponent of the right would limit its exercise to the terminally ill or those suffering intolerable pain, and would require the participation of a physician in a controlled hospital environment. For example, the referendum passed by Oregon voters in 1994 (like unsuccessful efforts in California and Washington state) permitted physician-assisted suicide only for the terminally ill. The World Federation of Right-to-Die Societies has lobbied for an assisted suicide right available only to the "incurably ill and/or intolerably suffering person who persistently requests that help."[330] Even in the Netherlands, regulations purport to limit aid-in-dying to patients who are "experiencing intolerable suffering with no prospect of improvement" and require that other alternatives to alleviate the patient's suffering "must have been considered and found wanting."[331]

Putting aside the difficulty of satisfactorily defining terms such as "terminally ill" or "intolerably suffering"—arguably as difficult to grapple with as "harm"—an assisted suicide right available only to such persons fails the neutrality test. Efforts to require a physician's participation in a hospital environment are similarly non-neutral. In a moderate assisted suicide regime, Christian virgins seeking to avoid rapacious invaders, monks seeking the face of God, Romeos despondent over lost loves, Sardanapolises weary with life, Buddhist monks seeking to protest war through self-immolation, prisoners tired of their confined lives, the handicapped overwhelmed by their disabilities—all are barred from taking their own lives in the manner they think most fitting.[332] Individuals seeking death must not only rationally choose it, they must also receive the imprimatur of the state that their lives are of a sort that may be taken; the state is hardly neutral about who qualifies.

Put another way, in the assisted suicide regime typically defended today, the individual's rational choice is a necessary

330. Letter from the World Federation of Right-to-Die Societies, *quoted in* 3 HOUSE OF LORDS REPORT, *supra* note 224, at 182.

331. 1 HOUSE OF LORDS REPORT, *supra* note 224, at 65.

332. Even Ms. Bouvia—whom no court found terminally ill or suffering intolerable pain—would not qualify. *See* discussion *supra* note 273.

but not sufficient precondition. Instead, the *state* asserts the right and responsibility to make the final moral judgment about which lives are worth protecting even against the rational patient's will. In doing so, the state must necessarily make a comparative moral judgment about the value of human lives, endorsing the premise that some persons (the sick, the terminally ill) may choose death, while others (the virgin, the monk, Romeo) may not. Robert Sedler, an American Civil Liberties Union ("ACLU") assisted-suicide advocate, makes the point plainly when he states that the ACLU would extend a right to assistance in suicide only to the "terminally ill or so . . . physically debilitated that it is *objectively reasonable* for them to find that their life has become unendurable."[333]

The determined neutralist comfortable with making such moral judgments about the comparative worth of human lives might object at this point that he has been misunderstood—that "paternalistic" non-neutral limits on choice *can* sometimes be justified. David Richards, for one, has contended that neutralism can supply

> a principle of paternalism and explain its proper scope and limits. From the point of view of the original position, the contractors would know that human beings would be subject to certain kinds of irrationalities with severe consequences, including death and the permanent impairment of health, and they would, accordingly, agree on an insurance principle against certain of these more serious irrationalities in the event they might occur to them.[334]

In the end, however, Richards would appear to permit only enough paternalism to ensure a fully rational adult decision. Indeed, to permit more paternalistic interference than that would threaten the core of the neutralist position. If persons in the original position could allow the state to permit the state to foreclose harmful choices altogether (as Raz posits), little would be left of the ideal of state neutrality.

Gerald Dworkin, too, recognizes this potential pitfall. He suggests that persons in the original position could agree to certain paternalistic restrictions on our freedom as "a kind of

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333. Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and* Within, 21 HASTINGS CONST. L.Q. 777, 794 (1994) (emphasis added).

334. RICHARDS, TOLERATION, *supra* note 307, at 57.

insurance policy we take out against making decisions which are far-reaching, potentially dangerous and irreversible."[335] But, he carefully qualifies his statement by asserting that persons in the original position would agree only to an insurance policy that forces them to think through their decision rationally before acting: "I suggest that we would be most likely to consent to paternalism in those instances in which it preserves and enhances for the individual his ability to rationally consider and carry out his own decisions."[336]

The right to assistance in suicide and euthanasia, at least as contemporary proponents usually present it, is far narrower than a neutralist's paternalism principle would allow. No matter how rational the decision, some decisions to die are deemed not worthy of respect and some lives are adjudged too important to end. Richards's criticism of doctors and hospitals that force dying patients to accept unwanted medical treatment is equally applicable to those who advocate an assisted-suicide right limited only to certain classes of adults: "To defend such interference [with an individual's decision to die] on the ground of the universal value of life is the essence of unjust paternalism . . . ."[337]

At this point neutralist assisted-suicide advocates might attempt a strategic retreat. Conceding that paternalism is justified on neutralist grounds only to the extent that it assures rational individual choice, they might suggest that an assisted-suicide right limited to the terminally ill or intolerably suffering represents a rough approximation of the choice rational individuals in the original position would make. This argument, however, abandons neutralism altogether for raw majoritarianism. It adopts a policy that many of us might accept but one that surely not everyone would freely choose if the state remained truly neutral.

Ronald Dworkin is case in point. Dworkin has written articles and a book, testified before the British House of Lords, and co-authored a brief to the U.S. Supreme Court promoting the legalization of assisted suicide. Yet, in the end, he has

335. Gerald Dworkin, *Paternalism, reprinted in* MORALITY AND THE LAW 122-23 (Robert Baird & Stuart Rosenbaum eds., 1971).

336. *Id.* at 125.

337. RICHARDS, TOLERATION, *supra* note 307, at 227.

conceded that he would require not only that a person's decision to die be rational, stable, and competent, but also that it be one society agrees is "reasonable."[338] Dworkin is unclear on what showing he would require for a patient's decision to die to qualify not only as "rational" but also as "reasonable," or how this additional requirement comports with neutralist principles. Indeed, his proffered explanation deeply undercuts any claim to pure neutralist reasoning:

> We might very well say *as a community*—we *bet* we might be wrong, but we *bet*—that if a teenage lover lives another two years, maybe even two weeks, he will be very glad not to have taken his own life. . . . I believe [the state] does have a sufficient interest in denying help and forbidding others to help someone who announces an intention to end his life, if [the state's judgment] is a reasonable judgment.[339]

A community's "bet," of course, is called majoritarian preference and legislation, not the stuff of neutralist principle.[340]

The Harm Principle. The notion that assisting suicide or euthanasia are purely self-regarding (or "harmless") acts is certainly questionable. In the wake of suicide, spouses are frequently left behind, bereft of their life-long companions. Children are sometimes orphaned. Even the most rational act of suicide, thus, can impose real "harm" on third persons, whatever one's understanding of the term. Thus, even in a purely Razian world, the state would likely be free to use its coercive powers to suppress many acts of suicide, assisting suicide, and euthanasia to protect against the harms befalling unconsenting persons.

Even supposing, however, that suicide imposed no third-party harms, a right to assistance in suicide or euthanasia

338. *See* Ronald Dworkin, *Euthanasia, Morality and the Law*, 31 LOY. L.A. L. REV. 1147, 1151-52, 1158 (1998).

339. *Id.* at 1152 (emphasis added).

340. Dworkin himself acknowledges criticism that he has strayed from the neutralist reasoning. *See id.* (admitting that other neutralists are "offended" by his concession that the state has a legitimate role in determining the "reasonableness" of suicide decisions). Having shed neutralism, Dworkin must either concede to majoritarian decisions or provide a systematic and substantive moral explanation regarding what does and does not qualify as a "reasonable judgment" by the state to limit the practices of assisting suicide and euthanasia. In at least some writings, Dworkin appears to rely on a utilitarian calculus to do so. *See* discussion *infra* Part VI.

limited to the terminally ill or intolerably suffering would fail the harm principle test. Such a right would improperly preclude some rational adults from making the (supposedly harmless) choice to die in the manner they choose. To comport with the harm principle, a right to assistance in suicide or euthanasia would require the state to abstain from interfering with *any* rational adult's private decision to die. Unlike neutralists, harm principle adherents would permit the state to *teach* against assisted suicide and euthanasia all it liked. But, while talk would be permitted, action would not. Harm principle adherents would firmly insist that the state refrain from coercively interfering with any freely chosen decision to die.

G. *The Only "Choice" Left for the Neutrality and Harm Principles*

In the end, neutralists and harm principle adherents who seek to endorse some form of assistance in suicide or euthanasia are left with only one principled choice: endorsing a right permitting all rational adults to kill themselves and to seek any form of assistance they wish. This option goes far beyond what most contemporary proponents claim to seek, requiring effective recognition of a right to consensual homicide. Such a right has no analogy in modern history and goes beyond even Rome's unruly precedent. The prisoner sick of his sentence, the exhibitionist who sets himself on an Olympic pyre, the impecunious seeking a better life for his family by selling himself for amusement, the Buddhist monk wanting to make a political point, and the terminally ill hoping to evade pain are all lumped together. Their different conceptions of the good death all have to be respected—if after a "cooling off" period.

Neutralist and harm principle advocates rarely reveal up-front the practical consequences of their philosophical commitments. Instead of openly advocating a consensual homicide right for all persons, they typically emphasize the dire medical condition of a particular patient, the unpleasantness of the hospital settings, and the compassion of individual physicians like Dr. Quill.

Gerald Dworkin, for instance, writes at length about how he would create a "Suicide Board" composed of psychologists "to

meet and talk with the person proposing to take his life."[341] But he is ultimately forced to divulge that neutral respect for personal autonomy requires that the Board's approval would be unnecessary and the decision to die (in any fashion) would always rest with the competent adult.[342] Richards likewise argues for an assisted-suicide right with a vivid discussion of the plight of cancer patients, but in the end, he too must admit that his argument extends beyond such sympathetic cases to *any* "voluntarily embraced" decision to die.[343]

Joel Feinberg discusses a British television drama, *Whose Life Is It Anyway?* In the program an active young man is paralyzed from the neck down in a car crash. He ultimately decides that he would rather die than live out his life as a quadriplegic. Feinberg describes the young man's physical plight in detail, yet it is all fundamentally irrelevant. To him, if "the choice is voluntary enough by reasonable tests, [one should be] firmly committed to a policy of non-interference . . . for the life at stake is [the patient's] life not ours. The person in sovereign control over it is precisely he."[344]

In his book *Life's Dominion*, Ronald Dworkin illustrates just how far the neutralist's commitment might be taken in practice. Dworkin (again) asks us to consider the decision of a sick older person, in this case a woman who has become demented due to Alzheimer's. Earlier, while still competent and rational, Dworkin supposes that the woman expressed a firm desire to be killed when full dementia set in. But now, after dementia has set in, the woman seems to enjoy life and says she wishes to live. Dworkin asks which request we should obey: the earlier, rational request, or the woman's present choice affected by dementia? Dworkin's response is telling:

> We might consider it morally unforgivable not to try to save the life of someone who plainly enjoys her life, no matter how demented she is, and we might think it beyond imagining that we should actually kill her. We might hate living in a community whose officials might make or license [such a] decision[]. We might have other good reasons for treating [her] as she now wishes, rather than, as, in my

341. Gerald Dworkin, *supra* note 335, at 124.
342. *See id.*
343. RICHARDS, SEX, DRUGS, DEATH, *supra* note 306, at 226.
344. FEINBERG, HARM TO SELF, *supra* note 306, at 354.

> imaginary case, she once asked. *But still, that violates rather than respects her autonomy.*[345]

To date, no concrete legislative proposal has been offered in America or England that would reach nearly as far as neutralist or harm principles might demand; even the World Federation of Right-to-Die Societies has yet to advocate such a law. Yet, as some academic neutralism and harm principle adherents are beginning to admit openly the consequences of their philosophical views, the practical implications are nearby. Dr. Kevorkian has regularly used a machine in the back of his van to kill "patients" who are neither terminally ill nor suffering intolerable pain; indeed, one was a middle-aged woman in the early stages of Alzheimer's still capable of beating her adult son at tennis—just no longer able to keep score. Moreover, the Dutch Supreme Court has recently relaxed the Netherlands' traditional requirement that a candidate for assistance in suicide show he or she is suffering intolerable pain, suggesting that those suffering merely *psychological* pain can now qualify.[346]

VI. ARGUMENTS FROM UTILITY

Unlike neutralism and harm principle advocates, utilitarians purport to offer the ability to defend a right to assistance in suicide or euthanasia that does not devolve into a Roman circus, open to all rational adults regardless of motive or physical condition. Eschewing principles of personal liberty, they approach the assisted suicide (and any) issue by asking what the best solution is for most people. Unlike autonomy theorists, they are not hamstrung by adherence to principle into defending a disturbingly overbroad right.

Justices O'Connor and Souter gave hints of utilitarian thinking in *Glucksberg* and *Quill*. Before deciding to write an assisted suicide and euthanasia right into the Constitution, both said they wanted to see the results of state legislative experiments. Implicit in their position is a desire to weigh whether the practice of assisting suicide and euthanasia carries

345. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 229 (1993) (emphasis added) [hereinafter LIFE'S DOMINION].

346. *See* Keown, *Some Reflections*, *supra* note 8, at 214.

more benefits than harms. The legislative arena commonly entertains utilitarian arguments for proposed laws, with legislators and citizens arguing that enacting a certain provision would (or would not) promote the greatest good for the greatest number.

The classic utilitarian argument for euthanasia is Glanville William's book, *The Sanctity of Life and the Criminal Law*.[347] In it, Williams argues that physician-assisted suicide should be legalized for terminally ill persons because the benefits it would produce for such persons outweigh any harms it might cause. Williams's utilitarian claim is even echoed by contemporary theorists who claim to eschew utilitarian reasoning. In *Life's Dominion*, Ronald Dworkin attempts to build a purely autonomy-based right to assistance in suicide. In the end, however, Dworkin is forced to admit that allowing assisted suicide would result not only in some persons exercising the right to choose death freely, but in other persons being killed against their will as a result of abuse and mistake.[348] In confronting this fact, Dworkin slips into a utilitarian calculus, weighing the pluses and minuses of an assisted suicide regime and arguing that, on the whole, the scale still tips in favor of legalization: "[The fear of abuse and mistake] loses its bite once we understand that legalizing *no* euthanasia is itself harmful to many people . . . . There are dangers both in legalizing and refusing to legalize; the rival dangers must be balanced, and neither should be ignored."[349]

Lurking here is a concession that autonomy interests lie on *both* sides of the assisted-suicide debate—the right to choose on the one hand; the right to be free from non-consensual homicide on the other. Lurking here, too, is a concession that utilitarian reasoning must be employed. Applying that reasoning, Dworkin concludes that, on the whole, permitting legalization is superior. In fact, all that is missing from Dworkin's utilitarian argument are the *reasons* why he thinks the "balance" ultimately tips in favor of permitting assisted suicide rather than outlawing it. He insists the utilitarian

347. WILLIAMS, SANCTITY OF LIFE, *supra* note 175.

348. *See* RONALD DWORKIN, LIFE'S DOMINION, *supra* note 345, at 190 ("But some opponents of euthanasia also appeal to autonomy; they worry that if euthanasia were legal, people would be killed who really want to stay alive.").

349. *Id.* at 197-98.

calculus favors one result over the other, but the lack of stated reasons for this result prevents the reader from meaningfully critiquing Dworkin's result.

This Part argues that two problems confront any such utilitarian argument for assisting suicide and euthanasia. First, contrary to Dworkin's assertion, the costs and benefits do not obviously tip in favor of legalization. For example, Dutch experience suggests that, even in a regime purporting carefully to limit assistance in suicide to the very ill, mistaken and abusive killings are a regular occurrence.[350] Anecdotal evidence suggests the problems of the Netherlands would recur in this country.[351] The instances of abuse and mistake may also fall disproportionately on certain vulnerable populations.[352] Imposing an assisted suicide regime would further impose a real cost on all society, which is required to make comparative judgments about the value of different human lives.[353] Meanwhile, on the other side of the balance, the benefits of permitting assisted suicide and euthanasia appear limited to a small class of persons.[354]

Second, and more fundamentally, the project of weighing the costs and benefits of assisting suicide is incoherent. Weighing the liberty interest of the person seeking death against the right of persons to avoid being killed as a result of abuse or mistake is literally impossible due to the incommensurability of the goods being weighed.[355]

A. *The Dutch Experience*

The Netherlands is the only country in the Western world with a regularly operating euthanasia regime and, as such, offers the only significant empirical evidence about the practice of euthanasia and what its legalization in the United States might entail.[356]

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350. *See* discussion *infra* Part VI.A.
351. *See* discussion *infra* Part VI.B.
352. *See* discussion *infra* Part VI.C.
353. *See* discussion *infra* Part VI.D.
354. *See* discussion *infra* Part VI.E.
355. *See* discussion *infra* Parts VI.F-G.
356. *See, e.g.*, John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407 (1995); John Griffiths, *Assisted Suicide in the Netherlands: The Chabot Case*, 58 MOD. L. REV. 232 (1995) [hereinafter *The* Chabot *Case*]; John Keown, *Further Reflections on Euthanasia in the*

Despite their widespread practice, assisting suicide and euthanasia remain statutorily proscribed crimes in the Netherlands.[357] They are tolerated only because Dutch courts have in recent years developed a "necessity" defense. In the view of the Dutch courts, cases of voluntary euthanasia pose the doctor with a situation of necessity if he has to choose between the duty to preserve life and the duty as a doctor to do everything possible to relieve the unbearable suffering, without prospect of improvement, of a patient committed to his care.[358] Euthanasia thus is legally tolerated as a necessity when carried out by a physician and applied to terminally ill patients suffering unbearable pain.

Three separate legislative efforts to repeal laws banning assistance of suicide and euthanasia have failed.[359] The Dutch government has recently proposed yet another bill that would formally legalize assisted suicide and euthanasia. This effort appears more likely to succeed. It would, however, extend the practice of assisted suicide and euthanasia to *children*. Anyone between the ages of twelve and sixteen could request assisted suicide or euthanasia and, with a doctor's consent, have his or her wishes prevail even over parental objections. Those over sixteen would be treated as adults.[360]

In 1990, the Dutch government commissioned a study to measure compliance with existing guidelines on assisted suicide and euthanasia. A year later, the Remmelink Commission, so named for the attorney-general chairman, issued a report containing a survey of 406 Dutch physicians conducted by Professor Van der Maas of the Institute of Public

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[1] *Netherlands in the Light of the Remmelink Report and the Van Der Maas Survey, in* EUTHANASIA, CLINICAL PRACTICE AND THE LAW 219, 223 (Luke Gormally ed., 1994) [hereinafter *Further Reflections*]; John Griffiths, *Recent Developments in the Netherlands Concerning Euthanasia and Other Medical Behavior that Shortens Life*, 1 MED. L. INT'L. 347 (1994); John Griffiths, *The Regulation of Euthanasia and Related Medical Procedures that Shorten Life in the Netherlands*, 1 MED. L. INT'L. 137 (1994); John Keown, *The Law and Practice of Euthansia in the Netherlands*, 108 L.Q. REV. 51 (1992).

357. Article 293 of the Dutch criminal code forbids an individual from taking the life of another even after the latter's "express and serious request." Keown, *Further Reflections*, *supra* note 359, at 193. Article 294 forbids "*intentionally incit[ing]* another to commit suicide, assist[ing] him to do so, or provid[ing] him with the means of doing so." Griffiths, *The* Chabot *Case*, *supra* note 359, at 233 n.6.

358. Keown, *Some Reflections*, *supra* note 8, at 194-96.

359. *See* 1 HOUSE OF LORDS REPORT, *supra* note 224, at 64.

360. *See* Ray Moseley, *Dutch Euthanasia Plan Lets Kids Make Choice*, CHI. TRIB., Aug. 26, 1999, at 1.

Health at Erasmus University, Rotterdam. The Van der Mass Survey identified 2,300 cases of euthanasia in the Netherlands during 1990, accounting for fully 1.8 percent of all deaths in the country that year.[361] The Survey found that an additional 0.3 percent of all deaths—or some four hundred cases—were due to physician-assisted suicide.[362] Accordingly, the survey estimated a total of 2,700 cases in which life was taken with the patient's consent and a physician's aid.[363] The Survey identified one thousand additional cases where physicians intentionally took a patient's life by active means *without* his consent.[364] Thus, for every 2.7 acts of physician- or patient-induced death with consent, the Survey found one case in which a physician actively killed a patient without consent in direct violation of the Dutch courts' necessity defense doctrine.

These numbers, moreover, vastly understate the incidence of euthanasia. They embrace only cases of *affirmative* euthanasia and do not include *omissions* of care taken with the *specific intent* of killing the patient (which Dutch medical practice recognizes to be acts of euthanasia).[365] Physicians reported that in an additional 8,750 cases they "[w]ithdr[ew] or withh[eld] treatment without explicit request" and did so with the purpose of terminating life.[366] All told, John Keown estimates that in 1990, the fifth year of the Dutch euthanasia system, as many as 26,350 deaths were caused by medical intervention intended either in whole or in part to kill, a figure that represents fully 20 percent of all deaths in Holland.[367] Over half of these killings (15,258) were without any express patient request.[368] Extrapolating to the United States, John Finnis estimates that application of Dutch practices here would mean "over 235,000 unrequested medically accelerated deaths per annum."[369]

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361. *See* Richard E. Coleson, *The* Glucksberg *and* Quill *Amicus Curiae Briefs: Verbatim Arguments Opposing Assisted Suicide*, ISSUES L. & MED., June 22, 1997, at 3.

362. *See id.*

363. *See id.*

364. *See id.*

365. Keown, *supra* note 241, at 270.

366. *Id. at* 270.

367. *Id.* at 271.

368. *Id.* at 270.

369. John Finnis, *Euthanasia, Morality, and Law*, 31 LOY. L.A. L. REV. 1123, 1128 (1998).

One might try to justify the high number of nonconsensual killings in two ways. First, while Dutch regulations require an explicit request from the patient before assistance in suicide can be administered, they do not mandate a written petition. Conditioning the exercise of an assisted suicide right on a written request arguably would allow fewer instances of abuse. Second, of the one thousand nonconsensual killings by action, about six hundred involved *some* discussion between physician and patient about the possibility of euthanasia. But, these discussions ranged substantially in their character:

> The[y] ranged from a rather vague earlier expression of a wish for euthanasia [as interpreted by the physician], as in comments like, "If I cannot be saved anymore, you must give me something," or "Doctor, please don't let me suffer for too long," to much more extensive discussions, yet still short of [the] explicit request [Dutch law requires].[370]

Ultimately, in a single year a minimum of 9,150 persons were killed by omission and four hundred by affirmative action without *any* indicia of consent. These numbers dwarf the four hundred or so cases where patients actually chose physician assistance in dying. Neither do they apparently include an additional ten or so cases in which newborns were actively killed by doctors because the children could not survive without life-sustaining treatment.[371]

Of further concern is the fact that physicians involved in the one thousand nonconsensual affirmative killings volunteered that ending pain and suffering motivated them in only 30 percent of these cases.[372] The primary reasons physicians offered for killing without express consent were the absence of prospects for improvement (60 percent), the futility of medical therapy (39 percent), avoidance of "'needless prolongation'" (33 percent), the relatives' inability to cope (32 percent), and "'low quality of life'" (31 percent).[373]

That thousands of persons are killed annually without their consent should hardly come as a surprise. Application of the

370. MARGARET PABST BATTIN, THE LEAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE 137 (1994).

371. *See id.*

372. *See* Keown, *Further Reflections*, *supra* note 319, at 230 (citing the Van Der Maas Survey).

373. *Id.*

necessity doctrine, at least in Anglo-American law, has never turned on the victim's consent. Rather, necessity is usually claimed precisely because the victim has *not* consented. So it was with the sailors who claimed that they needed to eat the cabin boy to survive in *Regina v. Dudley and Stephens*,[374] and so it is with nuclear missile protestors and anti-abortion advocates who insist on the "need" to trespass on testing sites or at abortion clinics to save lives.[375] Ultimately, the Remmelink Commission itself illustrates just how irrelevant patient consent is to application of Dutch necessity doctrine:

> [T]he ultimate justification for the intervention is in both cases [*i.e.*, where there is and is not an explicit request for assistance in dying] the patient's unbearable suffering. . . . The absence of a special request for the termination of life stems partly from the circumstances that the party in question is not (any longer) able to express his will because he is already in the terminal stage, and partly because the demand for an explicit request is not in order when the treatment of pain and symptoms is intensified. The degrading condition the patient is in confronts the doctor with a case of force majeure. According to the Commission, the intervention by the doctor can easily be regarded as an action that is justified by necessity, just like euthanasia.[376]

To the Dutch Commission, the "ultimate justification" for assisted suicide and euthanasia has nothing whatsoever to do with patient consent, choice or autonomy. Instead, it has everything to do with the "degrading condition" of the patient, who is perceived as better off dead than alive. The Report's eugenics implications were apparently lost on commission members.

B. *American Evidence and Issues*

Because assisted suicide and euthanasia have not yet been widely sanctioned in the United States, we cannot ascertain if they would be carried on here more successfully than in the Netherlands. The only American jurisdiction to experiment with assisted suicide, Oregon, reports that just twenty-three

374. 14 Q.B.D. 273 (1884).

375. *See, e.g.*, Note, Antinuclear Demonstrations and the Necessity Defense, 5 VT. L. REV. 103 (1980).

376. Remmelink Report, *translated in* Keown, *Further Reflections*, *supra* note 319, at 229.

persons received lethal prescriptions in 1998, the first year of implementation.[377]

In 1985, however, Mario Cuomo, then-Governor of New York, convened a task force composed of twenty-four members representing a wide variety of ethical, philosophical, and religious views to consider whether to legalize assisted suicide and euthanasia. It unanimously recommended against legalization, partly because it believed abuse and mistake would pose even greater problems in America than in the Netherlands:

> If euthanasia were practiced in a comparable percentage of cases in the United States [as in the Netherlands], voluntary euthanasia would account for about 36,000 deaths each year, and euthanasia without the patient's consent would occur in an additional 16,000 cases. The Task Force members regard this risk as unacceptable. They also believe that the risk of such abuse is neither speculative nor distant, but an inevitable byproduct of the transition from policy to practice in the diverse circumstances in which the practices would be employed.[378]

Recent developments and structural aspects of the American medical and legal system support the New York task force's conclusion.

A 1995 University of Pennsylvania study revealed that 25 percent of 879 polled physicians had withdrawn life-sustaining treatment *without* the consent of either patient or family.[379] Twelve percent admitted that they had withdrawn care without even the *knowledge* of the patient or family, and three percent said they had removed life-sustaining care over the express *objections* of patient or family.[380] Reacting to these figures, Dr. David Asch, leader of the study, stated that these figures may represent "a good thing, that physicians act like medical professionals, bringing their *own values* to the table, rather than like medical technicians, *doing whatever they are*

377. *See* Oregon Health Department, *Oregon's Death With Dignity Act: The First Year's Experience* (Mar. 15, 1999) <http://www.ohd.hr.state.or.us/cdpe/chs/pas/arresult.htm>.

378. *New York Task Force, supra* note 10, at 134.

379. *See* Richard A. Knox, *Study Finds ICU Doctors Withholding Treatment*, BOSTON GLOBE, Feb. 18, 1995, at 1.

380. *See id.*

told" by the patient and family.[381] As in the Remmelink Report, the ultimate justification for these killings has nothing to do with patient choice and autonomous decision-making; it is the physician's professional judgment—the values the doctor brings to the table—which prove determinative.

The apparently common practice of physicians disregarding autonomously expressed patient instructions they deem wasteful is already receiving some legal sanction. A Massachusetts trial court ruled in April 1995 that a hospital and its doctors need not provide life-sustaining care they view as futile, even if the patient has expressly requested it.[382] The case involved an elderly woman, Catherine Gilgunn, who became comatose after suffering irreversible brain damage. Her daughter instructed the hospital that her mother wished everything medically possible should be done for her should she become incompetent. The hospital, however, ignored the daughter's instructions and refused to place Mrs. Gilgunn on a respirator or to provide cardiopulmonary resuscitation. The lawyer defending the hospital provided this forthright assessment of the ruling: The court's "real point" was that, "in very rare instances, particularly in situations at the end of life, where medicine simply cannot hold off death, . . . physicians can't be required to do things they feel would be inappropriate and harmful to the patient"—regardless of how the patient herself "feels."[383]

Structural features of American medical and legal practice further call into question whether assisting suicide could be more safely practiced in the United States than in the Netherlands. Physicians in the Netherlands typically have longstanding relationships with patients; consequently, doctors are in some position to assess the patient's "concerns, values, and pressures that may be prompting the . . . request [for assistance in dying]."[384] By contrast, the AMA concedes that American physicians, increasingly employees or agents of large health maintenance organizations, "rarely have the depth of knowledge about their patients that would be necessary for an

381. *Id.* (emphasis added).

382. *See* Gina Kolata, *Court Ruling Limits Rights of Patients*, N.Y. TIMES, Apr. 22, 1995, sec. 1, at A6.

383. *Id.*

384. American Medical Association, *supra* note 263, at 2232.

appropriate evaluation of the patient's [assisted suicide] request."[385]

American courts and legislatures likewise have developed "substituted judgment" and "best interests" doctrines that permit third parties to refuse life-sustaining medical treatment for incompetent patients. Introducing these concepts into the assisted suicide and euthanasia arena would be a very small doctrinal step, and it would permit family members and others to kill an incompetent patient by substituting their judgment or deciding death to be in the patient's best interests. Abandoning patient consent for these artificial proxies may introduce additional cases of abuse and mistake not found even in the Netherlands where patient consent is, at least theoretically, required before any killing may occur. Family members concerned with escalating medical costs or diminishing inheritances and states acting as guardians of financially-burdensome incompetent persons are examples of persons that would have troublesome incentives to kill.

Finally, what little evidence can be adduced from Oregon's very limited assisted suicide experience (twenty-three patients) is not altogether comforting. The Oregon Health Department found that "[p]ersons who were divorced and persons who had never married were 6.8 times and 23.7 times, respectively, more likely to choose physician-assisted suicide than persons who were married."[386] Moreover, of the twenty-three persons who received a lethal prescription, as many as eight may have changed their mind and ultimately refused assistance in dying.[387] Of the remaining fifteen persons who did commit assisted suicide, only four had psychiatric or psychological consultation prior to dying, despite overwhelming evidence about the relationship between mental illness and suicide.[388] Furthermore, the Oregon Health Department concedes that it lacks objective information to assess whether physicians are complying with its procedural safeguards, even though this is

385. *Id.*
386. Oregon Health Department, *supra* note 377.
387. *See id.*
388. *See id.*

an affluent state where one would expect euthanasia and assistance in suicide to be regulated most carefully.[389]

C. *Threatened Minorities*

When entering hospitals, many elderly Dutch patients have begun insisting upon written contracts assuring they will not be killed without their consent.[390] Numerous polls suggest that the elderly and minorities in this country are similarly concerned by the prospect of legalized euthanasia. The *Detroit Free Press* has found that while 53 percent of whites it sampled in Michigan could envision choosing assisted suicide themselves, only 22 percent of blacks could.[391] A poll in Ohio revealed that while roughly one-half of those sampled favored allowing assisted suicide, those most likely to favor the practice were high-income, highly-educated young adults. Those most likely to oppose allowing assisted suicide were blacks, people 65 and older, and those with low levels of income and education.[392] A Harvard study found that, while 79 percent of those between eighteen and thirty-four would allow physician-assisted suicide, 54 percent of older Americans would not permit the practice.[393] These surveys demonstrate a concern shared by Dr. Nicholas Parkhurst Carballeira, Director of the Boston-based Latino Health Institute that, "[i]n the abstract, [permitting euthanasia] sounds like a wonderful idea, but in a practical sense it would be a disaster. My concern is for Latinos and other minority groups that might get disproportionately counseled to opt for physician-assisted suicide."[394]

Empirical evidence concerning the medical treatment provided to minority groups suggests that their relative unease with legalization is entirely rational. The *New England Journal*

389. *See id.* Under Oregon law, the only source of data on assisted suicide cases comes from physicians who report their activities to the State. The Oregon Health Department ("OHD") admits that this raises "the possibility of physician bias." *Id.* Accordingly, the OHD "cannot detect or collect data on issues of noncompliance with any accuracy." *Id.*

390. *See* 1 HOUSE OF LORDS REPORT, *supra* note 224, at 66.

391. *See id.*

392. *See Ohioans Divided on Doctor Assisted Suicide Issue*, UNITED PRESS INT'L, June 28, 1993 (citing poll conducted by the Institute for Policy Research at the University of Cincinnati and co-sponsored by the Cincinnati Post).

393. *See* Joseph P. Shapiro & David Bowermaster, *Death on Trial*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 31, 39.

394. *New York Task Force*, *supra* note 10, at 90.

of Medicine has reported that female, black, elderly and Hispanic cancer patients are all less likely than similarly situated non-minorities to receive adequate pain-relieving treatment.[395] Minority cancer patients are three times less likely than non-minority patients to receive adequate palliative care.[396] Minorities have also tended to receive poorer AIDS treatment: Only 48 percent of blacks receive medicines designed to slow the progress of AIDS, compared to 63 percent of whites; while 82 percent of whites receive effective treatments for preventing AIDS-related pneumonia, only 58 percent of blacks receive similar attention.[397]

In the events leading up to the consideration of the failed California voter referendum on euthanasia in 1992, euthanasia advocates turned to the American Bar Association ("ABA") for support. The ABA, however, ultimately recommended against endorsing a euthanasia right and did so specifically on the ground that

> [t]he proposed right to choose aid-in-dying freely and without undue influence is illusory and, indeed, dangerous for the thousands of Americans who have no or inadequate access to health and long-term care services . . . . The lack of access to or the financial burdens of health care hardly permit voluntary choice for many. What may be voluntary in Beverly Hills is not likely to be voluntary in Watts. Our national health care problem should be our priority—not endorsement of euthanasia.[398]

The New York task force likewise recommended against legalization in part because of its likely effects on minority populations. The task force found that legalization would impose severe risks for "the poor, minorities, and those who are least educated and least empowered. . . . Officially sanctioning [euthanasia] might also provide an excuse for those wanting to spend less money and effort to treat severely and terminally ill patients, such as patients with Acquired Immune

395. *See* Charles S. Cleeland et al., *Pain and its Treatment in Outpatients with Metastatic Cancer*, 330 NEW ENG. J. MED. 592, 594 (1994).

396. *See id.*

397. *See* Richard D. Moore et al., *Racial Differences in the Use of Drug Therapy for HIV Disease in an Urban Community*, 330 NEW ENG. J. MED. 763 (1994).

398. John H. Pickering, *The Continuing Debate Over Active Euthansia*, BIOETHICS BULLETIN (ABA), Summer 1994, at 1, 2 (quoting John Pickering, Memorandum to the ABA Commission on Legal Problems of the Elderly, Jan. 17, 1992).

Deficiency Syndrome."[399] Even those task force members who deemed euthanasia justified in some instances conceded that continued criminalization would

> curtail[] the autonomy of patients in a very small number of cases when assisted suicide is a compelling and justifiable response, [but would] . . . preserve[] the autonomy and well-being of many others. It [would] also prevent[] the widespread abuses that would be likely to occur if assisted suicide were legalized.[400]

The State of Michigan established a commission to study the assisted suicide issue after Dr. Kevorkian brought attention to the subject there. The commission was unable to achieve any majority-endorsed position, but those who concluded that euthanasia should not be legalized stressed the dangers of "social biases."[401] Though "proponents of assisted suicide would . . . point out that the criteria for allowing assisted suicide should be blind to the factors of age or disability," commission members argued that

> [t]o suggest that legalizing assisted suicide will not continue to reinforce . . . stereotypes and prejudices against disabling constitutions is to ignore the practicalities of how, and for whom, assisted suicide would be applied. . . . Assisted suicide is truly *accommodated suicide.* It is the provision of accommodations that enable a person with disabilities to commit suicide. Assistance is given in committing suicide, even though assistance is not available to obtain the full range of needed supports. In essence, the state is willing to accommodate people with disabilities in dying, but not in living.[402]

In 1993, the British Government commissioned a Select Committee of the House of Lords to study assisted suicide; it too, ultimately recommended against legalization partially out of "concern that vulnerable people—the elderly, lonely, sick or distressed—would feel pressure, whether real or imagined, to request early death."[403] The state surely possesses a strong

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399. *Id.* at 125, 96 (internal citation omitted).

400. *New York Task Force, supra* note 10, at 141.

401. MICHIGAN COMMISSION ON DEATH & DYING, FINAL REPORT (June 8, 1994).

402. MICHIGAN COMMISSION ON DEATH & DYING, REPORT OPPOSING LEGALIZED ASSISTED SUICIDE 6-7 (Apr. 25, 1994).

403. 1 HOUSE OF LORDS REPORT, *supra* note 224, at 491 ("[W]e believe that the message which society sends to vulnerable and disadvantaged people should not,

interest in assuring *all* its citizens that they will never be killed—or counseled to accept death—in whole or in part because of their age, race, or economic status.

D. *Turning Killing Into a Public Process*

Permitting assisted suicide and euthanasia poses another sort of threat to minority populations: Legalization would require society's active participation in making comparative moral judgments about the value of different kinds of human lives. Unless we adopt the neutralist's position that assisted suicide and euthanasia should be open to *all* rational adults, an individual's request to die would not be honored without social ratification. Society would have to regulate which lives are worth living and which are not. Our publicly funded physicians and nurses would become instruments of killing as well as healing, and our publicly funded hospitals would host their activity. Our public medical and nursing schools would teach proper techniques. Killing would be transformed into a public process in which we would all be forced to participate at some level.

Requiring social acquiescence and participation in this process would impose harm on the members of our community who have fundamental moral objections to assisted suicide and euthanasia. Legalization would place many persons in the position abolitionists found themselves in antebellum America, or contemporary abortion and capital punishment opponents find themselves today—in deep distress at even passive participation in a regime which facilitates what they believe to be a severe wrong. The social division and potential unrest such discontent could bring is a "cost" no utilitarian calculus could ignore.

E. *The "Benefits" of Assisting Suicide and Euthanasia*

While ample grounds exist for concern about the costs associated with legalizing assistance in suicide or euthanasia, on the other side of the utilitarian balance it is unclear how frequently assisted suicide or euthanasia would be a "compelling and justifiable" medical response.[404] The

however obliquely, encourage them to seek death, but should assure them of our care and support in life.").

404. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).

terminally ill, the only group to whom the Ninth Circuit sought to extend right to assistance in suicide, account for just 1.4 percent of the U.S. population.[405] They are, moreover, hardly overly inclined to self-killing, representing only about two to four percent of suicides in this country.[406] As to those few terminally ill patients who do seek death, medical evidence suggests that many may act not as a result of (approved) rational deliberation, but rather because of mental illness.[407] With modern palliative care techniques, it is additionally unclear how frequently pain-avoidance need be a reason for assisting suicide or euthanasia.

A 1988 study reveals that physician incompetence and the unavailability of palliative medicines in the Netherlands created many cases of "necessary" killings: more than 50 percent of Dutch cancer patients surveyed suffered treatable pain unnecessarily, and 56 percent of Dutch physician practitioners were inadequately trained in pain relief techniques.[408] Another study conducted under the auspices of the U.S. Department of Health and Human Services revealed similar results in this country:

> [I]n up to 90 percent of [cancer] patients[,] the pain can be controlled by relatively simple means. Nevertheless, undertreatment of cancer pain is common because of clinicians' inadequate knowledge of effective assessment and management practices, negative attitudes of patients and clinicians toward the use of drugs for the relief of pain, and a variety of problems related to reimbursement for effective pain management.[409]

The AMA likewise opposes euthanasia in part on the medical judgment that the technology of pain management has advanced to the point where most pain is now controllable; the success of the modern hospice movement illustrates the extent

405. *See* David Clark, *"Rational" Suicide and People with Terminal Conditions or Disability*, 8 ISSUES L. & MED. 147, 151-53 (1992).

406. *See id.; see also New York Task Force, supra* note 10, at 147 ("Even the firmest supporters of assisted suicide and euthanasia would acknowledge that only a relatively small percentage of patients in hospitals and nursing homes today would use the practices, if legal.").

407. *See generally* Clark, *supra* note 405.

408. *See* 1 HOUSE OF LORDS REPORT, *supra* note 224, at 67.

409. Ada Jacox et al., *New Clinical-Practice Guidelines for the Management of Pain in Patients with Cancer*, 330 NEW ENG. J. MED. 651, 651 (1994).

to which aggressive pain control and close attention to patient comfort and dignity can ease the transition to death.[410]

Killing patients may also create perverse incentives. Euthanasia offers a cheaper social option than guaranteeing the care, attention, and pain medication required to afford the opportunity to die in comfort and without pain. Sanctioning killing as a valid medical response to patient pain would, by natural laws of economics, create disincentives to develop and disseminate pain suppressants that could prevent much unnecessary suffering and the "necessity" of killing many persons:

> The difficulties in developing caring and creative means of responding to suffering discourage society as well as health care providers from greater efforts. A policy of active euthanasia can become another means of such avoidance.... I could not rid my mind of the images of care provided in our hard-pressed public hospitals and in many nursing homes, where compassionate professionals could easily regard a swift and painless death as the best alternative for a large number of patients.[411]

Contrary to claims by Ronald Dworkin, Glanville Williams, and others, an examination of the "costs" and "benefits" of allowing assisted suicide or euthanasia does not obviously lead to a conclusion that legalization represents the greatest possible solution for the greatest number of persons.

F. *The Utilitarian Miscalculation*

An even more fundamental problem remains in the utilitarian project. Utilitarians do not line up uniformly in favor of legalizing assisted suicide or euthanasia. Soon after Glanville Williams published *The Sanctity of Life* arguing that the costs and benefits associated with euthanasia favored recognizing a right, Yale Kamisar published an article arguing for the opposite conclusion, applying the same utilitarian methodology.[412] Kamisar argued that Williams miscalibrated

410. *See* American Medical Association, *supra* note 263, at 2232.

411. Alexander M. Capron, *Euthanasia in the Netherlands: American Observations*, *in* 22 HASTINGS CTR. REP. 30, 32 (1992).

412. *See* Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958).

his calculus, failing to account accurately for all the costs associated with legalization.

The significance of the Williams-Kamisar debate lies not so much in who performed the most accurate utilitarian calculus, but in the impossibility of their mutual undertaking. Even if one could identify *all* the costs and benefits associated with assisted suicide or euthanasia, on what rational scale could one objectively weigh them? Without reference to any moral conviction, how can one possibly compare, for instance, the interest the rational adult seeking death has in dying with the danger of mistakenly killing persons without their consent?

The problem facing *both* Williams and Kamisar is the absence of any pre-moral scale on which the utilitarian can weigh or compare such competing values.[413] Endeavoring to weigh the interest the rational adult has in choosing death against the interest the incompetent elderly widow has in avoiding being killed by a greedy nephew willing to "substitute" his judgment for hers is metaphysically impossible without reference to any moral rule or code. It is as senseless as comparing the virtues of apples to those of oranges, senseless

> in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book.[414]

Adopting a moral system or code does, however, furnish a scale on which to weigh whether or not society should continue to criminalize euthanasia and assisted suicide. Accepting the moral premises that one ought never harm basic goods intentionally and that human life is such a good, it follows that euthanasia should not be legalized, whatever the unfortunate side-effects may be for the rational adult who wishes to die.[415] Conversely, adopting the premise that the state may only act with neutral respect for all conceptions of the good life requires recognition of an unfettered right to consensual homicide. Adopting a moral code is thus akin to constructing a scale that calibrates values such that one *can* compare them. It provides a

413. *See, e.g.*, RAZ, *supra* note 299, at 321-66; JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 112-18 (1991); John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

414. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 115.

415. *See* discussion *infra* Part VII.

methodology for ranking competing values and a framework for resolving conflicts between them.[416]

Margaret Battin, a pro-euthanasia medical ethicist, appears to identify the incommensurability problem with utilitarian arguments against assisted suicide and euthanasia when she acknowledges that

> *the argument sets up a conflict.* Either we ignore the welfare and abridge the rights of persons for whom euthanasia would clearly be morally permissible in order to protect those who would be the victims of corrupt euthanasia practices, or we ignore the potential victims in order to extend mercy and respect for autonomy to those who are the current victims of euthanasia prohibitions.[417]

Though she seemingly identifies the incommensurability problem (*viz.*, that utilitarian reasoning merely "sets up a conflict" between competing goods), Battin claims she has identified a way out:

> To protect those who might wrongly be killed or allowed to die might seem a stronger obligation than to satisfy the wishes of those who desire release from pain, analogous perhaps to the principle in law that "better ten guilty men go free than one be unjustly convicted." However, the situation is not in fact analogous and does not favor protecting those who might be wrongly killed. To let ten guilty men go free in the interests of protecting one innocent man is not to impose harm on the ten guilty men. But to require the person who chooses to die to stay alive in order to protect those who might unwillingly be killed sometime in the future is to impose an extreme harm—intolerable suffering—on that person, which he or she must bear for the sake of others. Furthermore, since, as I have argued, the question of which is worse, suffering or death, is person-relative, we have no independent, objective basis for protecting the class of persons who might be killed at the expense of those who would suffer intolerable pain; perhaps our protecting ought to be done the other way around.[418]

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416. *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 115.
> One can *adopt* a system of weights and measures that will *bring* the three kinds of quantity into a relation with each other . . . But the adoption of a set of commitments, by an individual or a society, is *nothing like* carrying out a calculus of commensurable goods.

Id.

417. BATTIN, *supra* note 370, at 119 (emphasis added).

418. *Id.*

In this latter passage, Battin intimates that the conflict between competing autonomy concerns *can* be resolved—and resolved in favor of allowing euthanasia.[419] But Battin's attempt to bypass the incommensurability only demonstrates the impossibility of the task.

Battin suggests that the "ten guilty men" maxim does not apply and, in fact, militates in favor of permitting euthanasia. She suggests that society's traditional willingness to protect the one innocent man even at the expense of letting ten guilty men go free is at least partly based on the fact that doing so imposes no "harm" on the guilty men. But the point of the maxim is not that we protect innocent human life only when it imposes no harm on the guilty, but that society protects the innocent individual life even when it means accepting harms to the guilty men's potential future innocent victims and to the innocent victims of those emboldened by the state's leniency. Indeed, the maxim suggests a categorical moral rule against intentionally harming an innocent human person, even if the side-effects (placing ten guilty men in prison) are desirable. The maxim is thus hardly any pre-moral utilitarian calculator; it apparently affirms a school of moral theory one might associate with Aristotle or Aquinas. Any attempt to apply the maxim in the consensual homicide context would result in the conclusion that it is wrong to risk killing one innocent person even if it means accepting the fact that other innocent persons may be forced to endure unwanted pain and suffering.

Having recognized the incommensurability problem, Battin fails to solve it. She supplies no clear non-moral equation for weighing the costs and benefits of assisted suicide or euthanasia and instead offers a moral rule that would actually seem to foreclose her position on legalization.

G. *A Double-Effect Defense?*

Utilitarians seeking a way around the incommensurability problem sometimes argue that the disadvantages associated with permitting consensual homicide may be discounted because they are not *intentional.* In permitting consensual homicide, the objective is to permit free choice; no one intends

419. *Id.* (suggesting that "perhaps our protecting ought to be done the other way around").

deaths caused by abuse and mistake. At most, one accepts them only as foreseeable but unintended side effects.

For example, Joel Feinberg argues that one should "consider reasonable mistakes in a legalized voluntary euthanasia scheme to be 'the inevitable by-products' of efforts to deliver human beings, at their own requests, from intolerable suffering, or from elaborate and expensive prolongations of a body's functioning in the permanent absence of any person to animate that body[.]"[420] Like the supposed neutralist seeking to justify a right to assistance in suicide limited to the terminally ill by resorting to utilitarian arguments,[421] however, Feinberg here must abandon his principled utilitarian views in an attempt to save a particular result. To suggest that intended effects are more important than unintended ones, Feinberg must endorse a controversial premise of moral reasoning that allows him to *rank* or *score* different kinds of consequences on a common scale. He must abandon the utilitarian promise of purely objective pre-moral calculation leading to the maximization of overall social good and admit the need to adopt a subjective moral code that allows him to compare and draw conclusions about different kinds of consequences.[422]

VII. AN ARGUMENT FOR RESPECTING LIFE AS A SACROSANCT GOOD

This Article has considered arguments for assisting suicide and euthanasia based on history, fairness, neutrality, the harm principle, and utilitarianism. None of these arguments provides a principled basis for a right limited to the terminally ill. The failure of these arguments to supply a persuasive basis for an assisted suicide or euthanasia right confined to the terminally ill suggests that a fundamental problem exists in the effort. It also suggests the difficulty of attempting to resolve an inherently moral question on non-moral grounds such as utilitarianism, which seeks to maximize some pre-moral overall

420. JOEL FEINBERG, FREEDOM AND FULFILLMENT 273-74 (1992).

421. *See supra* notes 348-49 and accompanying text (discussing Dworkin).

422. Moreover, if intended consequences are more morally significant than unintended consequences, Feinberg owes us an explanation why a regime that incidentally kills people in order to permit freely chosen deaths is preferable to one that incidentally forbids freely chosen deaths in order to prevent accidental or intentionally abusive killings.

good, or autonomy theory, which seeks to defend the value of choosing often without reference to the value of what is chosen.

This Part argues that a persuasive argument against *any* form of assisted suicide or euthanasia has been largely overlooked in contemporary debate. This moral (and legal) argument does not claim to resolve end-of-life questions objectively, but it concedes that reference to a necessarily subjective conception of right and wrong is required. It is an argument concerning the sanctity of human life.

Under this view, the intentional taking of human life by private persons is always wrong. Publicly authorized forms of killing—in war or in the criminal justice system—fall in a separate category.[423] Some adherents to the sanctity-of-life view argue that war can be waged and capital punishment can be practiced consistently with the norm against private intentional killing; others disagree.[424] But, inherent in *any* version of the sanctity-of-life position is an exceptionless norm against the intentional taking of human life by private persons.[425] This view seeks to establish both an absolute rule against intentionally taking innocent human life and reasons "why one should not kill an innocent person, even if that killing should violate no norm of fairness or, for that matter, any other relevant moral norm," like autonomy or utility.[426]

A. *Life as a Basic Good*

The sanctity-of-life position starts with the supposition that there are certain irreducible and categorical moral goods and evils. The existence of such moral absolutes has been

423. *See, e.g.*, Joseph M. Boyle, Jr., *Sanctity of Life and Suicide: Tensions and Developments Within Common Morality*, *in* SUICIDE AND EUTHANASIA 221, 221 (Baruch A. Brody ed., 1989); THOMAS AQUINAS, SUMMA THEOLOGICA II-II 197-208 (Fathers of the English Dominican Province trans., 1918) arts. 2-6 (arguing that the criminal loses his human dignity by his criminal activity).

424. *See* Boyle, *supra* note 423, at 221. *But see* JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM (1987).

425. Abortion is ruled out by such a principle if, but only if, the fetus is considered a form of human life. It is precisely this question over which the Supreme Court in *Roe* divided. *See supra* notes 287-89 and accompanying text. In fact, *Roe* supports the sanctity-of-life position in its candid admission that if the fetus were considered a human life, the Court could not have reached the result it did because no constitutional basis exists for preferring the mother's liberty over the child's life. *See id.*

426. Boyle, *supra* note 423, at 221.

suggested by Aristotle,[427] argued by Aquinas,[428] and defended by contemporary natural law thinkers.[429] A categorical moral good is one understood as intrinsically worthwhile. It is an end that is a *reason,* in and of itself, for action and choice and decision. Reference to some prior premises need not—and cannot—deduce its value; instead, its truth is self-evident (*per se nota,* to Aquinas).[430] Society's understanding of basic moral goods comes not from logical constructs, but from practical reasoning and experience. Neither are basic human goods Platonic forms that are unrealizable in daily life. They are reasoned practically from human experience.[431] Such goods and evils are fundamental aspects of human nature and fulfillment. No logical truth about what "is" can be used to derive these collection of moral "oughts."[432]

Likewise, as *basic* reasons for action, basic goods are not instrumental or merely useful for the purpose of achieving some other end. By definition, these ends in and of themselves are fulfilling in their own right. In claiming something as a basic good, one claims that an indefinite number of persons can participate in this inherent good in an indefinite number of

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427. *See, e.g.,* ARISTOTLE, NICHOMACHEAN ETHICS, *supra* note 137, at 44.

> Not every action or emotion admits of a mean. There are some actions and emotions whose very names connote baseness, e.g., spite, shamelessness, envy; and among actions, adultery, theft, murder. . . . It is, therefore, impossible ever to do right in performing them: to perform them is always to do wrong. In cases of this sort, let us say adultery, rightness and wrongness do not depend on committing it with the right woman at the right time and in the right manner, but the mere fact of committing such action at all is to do wrong.

Id.

428. *See supra* note 163, at 48-50.

429. *See, e.g.,* JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION AND TRUTH 1-30 (1988) [herinafter MORAL ABSOLUTES]; FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at ch. 5; Robert P. George, *Recent Criticisms of Natural Law Theory,* 55 U. CHI. L. REV. 1371 (1988) [*hereinafter Recent Criticisms*]; Robert P. George, *Self-Evident Practical Principles and Rationally Motivated Action: A Reply to Michael Perry,* 64 TUL. L. REV. 887 (1990).

430. *See* AQUINAS, *supra* note 161, at 48-50. To say that a good is self-evident is not to say that everyone will recognize it as such. The Declaration of Independence holds it to be self-evident that United States citizens have a right to pursue happiness; not every society shares this position. *See* George, *Recent Criticisms, supra* note 429, at 1410-12.

431. How basic goods are derived from practical reasoning is the subject of much attention by contemporary natural law theorists. *See, e.g.,* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at ch. 5; George, *Recent Criticisms, supra* note 429, at 1371.

432. *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 36-42.

valuable ways, many of which may be beyond what is presently imaginable.[433]

Human life qualifies as such a basic value. Its status as such is suggested by the fact that people everyday and in countless ways do something to protect human life (one's own or another's) without thinking about any good beyond life itself. The recognitions of this basic good

> are as various as the crafty struggle and prayer of a man overboard seeking to stay afloat until his ship turns back for him; the teamwork of surgeons and the whole network of supporting staff, ancillary services, medical schools, etc.; road safety laws and programmes; famine relief expeditions; farming and rearing and fishing; food marketing; the resuscitation of suicides; watching out as one steps off the kerb.[434]

The fundamental and irreducible value of human life is further evidenced by the fact that it is essential to well-being. To have a good and fulfilled life, one must have life. Human beings are not merely rational beings, but corporeal bodies. Their fulfillment depends on their having physical lives. Life is *intrinsic* to human fulfillment.[435]

Naturally, these considerations only *indicate* that life qualifies as a basic human good; fundamental premises and principles are not capable of syllogistic demonstration. Still, some objections to life's status as a basic good can be convincingly addressed. One might object that human life is not an intrinsically valuable or categorical good, but merely an *instrumental* one valuable only to the extent that it permits us to enjoy other goods, such as friendship and family. Most of us, for instance, would see little inherent good in a life spent in a coma. What is valuable to people about living is not the chance to exist, but the opportunity existence brings for pursuing other objectives and ends—family, friends, play, and work.

This objection, however, founders on the fact that family, friends, and medical workers often choose to provide years of loving care to persons who exist only physically, comatose or semicomatose, even linked to a respirator and feeding tubes.

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433. *See* George, *Recent Criticisms*, *supra* note 429, at 1412-14.

434. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 86.

435. *See* AQUINAS, *supra* note 161, at 48-50 (arguing that humans have "natural inclination" to live and reproduce shared in common with all living things).

Members of religious orders and hospice organizations choose to devote their entire adult lives caring for such persons precisely because they *are* human persons, not because doing so instrumentally advances some other hidden objective. Even though all persons would not make a similar choice, "the fact that some people have made [such a choice] gives evidence that life is a basic human good—one which offers for choice an intelligible ground which need have no ulterior" motive.[436]

Others might object that if human life is a basic good, people would want to remain alive always and under all circumstances. However, to classify something as a basic good does not mean that one always chooses it over other options. Multiple good ways of life compete for human attention, and people must often favor one at the expense of others. Indeed, choice is the inevitable consequence of the fact that people do not live like the Man in the Pit, but in a world where many and varied "good lives" exist. Thus, the soldier who accepts an assignment leading to certain death does not deny the basic goodness of human life; such sacrificial choices only affirm the existence of other worthwhile ends. Indeed, "it is the diversity of *rationally* appealing human goods which makes free choice both possible and frequently necessary—the choice between rationally appealing and incompatible alternative options, such that nothing but the choosing itself settles which option is chosen and pursued."[437]

B. *Respecting Human Life as a Basic Good*

This point leads back to the moral distinction between intended and unintended actions, drawn since the time of Aristotle and Aquinas and endorsed even by self-described consequentialists like Feinberg. As discussed earlier, we cannot always control the unintentional side-effects of our actions.[438] In choosing to take a family holiday this year, an employee knows it will mean that co-workers at the office will

436. Boyle, *supra* note 423, at 238-39.

437. Finnis, *Natural Law and Legal Reasoning*, *supra* note 413, at 3. This is not to say that such choice is or can be guided by some utilitarian calculus. To assert that reason can aid and guide choice between competing incommensurable goods is not to claim that incommensurable goods can be compared, weighed, and unqualifiedly resolved—*viz.*, that reason can reach some uniquely correct decision.

438. *See supra* Parts III.B-C & IV.C.

have to work overtime. In choosing to invade and liberate Europe, Eisenhower knew it meant certain death for thousands of young men. In both cases, the *intended* action is morally upright (spending time with family; freeing Europe), but both entail negative, if unwanted, side-effects. Living in a world with many diverse and good ways of life, one simply cannot avoid making good choices that exclude or harm other goods.

By contrast, one *can* always refrain from doing intentional harm. Purposeful actions are entirely within a person's ability to control. To intend freely and deliberately to do wrong, moreover, necessarily reveals something about character and commitments that no unintended side effect ever could.[439] At an irreducible minimum, therefore, to respect human life means avoiding intentionally doing harm to it, even if we cannot always avoid actions that have the unintended side-effect of harming human life. Applying that rule here eliminates assisted suicide and euthanasia—acts which, by definition, involve an intentional assault against the basic good of life.

The alternative to an absolute rule against private intentional killing, moreover, is troubling territory. Once *some* intentional killings become acceptable, society becomes enmeshed in making moral decisions about which ones it deems permissible. In the assisted suicide and euthanasia context, unless we unleash the full-throttle neutralist and harm principle right open to all adults, society is forced into a debate over the relative value of different kinds of human life. Judging whose lives may and may not be taken in turn depends upon assessments of quality of life—whether one is young and fit or old and sick. Different human lives are thus left with different moral and legal statuses based on their perceived "quality of life."

Recognizing a rule against the intentional taking of human life, however, does not mean that autonomy and choice count for nothing. Indeed, there remains ample room for refusing or discontinuing medical treatment—even life-sustaining treatment. Patient often reject treatment because they are unwilling to impose further expense on their families, are tired

439. *See id.*; *see also* THOMAS AQUINAS, SUMMA THEOLOGICA II-II 70-72 (Fathers of the English Dominican Republic trans., 1917).

of invasive tubes, or simply wish to leave the hospital and go home. None of these everyday decisions involves an *intent* to die, even when death is foreseen. And medical professionals can respect and give effect to such requests, even when they consider the requests unreasonable or wrong, without *intending* to kill. Indeed, these free and autonomous decisions deserve respect and they are in no way inconsistent with the view that human life is sacrosanct.[440]

C. *The Common Law's Respect for the Sanctity of Life*

The common law reflects and embraces the sanctity-of-life position by proscribing all intentional killings. While unintentional homicides sometimes are excused or punished lightly, intentional killings are treated as always wrong. No defense is accepted. The Court in *Cruzan* professed substantial deference to the common law when deciding whether to respect decisions to terminate life-support.[441] A similar deference to the common law by courts considering assisted suicide and euthanasia would lead to the rejection of those claimed rights.

Although opponents of the sanctity-of-life position might point to the insanity defense as evidence that intentional killings sometimes are permitted, the defense only reinforces the centrality of the element of intent. To prevail on an insanity plea, the defendant must show that he either did not intend the wrongful act or did not appreciate its wrongfulness.[442]

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440. *See* John Finnis, *A Philosophical Case Against Euthanasia, in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES 23, 33 (John Keown ed., 1995) [hereinafter *Philosophical Case*].

> Where one does not know that the requests are suicidal in intent, one can rightly, as a health-care professional or someone responsible for the care of people, give full effect to requests to withhold specified treatments or indeed any and all treatments, even when one considers the requests misguided and regrettable. For one is entitled and indeed ought to honour these people's autonomy, and can reasonably accept their death as a *side-effect* of doing so.

Id. (emphasis added).

441. *See generally* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) (discussing common law right to refuse treatment).

442. *See, e.g.*, MODEL PENAL CODE § 4.01 (Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."); *M'Naughten's Case*, 8 Eng. Rep. 718 (1843):

> [I]t must be clearly proved that, at the time of the committing of the act,

Opponents might also attempt to point to necessity doctrine. But necessity has been rejected at common law as an excuse to murder. Indeed, in *Regina v. Dudley and Stephens*, where the two shipwrecked men ate the cabin boy, the court rejected the necessity doctrine in part because of the moral briar patch that would result if we opened the door to some intentional acts of homicide:

> Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen.[443]

Similarly, in *United States v. Holmes*,[444] the court rejected the claim of necessity by a ship's first mate who had ordered eighteen passengers thrown overboard in a grossly overcrowded lifeboat. The court ruled that if decisions of killing had to be made, they should have been made by lot because "[i]n no other way than this or some like way are those having equal rights put on equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict."[445] While sentencing defendants in cases like *Dudley* and *Holmes* is a difficult task deserving of some leniency, the courts in both of these cases refused to allow sentencing concerns to sway determinations of guilt and innocence.[446]

In *Law and Literature*, Benjamin Cardozo expressly defended *Holmes*: "Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human

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> the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id.

443. 14 Q.B.D. 273 (1884) (Eng.).

444. 26 F. Cas. 360 (C.C.E.D. Pa. 1842).

445. *Id.* at 370.

446. In *Dudley and Stephens*, the Court imposed a death sentence that the Crown later commuted to six months' imprisonment. Holmes initially was sentenced to prison for six months, though the punishment was remitted.

jettison."[447] Numerous state statutes have codified this teaching.[448]

Despite caselaw and statutes to the contrary, one commentary in the Model Penal Code appears to endorse application of necessity doctrine to acts of intentional homicide.[449] While "recognizing that the sanctity of life has a supreme place in the hierarchy of values," the Model Penal Code drafters argue for necessity doctrine by citing the example of the person who "makes a breach in a dike, knowing that this will inundate a farm [and kill the inhabitants of the farmhouse], but taking the only course available to save a whole town."[450]

Far from demonstrating that necessity doctrine should be incorporated into our law of homicide, this example does just the opposite. The dike-breaker is no more a murderer than General Eisenhower or those who help persons remove unwanted medical care. The dike-breaker *intends* only to save the town, and in no way wishes to do any harm to (let alone kill) the farmhouse inhabitants. He would be happy to save the town *and* the farmhouse inhabitants. Neither he nor Eisenhower (nor persons removing unwanted life-support) need resort to claims of necessity to defend their morally and legally upright actions.

The Model Penal Code also cites the example of a mountaineer, "roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope."[451] But again, this is hardly an *intentional* act of homicide. The mountaineer does not wish to kill as either an end or as a means, but only to lighten the weight on the rope to save himself. Unlike Dr. Kevorkian, he would be delighted if

447. BENJAMIN N. CARDOZO, LAW AND LITERATURE 113 (1931).

448. *See, e.g.*, WIS. STAT. ANN. § 939.47 (West 1996).

> Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide the degree of the crime is reduced to second-degree intentional homicide.

Id.; MO. ANN. STAT. § 563.026 (West 1999).

449. *See* MODEL PENAL CODE, cmt. to § 3.02, at 14-15.

450. *Id.* at 14-15.

451. *Id.* at 15.

his companion managed to fall to safety. His act of self-defense is in no way murder, and resort to necessity doctrine is hardly required to justify it.[452]

Turning more specifically to the assisted suicide and euthanasia, the common law has repeatedly refused to be drawn into differentiating between persons based upon the quality of their lives, treating all such intentional acts against human life as wrongful. For example, in *Blackburn v. State of Ohio*[453] the Ohio Supreme Court faced the remaining survivor of a double-suicide pact. After providing Mary Jane Lovell poisoned port-wine, John Blackburn apparently did not drink his own glass. He was later tried for second-degree murder and attempted to defend himself on the grounds that life had become a burden to Ms. Lovell, who wished to die. The court rejected the defense, expressly holding that

> [t]he lives of all are under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.[454]

In *People v. Roberts*,[455] the Michigan Supreme Court was confronted by a husband who, at his wife's request, had provided her with poison that she used to take her own life. At the time, she was terminally ill with multiple sclerosis. The Court affirmed the husband's conviction for murder and held that the wife's medical condition and suffering in no way suspended the ordinary operation of murder doctrine or otherwise excused the act. Contemporary commentators endorsed this reasoning, positing that "this decision is undoubtedly sound. The law has too high a regard for human life to suffer it be lightly tampered with. It protects the lives of those to whom life is a burden as well as those in the full tide of life's enjoyment."[456] Likewise, nothing in the Model Penal

452. *See supra* Part III.C (discussing Aquinas's theory of self-defense).
453. 23 Ohio St. 146 (Ohio 1872).
454. *Id.* at 163.
455. 178 N.W. 690 (1920).
456. Recent Decisions, 7 VA. L. REV. 147, 148 (1920); *see also* Comment, 30 YALE L.J. 408, 412 (1921).

Code or state statutes supplanting the common law offers even the faintest hint that the quality-of-life of the decedent offers any defense to an assisted suicide or euthanasia charge.[457]

D. *Toward a Consistent End-of-Life Ethic*

Respect for the sanctity of life has implications for end-of-life issues beyond assisting suicide and euthanasia, including removal of life support, provision of palliative medical care, and treatment of incompetent patients. In each of these arenas, a consistent rule requiring persons to refrain from intentionally killing others can, and should be applied. Indeed, the evolving law in these areas may be understood as a groping and fitful movement toward a consistent end-of-life ethic centered around respect for the sanctity-of-life.

Right to Refuse. In the life support arena, this Article has shown that courts consistently have permitted patients to discontinue unwanted treatment where their intentions are not to die, but to pursue some other end.[458] Courts recognizing the right to refuse have taken pains to stress that no intention to die had been formed by the patient and no intention to kill had been formed by the physician. While several states have passed statutes codifying the right to refuse without particular reference to patient or physician intent, it would be inconsistent with the sanctity-of-life principle to interpret these laws as protecting refusals where an intent to die (or kill) is present. As previously discussed, it would also be inconsistent with the common law right to refuse these statutes were intended to codify. Furthermore, it would create incoherence with other state statutes banning the assistance of suicide and privileging efforts to detain persons attempting suicide. At the same time, a right to refuse limited to instances where death is foreseeable but unintended would leave ample room for patients to refuse the often hyper-technological burdensome end-of-life care found in modern hospital environments.

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457. "Life itself is a terminal condition . . . . A terminal illness can vary from a sickness causing death in days or weeks to cancer [which can be] 'very slow' in its deadly impact, to a heart condition which . . . can be relieved by a transplant, to AIDS, which . . . is fatal once contracted." Compassion in Dying v. Washington, 49 F.3d 586, 593 (1995).

458. *See supra* Part IV.C-D.

Palliative Care. Justice Stevens suggested that it is an ethically acceptable medical practice to kill an ailing patient intentionally by prescribing an overdose of pain suppressants.[459] If true, such a position would be antithetical to the sanctity-of-life perspective. As it turns out, Justice Stevens is simply wrong. The AMA has endorsed the provision of palliative care when intended to relieve pain, even when high dosages necessary to relieve pain might foreseeably result in death.[460] But it has also expressly rejected the use of palliative care with the intent to kill, holding that "[w]here a physician prescribes treatment for the purpose of causing death, the physician has exceeded the bounds of ethical medical practice, regardless of what other purpose the physician may 'point to.'"[461]

The AMA's view of palliative care, thus, precisely tracks the sanctity-of-life position's concern with human intention. Indeed, the AMA applies the same sanctity-of-life distinction between intended and unintended acts against human life in all medical care:

> Analytically and medically, acceptance of palliative treatment that may result in death is no different from the knowing acceptance of the risk of death that accompanies many medical treatments, such as the risk of death attendant on a quadruple bypass. If the patient's death results from the surgery, the surgeon is not responsible for the death, nor does he intend it, even though it technically occurred at his hands. The indicated treatment—intended for the patient's well-being and undertaken with the patient's informed consent—simply was not successful.[462]

Incompetent Persons. Where incompetent patients have left no instructions regarding their end-of-life care and designated no family member to serve as their surrogate, or where patients were never capable of doing deciding for themselves (e.g., infants), courts have strained to give meaning to their right to refuse by appointing guardians to "substitute their judgment" for the patient's, or by themselves openly weighing the patient's "best interests."

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459. *See* Washington v. Glucksberg, 521 U.S. 702, 750 (1997).

460. *See* American Medical Association, *supra* note 263, at 2232.

461. Motion for Leave to File Brief, *supra* note 264, at 15.

462. Brief of the Attorney General at n.9, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), *reprinted in* 12 ISSUES L. & MED. 275, 281 (1996).

Whether performed by a guardian or a court, the exercise of the right to refuse in such circumstances can and should be judged by the same standards as competent patient refusals and the provision of palliative care. Those who have a duty to care for someone else should not be permitted to exercise that duty in a way *intended* to bring about death. This does not mean that all conceivable medical treatment must be provided. The ordinary purpose of medical treatment is to restore a patient to health. That goal is simply unattainable for the permanently "vegetative" patient. Thus, one can easily reject elaborate medical procedures on the grounds that the cost and burdens associated with the treatment is too much for too little restorative gain. Nothing in a decision to reject a lung transplant or open-heart surgery need involve an intent to kill or a wish to see the incompetent patient die.

The question of intent does, however, come more sharply into focus when inexpensive, non-burdensome care is at issue. Rejection of such care certainly need not always involve an intent to kill. For instance, taking an elderly loved-one home from the hospital to be cared for by family rather than to be attached to intravenous drips in an isolating ward often emanates from concerns for family and loved ones. But, denying incompetent persons basic care can also stem from more nefarious intentions and callous disregard:

> [T]o desist from providing at least food and basic hygiene to invalids whose deaths are not imminent and to whom the process involved are no significant burden, seems to be either (1) to intend and bring about their death as a means, e.g., to save the other costs involved in their continued existence, or (2) to make a choice (however hidden by benign sentiments and palliative accompaniments) to cease providing care for them. And in an affluent society—unlike in a society, e.g., after a nuclear attack, where attending to the needs of the able-bodied might reasonably be preferred [without embracing an intent to kill]—the latter is willy nilly a choice to deny the personhood of these invalids by breaking off human solidarity with them at its root.[463]

Accordingly, guardians for incompetent persons choosing to reject basic care like food, water, and nursing care should have

463. John Finnis, *Bland: Crossing the Rubicon?*, 109 L. QUART. REV. 329 (1993); *see also* Finnis, *Philosophical Case*, *supra* note 440, at 33.

some demonstrable form of authority and some real accountability to ensure against acts of intentional homicide—be it via a living-will or a court-appointed commission. This is, however, an underdeveloped area of law that deserves attention. The law should authorize no one to have the power of death over another person without some safeguard that the power is exercised within the limits of any assigned authority and within the limit of law outlawing intentional killing. Nor does this matter simply involve fiduciaries acting *ultra vires*, but rather, it concerns life and death.

VIII. CONCLUSION

Far from resolving the constitutional status of suicide and euthanasia, the Supreme Court's decisions in *Glucksberg* and *Quill* essentially deferred the question of assisted suicide and euthanasia for another day. The Court upheld laws banning assisted suicide as facially valid, but several justices reserved judgment on the constitutionality of such laws as applied to terminally ill adults who choose death. The Court's decisions, as well as its language encouraging state legislatures to experiment in this area, raise a number of questions for future courts and lawmakers.

First, they raise the question whether historical precedent exists to support either a constitutional right to, or legalization of, assisting suicide and euthanasia. Although ancient Rome offers some precedent for assisted suicide, few today would seriously wish to emulate the practices it sometimes tolerated. Looking to English and American common law history, no meaningful historical antecedent supports an assisted suicide or euthanasia right, despite contrary arguments by Judge Reinhardt and others stemming from the "decriminalization" of suicide in the nineteenth century.

Second, the Court's decision and Justice Stevens's strenuous contrary opinion raise the question whether principles of equal treatment and fairness require toleration of assisted suicide and euthanasia since we recognize a right to refuse life-sustaining medical treatment. Attempts to distinguish between the practices on causation and act-omission grounds prove unsuccessful, but a meaningful moral-legal distinction exists based on intent: the right to refuse need not involve any

intention to die or kill, whereas the supposed right to assisted suicide and euthanasia always does.

Third, the Article explored whether *Casey* and *Cruzan's* language about the importance of choice and autonomy command legalization. As a matter of constitutional doctrine, it found that neither mandates a right to assisted suicide or euthanasia. As a matter of logic, it found that any autonomy right grounded in neutralist or harm principle theory would result in a vastly overbroad and unappealing right.

Fourth, the Article considered whether utilitarianism provides a basis for legalization or future court action. Justice O'Connor expressed open curiosity whether experimentation would reveal that legalization "benefits" more persons than it harmed. The Article found, however, that given the existing evidence, the utilitarian calculus does not clearly weigh in favor of legalization and the project of attempting to compare incommensurate goods (the liberty to kill oneself versus the lives of persons who would be killed as a result of abuse and mistake) is analytically unsound.

Finally, the Article argued that courts and legislators should consider a new perspective grounded in the recognition of the sanctity of human life. Under this perspective, private intentional acts of homicide are always wrong. Persuasive moral reasoning and common law experience support this rule. According to such a rule, assisted suicide and euthanasia plainly would not be permitted. The sanctity-of-life view also has implications for the removal of life-sustaining treatment, the use of palliative care, and the treatment of incompetent persons. All these end-of-life decisions should be treated consistently, and the developing common law in these areas is largely coming to reflect and embrace the sanctity-of-life position endorsed here.

WILL THE GENTLEMEN PLEASE YIELD? A DEFENSE OF THE CONSTITUTIONALITY OF STATE-IMPOSED TERM LIMITATIONS

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and
Michael Guzman[**]

INTRODUCTION

Prior to the 1990 congressional elections, the crescendo of voter dissatisfaction with incumbent legislators seemed likely to culminate in substantial victories for challengers across the country. When the votes were counted, however, only one incumbent senator had been defeated and ninety-six percent of the representatives who ran were re-elected.[1] Such is the story of contemporary American politics: year after year we witness pre-election expressions of voter outrage that are followed by consistent re-election rates of ninety percent or more.[2] Lee Iacocca has summed up the trend with this observation: "Sitting Congressmen are almost as likely to be sentenced to jail as they are to be sent home by the voters. Since 1988, six Congressmen went home and five were sentenced to the slammer."[3]

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1. *See* Mark Blitz, *Give Congress Horse Races, Not Distracted Lame Ducks; Term Limits: The Problem Is Too Little Competition, Not Too Much Longevity*, L.A. TIMES, Dec. 14, 1990, at B7.

2. *See* Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 973 (1988) (observing that, since World War II, voters have re-elected over ninety percent of all incumbent representatives running for office); *see also* graph at Appendix (from TRUDY PEARCE, TERM LIMITATION: THE RETURN TO A CITIZEN LEGISLATURE (1991)).

3. Lee Iacocca, *We Can't Even Throw The Rascals Out; Congress: What Does it Mean When Incumbents Keep Getting Reelected? That We're Pleased With Their Work?*, L.A. TIMES, May 18, 1990, at B7. Senator Hank Brown (R-CO) has also noted that the turnover in the United States House of Representatives during the 1980s was almost identical to that of Britain's House of Lords. The members of the House of Lords, of course, are appointed

In protest over these re-election trends, a populist movement to limit the tenure of elected officials has sprung up in the western states and appears to be spreading rapidly across the country.[4] In 1990, California and Oklahoma voters passed initiatives limiting the terms of their state legislators.[5] Coloradans went further, limiting the terms of both state and congressional representatives.[6] Despite Washington's 1991 rejection of a term limit initiative,[7] the movement is unlikely to wane; nearly 150 term limit bills are currently pending in 45 states, and proponents claim that term limit initiatives will be on the ballot in seventeen states this November.[8]

A broad coalition stands behind the term limitation movement. Consumer activist Ralph Nader, presidential candidate Jerry Brown, Senators Barbara Mikulski (D-MD) and Dennis Deconcini (D-AZ), Texas Governor Ann Richards, and other grass-roots liberals have forged an unlikely alliance with the likes of President George Bush,[9]

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for life. *See* 137 CONG. REC. S6273 (daily ed. May 22, 1991) (statement of Sen. Brown).

4. Of course, western voters also continue to re-elect their own congressmen. Noticing this oddity, Jeff Greenfield quipped, "[i]t's almost as if the voters are saying, '[s]top me before I reelect again.'" *Nightline: Congressional Term Limits* (ABC television broadcast, Nov. 4, 1991) (transcript on file with the authors) [hereinafter *Nightline*]. Certainly, it appears as though the voters are more dissatisfied with incumbents from other states or districts than with their own. *See, e.g.*, Timothy Egau, *Term Limits; State of Washington Rejects a Plan to Curb Incumbents*, N.Y. TIMES, Nov. 7, 1991, at B16.

5. *See* CAL. CONST. art. IV, § 2 (amended 1990); OKLA. CONST. art. V, § 17A (amended 1990).

6. *See* COLO. CONST. art. XVIII, § 9(1) (amended 1990).

7. The Washington term limit initiative was rejected on November 5, 1991, by a vote of 54% to 46%. *See* Ross Anderson, *Voters Say, "Not So Fast" Abortion Measure Teeters On Absentees*, SEATTLE TIMES, Nov. 6, 1991, at A1. Many commentators speculate that the initiative lost because Washington voters feared losing the influence of Speaker Foley. *See, e.g.*, Jim Simon, *Stunning Loss For Term Limits*, SEATTLE TIMES, Nov. 6, 1991, at D1.

8. Gloria Borger, *Can Term Limits Do the Job?*, U.S. NEWS & WORLD REP., Nov. 11, 1991, at 34. Recently, political commentators have begun to suggest that the 1992 elections may result in as many as one hundred new members of the Congress. *See, e.g.*, William J. Eaton, *Is Congress Headed For Big Turnover?*, L.A. TIMES, Feb. 26, 1992 at A5. Arguably, such a large turnover could snatch the impetus from the term limitation movement. It would be a mistake, however, to attribute all of the predicted change, if it even happens, to anti-incumbent sentiment. At most, only about half of the predicted new faces will have beaten an incumbent. According to one commentator's worst case (for incumbents) projections, sixty-five representatives will retire in 1992 and forty-two will lose their seats to challengers. *See* Charles F. Cooper, *Numbers Game: How Many Will Lose Their Seats?*, ROLL CALL, Mar. 30, 1992. House members who retire before 1993 can pocket unused campaign funds. This "severance pay" could be as large as one million dollars for some. *Id.* Of the forty-two defeated incumbents, a small number can be attributed to redistricting. In 1992, at least five pairs of incumbents will be running against each other. Eaton, *supra*. The result of this worst case scenario: a re-election rate of 88.7%, about the same as that of 1982 (90.1%). Cooper, *supra*.

9. A bellicose President Bush lashed out: "Those old guys that control those subcom-

Senator Hank Brown (R-CO), and columnists George Will and Gordon Crovitz.[10] Even Dan Quayle, a Washington establishment member since 1976, claims to have supported term limits before they were fashionable.[11] It seems only long-term legislators, lobbyists, and academicians oppose term limits with any vigor.[12]

With popular support for congressional term limits running at almost seventy-five percent and term limit proposals pending in nearly every state,[13] opponents of such measures have already begun looking to the courts for help. Campaigning against the Washington initiative that would have cost him the job that he has held for twenty-eight years, Speaker of the House Tom Foley (D-WA) threatened, "[i]f the voters of the state of Washington pass this initiative, it should and must be tested constitutionally, and I will take an active part in testing it."[14] Less visibly, Representative Larry Smith (D-FL) actually became the first member of Congress to challenge the constitutionality of term limits; Smith recently filed a brief that he had prepared by House Counsel asking the Florida Supreme Court to issue an advisory opinion on the constitutionality of a Florida term limit initiative.[15]

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mittees haven't had a new idea in the 30 years they've been there, and it's time to change it, and I mean it. Why do you think the American people are so excited about term limitations? They wised up, they understand it, and I'm going to fight for that, too, all next year." *Nightline, supra* note 4 (replaying a Bush statement made on October 10, 1991).

10. *See* Cleta D. Mitchell, *Reflections on Congressional Term Limits*, 7 J.L. & POL. 733, 740 (1991); Susan B. Glasser, *Know Your Enemy; Meet the Leading Lights of the Term-Limit Movement*, ROLL CALL, Sept. 23, 1991, at 21.

11. Quayle insists that he floated the idea as a freshman representative from Indiana in a 1977 speech. *See* Glasser, *supra* note 10.

12. *See generally* MARK P. PETRACCA, WHY POLITICAL SCIENTISTS OPPOSE TERM LIMITS (Cato Institute Briefing Paper No. 14) (arguing that political scientists were instrumental in promoting the professionalization of legislators and that they, therefore, perceive attacks on professional politicians as a threat to their own self-proclaimed professionalism).

13. *See* Borger, *supra* note 8.

14. *Nightline, supra* note 4.

15. *See* Susan B. Glasser, *Are Term Limits Constitutional?: First Ruling by Court Imminent*, ROLL CALL, Oct. 24, 1991, at 1 [hereinafter Glasser, *Are Term Limits Constitutional?*]. The Florida Supreme Court is faced only with the narrow question of whether a Florida term limit initiative was properly drafted to include only one issue. Smith's use of House Counsel to prepare the brief drew criticism. *See id.* Representative Chris Cox (R-CA) moved that the House publicly "express regret" at this improper use of House Counsel services. The motion was ultimately tabled by a 264 to 160 vote. Phil Handy, leader of Florida's "Eight is Enough" term limit movement, sent a letter to Representative Smith demanding that he reimburse the House for the approximately $25,000 that it cost to produce the brief. *See* Susan B. Glasser, *Fla. Court Rejects Brief of House Counsel, OKs Term-Limit Initiative for Nov. 3 Ballot*, ROLL CALL, Jan. 6, 1992, at 3.

Opponents contend that a state-imposed limit on congressional terms is unquestionably unconstitutional. They argue, among other things, that a term limit impermissibly augments the three qualifications listed in Article I—age, residence, and citizenship—by requiring that a congressman also *not* be a long-term incumbent. According to Representative Smith's brief, "[s]ingularly unanimous rulings of the Supreme Court of the United States, the Florida courts, and all other state and federal courts that have confronted such an issue, have uniformly held that neither Congress nor any of the states may add to, subtract from, or otherwise modify the three constitutionally enumerated qualifications."[16] Speaker Foley puts the proposition more bluntly: "Any constitutional lawyer worth his salt will tell you [term limits are] a sham."[17]

We beg to differ. Though building a constitutional case for state-imposed term limits is not simple, neither is it as futile as Speaker Foley and others suggest. The Constitution contains no explicit guarantee of a right to candidacy, ballot-access, or continuity in office. Indeed, it is precisely because of the Constitution's silence on such matters that term limit opponents must scrabble to grasp onto little known handholds like the qualifications clauses to protect their incumbency.

Before taking up the constitutional case for term limits, let us begin by explaining exactly what we aim to defend. Although various term limits have been suggested,[18] we will defend a measure similar to the initiative passed in Colorado—the only congressional term limit actually passed to date. Colorado's amendment limits United States Senators and Representatives to twelve years in office, allowing them to run again only after a four-year "rotation" out of office.[19] The

16. *See* Glasser, *Are Term Limits Constitutional?*, *supra* note 15.

17. *Term Limits: The Talk of the Town*, THE HOTLINE, Oct. 21, 1991.

18. From a legal standpoint, the least risky way to enact a congressional term limit is to amend the federal Constitution. In fact, during the 102d Congress at least three such proposals were made. *See* H.R.J. Res. 363, 102d Cong., 2d Sess. (1991); H.R.J. Res. 112, 102d Cong., 1st Sess. (1991); H.R.J. Res. 28, 102d Cong., 1st Sess. (1991). Not surprisingly, none of these proposals was ever voted upon on the floor. Also, Senator Brown (R-CO) introduced an innovative term limit proposal in the Senate last year that would link receipt of federal campaign funds with a pledge by the recipient candidate that he will step down after twelve years. 137 Cong. Rec. S6273 (daily ed. May 22, 1991).

19. Art. XVIII, section 9(1) of the Colorado Constitution, as amended in 1990, reads in pertinent part:

> [N]o United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of

Colorado Amendment applies prospectively only; in other words, it affects only those congressmen whose terms began after January 1, 1991.[20] To the Colorado initiative we would add one important provision: an incumbent would be allowed to conduct write-in candidacies at any time. Thus, the term limit that we defend would remove an incumbent from the printed ballot after twelve consecutive years, but leave him the option to run as a write-in candidate. The legal significance of this modification will become apparent later in our analysis.[21]

Organizationally, we divide our argument into four sections. We begin in Section I by examining the relevant constitutional history. In Section II, we consider constitutional provisions and precedents, seeking to determine whether a term limit on the Congress must inevitably be judged an impermissible qualification. Although by no means an easy argument, this section concludes that a term limit should be considered a legitimate exercise of state authority to regulate the time, place, and manner of congressional elections. On that assumption, we proceed in Section III to analyze whether such a regulation would violate the First and Fourteenth Amendment rights of candidates or voters. After demonstrating that a term limit would almost certainly pass muster on these grounds, this Article concludes in Section IV by arguing that a term limit imposed only upon state elected officials is likewise constitutional.

I. HISTORICAL PERSPECTIVE

Opponents of term limits frequently emphasize the absence of a limit on congressional terms in the Constitution as evidence that the Framers intended to preclude such a measure.[22] This argument overextends the available evidence. Instead, the recorded history demonstrates that the Framers were indisputably fearful of creating an aristo-

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Representatives . . . . Terms are considered consecutive unless they are at least four years apart.

20. COLO. CONST. art. XVII, § 9(1). "This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991." *Id.*

21. *See infra* notes 139-41 and accompanying text. In practical terms, allowing a write-in candidacy hardly saps a term limit of its efficacy, but it does provide some hope for a twelve-year incumbent who believes he has a mandate. As of 1982, four write-in candidates had won congressional seats. *See* Facts on File World News Digest (available in Lexis) Nov. 5, 1982.

22. *See, e.g.*, Steven Greenberger, *Democracy and Congressional Tenure*, 41 DEPAUL L. REV. 37, 38 (1991).

cratic legislature permanently ensconced in the capital. To prevent this, the Framers wrote relatively short terms of officeholding into the Constitution on the assumption that frequent elections would ensure a high degree of turnover. In addition, the Framers gave the states primary authority to regulate the times, places, and manner of congressional elections, a power that the Framers understood would let the states play an important role in selecting the Congress. With these safeguards in place, the best explanation for the absence of a term limit in the Constitution is that the Framers simply thought it unnecessary to include one.

The notion of limiting the terms of elected representatives dates back at least to the eighteenth century. Prior to the drafting and ratification of our present Constitution, several states limited the terms of their legislators. For example, the Pennsylvania Constitution of 1776 prohibited state legislators from serving more than four one-year terms within a period of seven years, hoping that "the danger of establishing an inconvenient aristocracy [would] be effectually prevented."[23]

Likewise, in our nation's first federal term limit,[24] delegates under the Articles of Confederation were limited to a maximum of three one-year terms during any six-year period.[25] In 1784, when this limit was first to take effect, an attempt to exclude delegates who had exceeded their terms created an ugly incident on the floor of the Congress. With respect to the bickering, James Monroe commented, "I never saw more indecent conduct in any assembly before."[26]

Perhaps hoping to continue a tradition of limited terms, on May 29, 1787, Edmund Randolph proposed, as part of what has come to be known as the Virginia Plan, a rotation scheme that would have prevented members of the House from serving consecutive terms.[27]

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23. PA. CONST. of 1776, Ch. II, § 8; *see also* VA. CONST. of 1776, para. 4 (creating a rotation system for the senate).

24. The second federal term limit was the enactment of the Twenty-Second Amendment in 1951, which limits presidential tenure to two four-year terms. *See* U.S. CONST. amend. XXII.

25. ARTICLES OF CONFEDERATION art. V, cl.2.

26. EDMUND C. BURNETT, THE CONTINENTAL CONGRESS 606 (1941).

27. In relevant part, the Plan provided:

> 3. Resolved, that the national legislature ought to consist of two branches.
>
> 4. Resolved, that the members of the first branch of the national legislature ought to be elected by the people of the several states every _____ for the term of _____[;] to be of the age of _____ years at least; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public ser-

Randolph's rotation proposal was never the subject of recorded debate and was set aside two days later along with several other provisions concerning the legislative branch because they entered "too much into detail for general propositions."[28] At that early date in the Convention, the delegates had hardly become comfortable with their decision to create a new government and they were still debating the larger issues of its organization. When the delegates did take up the details of constituting the legislative branch in mid-August, they were no longer working from the text of Randolph's proposals.[29] Thus, the final version of Article I did not include a system of rotation.[30]

Each of the early rotation schemes was one of a variety of mechanisms designed to prevent the national legislature from becoming an American House of Lords; the newly independent Americans believed that representatives ought to be representative. With his characteristic forthrightness, John Adams summed up the feeling of many anti-federalists: "[The legislature] should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them."[31] Of course, not all of the Framers shared the intensity of Adams' view. But even Federalist Alexander Hamilton, never

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vice; to be ineligible to any office established by a particular state, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of _____ after its expiration; *to be incapable of reelection for the space of _____ after the expiration of their term of service*, and to be subject to recall. 5 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127 (Jonathan Elliot ed., 1836) (emphasis added) [hereinafter ELLIOT'S DEBATES].

28. *Id.* at 137.

29. On August 6, the Committee of Detail presented each delegate with a printed copy of the Constitution as it then stood. *Id.* at 376-78. The delegates then proceeded to debate the various provisions using this version as their guide. This draft did not include Randolph's rotation scheme. *Id.*

30. *See* U.S. CONST. art. I. The Framers did debate the idea of a rotation scheme for the office of President. Before the Convention settled on the present method of electing the President via an electoral college, the Delegates debated how a President chosen by the state legislatures could remain independent of them, yet retain some representativeness or popular accountability. At this point, Charles Pinckney moved that no President could serve more than six years in any twelve. *See* 5 ELLIOT'S DEBATES, *supra* note 27, at 365. This motion was defeated by a 6-5 vote. *Id.* at 368. The representativeness concerns were apparently allayed by the adoption of a Presidential term of four years instead of the substantially longer tenures—ranging from fifteen years to life—that were originally proposed. *Id.* at 358-68.

31. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 165 (1969). George Mason similarly argued, "[Representatives] ought to mix with the people, think as they think, feel as they feel—ought to be perfectly amenable to them, and thoroughly acquainted with their interest and condition." CECILIA M. KENYON, THE ANTIFEDERALISTS lii (1966).

keen on too much democracy, recognized that members of the House of Representatives "should have an immediate dependence on, and an intimate sympathy with, the people."[32]

The notion that a long term in office would diminish representativeness and unduly empower officeholders clearly worried many delegates. Charles Pinckney, for example, proposed a Senate term of four years, urging that "[a] longer time would fix them at the seat of government. They would acquire an interest there, perhaps transfer their property, and lose sight of the states they represent."[33] Opposing a proposed nine-year Senate term, Roger Sherman argued: "Government is instituted for those who live under it . . . . The more permanency it has, the worse, if it be a bad government. Frequent elections are necessary to preserve the good behavior of rulers."[34] John Adams was equally eloquent in his advocacy of frequent elections:

> [E]lections, especially of representatives and counselors, should be annual, there not being in the whole circle of the sciences a maxim more infallible than this, "where annual elections end, there slavery begins." These great men . . . should be elected once a year—like bubbles on the sea of matter borne, they rise, they break, and to that sea return.[35]

As a result of these concerns, the Framers adopted relatively short terms for all federal elected officials. The delegates finally settled on a six-year Senate term only after debating proposals for a tenure of "during good behavior," nine years, seven years, and four years.[36] Likewise, terms in the House were fixed at two years after consideration of proposals of three years and one year.[37] The presi-

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32. THE FEDERALIST No. 52, at 350 (Alexander Hamilton) (Paul L. Ford ed., 1898).

33. *Id.* at 241.

34. *Id.* at 243.

35. JOHN ADAMS, THE POLITICAL WRITINGS OF JOHN ADAMS 134 (George Peek, Jr. ed., 1985).

36. *See* 5 ELLIOT'S DEBATES, *supra* note 27, at 241-45.

37. *Id.* at 224-26. The terms of state legislators were mostly fixed at one year. Connecticut and Rhode Island had semi-annual elections and South Carolina held them biennially. *See* THE FEDERALIST No. 53, *supra* note 32, at 354 (Alexander Hamilton). It seems that the primary reason for choosing two- instead of one-year terms was inconvenience—not for the electorate, but for the representatives. James Madison, for example, fretted, "[Representatives] would have to travel seven or eight hundred miles from the distant parts of the Union; and would probably not be allowed even a reimbursement of their expenses." 5 ELLIOT'S DEBATES, *supra* note 27, at 225. Similarly, William Randolph "would have preferred annual to biennial, but for the extent of the United States, and the inconvenience which would result

dential term was also reduced to four years after proposed terms of life tenure, twenty years, fifteen years, eight years, and seven years were debated and rejected.[38]

Because of these frequent elections, it was virtually inconceivable that most incumbents would be able to win continual re-election.[39] Rather, the common assumption was that frequent elections would produce a high degree of turnover. This assumption is plainly evident in the debate over the length of tenure for representatives. Antifederalist "John DeWitt," for example, argued in favor of a one-year term for representatives despite his belief that two-thirds of the members would be new each term.[40] James Madison, likewise assuming that "new members . . . would always form a large proportion" of the House, urged longer terms in order to allow the newcomers to learn their job.[41]

The Framers' decision to "stagger" the terms of Senators also demonstrates the common assumption of significant turnover.[42] Staggered terms were advocated as a mechanism both for ensuring that not all members would be new at the same time[43] and for creating at least a limited degree of accountability in the Senate by compelling one-third of its members to run biennially.[44] The former rationale as-

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from them to the representatives of the extreme parts of the empire." *Id.* at 224.

38. *See* THE FEDERALIST No. 53, *supra* note 32, at 358-68.

39. Hamilton observed that, "[a] few of the members [of the House], as happens in all such assemblies, will possess superior talents; will, by frequent re-election, become members of longstanding . . . ." *Id.* at 359. He clearly envisioned, however, that most of the seats would be continually occupied by new members. Contrasting the continual re-election of the delegates to the Continental Congress chosen by their state legislatures with the proposed popularly elected representatives in the House, he argued that "their re-election is considered by the legislative assemblies almost as a matter of course. *The election of the representatives by the people would not be governed by the same principle.*" *Id.* (emphasis added).

40. John DeWitt, No. 3, Fall 1787, *in* 2 PHILIP KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 51 (1987).

41. 5 ELLIOT'S DEBATES, *supra* note 27, at 225.

42. *See* U.S. CONST. art. III, § 1.

> Immediately after [the Senate] shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year.

Id.

43. 5 ELLIOT'S DEBATES, *supra* note 27, at 224-25. "In order to prevent the inconvenience of an entire change of the whole number [of House members] at the same moment, [Mr. Dickinson] suggested rotation, by an annual election of one third." *Id.*

44. In the Massachussets ratification debates, Mr. Ames argued that, although "the

sumes a relatively high degree of turnover to make it necessary; the latter depends upon the same assumption for its efficacy.

In addition to adopting relatively short terms of office, the Framers created a second check on the ability of the Congress to insulate itself from its constituents by explicitly assigning to the states primary authority to regulate the "Times, Places and Manner" of congressional elections, albeit subject to congressional override.[45] The Framers recognized that election procedures could be used to shape and control the Congress. Indeed, many argued that state regulation was necessary because otherwise the Congress might set election rules so as to favor a certain group or class—likely themselves. For example, Brutus wrote:

> The proposed Congress may make the whole state one district, and direct that the capital (the city of New York, for instance) shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class.[46]

On the other hand, ardent Federalists like Madison and Hamilton believed that the power to regulate elections must be vested at least in part with the Congress, lest the states manipulate the rules to advance their own parochial interests or to subvert the national government altogether by simply refusing to hold elections.[47] Defending the scheme of shared power embodied in Article 1, section 4, Hamilton wrote,

> [E]very government ought to contain in itself the means of its own preservation . . . . Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate

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senators are seated for six years, they are admonished of their responsibility to the state legislatures. If one third new members are introduced, who feel the sentiments of their states, they will awe that third whose term will be near expiring." 2 ELLIOT'S DEBATES, *supra* note 27, at 46-47.

45. U.S. CONST. art. 1, § 4. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

46. Brutus, No. 4, 29 Nov. 1787, *in* KURLAND & LERNER, *supra* note 40, at 251.

47. *See* 5 ELLIOT'S DEBATES, *supra* note 27, at 401-02. "The necessity of a general government supposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices." *Id.*

> it, by neglecting to provide for the choice of persons to administer its affairs."[48]

Understanding that power over election procedures was too important to be left to chance, the Framers adopted a compromise, placing primary authority with the states, but empowering the Congress to override undesirable regulations. This designation was important. It allows states to shape districts, restrict access to the ballot, determine a runoff system, and otherwise regulate congressional elections. Nevertheless, the Congress may nullify or replace any regulation it finds unpalatable.

Thus, when the Framers were ready to finalize Article I, they had already adopted shorter congressional and presidential terms than originally proposed on the assumption that these frequent elections would produce a high amount of turnover. Moreover, they had vested the primary authority to regulate elections in the states. Given these measures to prevent a stagnant and unresponsive legislature, the absence of a term limit cannot plausibly be read as strong evidence that the Framers intended to preclude such a measure. Rather, the best explanation of the omission is that most of the Framers did not think a rotation scheme was necessary to guard against perpetual incumbents.

Of course, there were a few anti-federalists and others who objected to a lack of a rotation for the Congress. For example, during the Virginia ratification debate, George Mason warned that

> [n]othing is so essential to the preservation of a republican government as a periodical rotation. Nothing so strongly impels a man to regard the interest of his constituents as the certainty of returning to the general mass of the people, from whence he was taken . . . . It is a great defect in the Senate that they are not ineligible at the end of six years.[49]

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48. THE FEDERALIST No. 59, *supra* note 32, at 392 (Alexander Hamilton).

49. 3 ELLIOT'S DEBATES, *supra* note 27, at 485. Patrick Henry likewise lamented that "[t]he only semblance of a check is the negative power of not reëlecting them. This sir, is but a feeble barrier, when their personal interest, their ambition and avarice, come to be put in contrast with the happiness of the people." *Id.* at 167. Samuel Chase of Maryland complained that members of the House "will not be the representatives of the people at large but really of a few rich men in each state. A representative should be the image of those he represents. He should know their sentiments and their wants and desires . . . ." 5 THE COMPLETE ANTI-FEDERALIST 89 (Herbert J. Storing ed., 1981) (footnote omitted). Gilbert Livingston of New York and antifederalist writers "Centinel," "Montezuma," and "John DeWitt" also decried the lack of rotation and predicted that it would lead to a congressional aristocracy. *See* Kenyon, *supra* note 31, at 62, 89, 390-96.

Similarly, Thomas Jefferson felt that the absence of rotation, along with the omission of a bill of rights, was one of the two largest flaws in the Constitution.[50] The majority of delegates, however, apparently believed that the measures that they had already enacted were sufficient.[51]

The majority's assumptions proved correct for quite some time. In the first House election after George Washington was elected President, forty percent of incumbents were defeated.[52] Indeed, there was a tradition that lasted through the first half of the nineteenth century for members of the House to serve only four years and for Senators to serve only six. Abraham Lincoln, for example, stepped down after serving one term in the House and did not run again until he sought the Presidency.[53] Perhaps in part due to these traditions, forty to fifty percent of Congress typically left office in every election until the Civil War.[54]

Only after the Civil War, in part because the establishment of standing committees made seniority more important, did House seniority begin to rise. From 1860 to 1920, the average length of service doubled, rising from four to eight years. By 1991, there were twenty House members who had held office at least twenty-eight years.[55]

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50. Commenting on the proposed Constitution in a letter to James Madison, Jefferson wrote, "[another] feature I dislike, and strongly dislike, is the abandonment, in every instance, of the principle of rotation in office . . . ." 2 THE WRITINGS OF THOMAS JEFFERSON 330 (H.A. Washington ed., 1853).

51. Of course, there were also some Framers who adamantly opposed the principle of rotation. For example, Alexander Hamilton remarked that, "in contending for rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well . . . ." 2 ELLIOT'S DEBATES, *supra* note 27, at 320. Speaking against rotation for the presidency, Gouverneur Morris argued that, "[i]t formed a political school, in which we were always governed by the scholars, and not by the masters." 5 ELLIOT'S DEBATES, *supra* note 27, at 366-67. He believed that the problem of representativeness could best be addressed by a popularly elected president, and moved that each voter should "vote for two persons, one of whom at least should not be of his own state." *Id.*

52. *See* JOHN H. FUND, TERM LIMITATION: AN IDEA WHOSE TIME HAS COME, 3 (Cato Institute, Policy Analysis No. 141, Oct. 30, 1990).

53. This was apparently the result of an informal agreement with his political rivals. Such agreements were common and evidenced a vigorous party system. *See id.* at 4.

54. *See id.*

55. *See* TRUDY PEARCE, TERM LIMITATION: THE RETURN TO A CITIZEN LEGISLATURE 14 (1991). The record for House service is held by Jamie Whitten (D-MS), who has been a member for over fifty years. *See id.* Seniority has clearly become more important over time. In 1811, Henry Clay was chosen Speaker of the House as he began his first term as a congressman. Of the seven Speakers of the House chosen between 1870 and 1894, one was

When the 57th Congress convened in 1901, for the first time less than thirty percent of its members were freshmen. In 1981, when the 97th Congress convened, only seventeen percent of the members were newly elected. By contrast, when the 101st Congress convened, fewer than eight percent were newcomers.[56]

Clearly, the Framers' underlying assumptions about the length of elective service no longer reflect reality. Indeed, the statements of some anti-federalists warning against a permanent legislature now appear to have been prophetic. Given the current lack of congressional turnover and the concomitant increase in length of legislative service, the Framers' apparent reason for not adopting a rotation scheme—that it was not necessary to ensure turnover—no longer applies.

Constitutional history, thus, teaches three relevant lessons. First, the mere absence of a term limit in the Constitution itself hardly can be said to indicate an intention to preclude such a limit. Second, the Framers recognized that the power to control the procedures of Congressional elections was significant. For that reason, they divided it between the states and the Congress. Finally, the Framers' likely reason for omitting a term limit has been substantially undermined by subsequent experience.

II. ARTICLE I OBJECTIONS

While the historical evidence demonstrates that the Framers likely did not intend to preclude a state-imposed term limit, we turn now to the question of whether the Constitution itself presents any barriers. In so doing, we first consider Article I, sections 2 through 4, the provisions that directly govern election to the Congress.

A. Background

Article I, sections 2 and 3, the "qualifications clauses," establish three qualifications for membership in the Congress. At the time of their election, members of the House of Representatives and Senators must have attained the ages of 25 and 30, respectively; members of the House and Senate must have been U.S. citizens for at least seven

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elected in his third term of office, two in their fourth, two in their fifth, one in his sixth, and one in his seventh. By contrast, Jim Wright, chosen to be Speaker in 1987, was in his seventeenth term and Thomas Foley, selected in 1989, was in his thirteenth term. *See* Fund, *supra* note 52, at 4.

56. *See* FUND, *supra* note 52, at 4.

and nine years, respectively; and members of both houses must have been inhabitants of the state from which they were elected.[57] Article I, section 4, deals with the regulation of congressional election. Specifically, it assigns to the several states the task of regulating the times, places and manner of congressional elections, albeit subject to congressional override.[58] Opponents of term limits commonly insist that a term limit imposes a *de facto* fourth qualification upon the Congress—namely, that a candidate *not* be a long-term incumbent. The reason is obvious: if labeled a qualification, a term limit would not likely survive Constitutional scrutiny because, in *Powell v. McCormack*,[59] the Supreme Court held that at least the Congress may not supplement the three enumerated qualifications.

Adopting the logic of this argument, however, one could conclude that any election regulation creates a qualification; for example, a requirement that a candidate gather a given number of signatures before gaining access to the ballot could be cast as imposing a fourth qualification that he demonstrate popular support for his candidacy. Thus, any attempt to determine whether a term limit ought to be considered a qualification must go beyond mere conclusory labeling and explain why the label assigned is appropriate.

In this section, we confront directly the assumption that a term limit constitutes a qualification.[60] In our view, a term limit is better considered a regulation affecting the manner of an election. As a manner regulation, a term limit ought to survive Article I scrutiny because states have explicit authority to regulate congressional elections pursuant to section 4. Indeed, since Congress may override a state election regulation at any time, a state could not enact a term

57. *See* U.S. CONST. art I, § 2, cl. 2 and § 3, cl. 3.

58. *See supra* note 45 and accompanying text.

59. 395 U.S. 486 (1968).

60. We note that another alternative would be to concede that a term limit is a qualification, but to argue that a state may impose additional qualifications pursuant to authority derived from the Tenth Amendment. *See, e.g.*, JOHN C. SCULLY, CONGRESSIONAL TERM LIMITATION—IT'S CONSTITUTIONAL FOR THE STATES TO ACT (Washington Legal Foundation) (on file with the authors). Under this view, *Powell* would not apply to the states because its literal holding was no more than that the Congress itself is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." *Powell*, 395 U.S. at 522. Others, however, have argued that the breadth and exhaustiveness of the Court's analysis in *Powell* bespeaks an intention to preclude states from adding qualifications as well. *See, e.g.*, Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 581-82 (1991). Because we believe that a term limit should be viewed as a manner regulation, we will not attempt to resolve this dispute.

limit under section 4 without congressional acquiescence. Put simply, if we are correct in considering term limits as manner regulations, Speaker Foley has nothing to complain about save his own ability to muster a congressional majority to defeat them.

B. Distinguishing Between a Qualification and a Manner Regulation

To resolve the question of whether a term limit is better considered a qualification or a manner regulation, we must first understand what is meant by each term. Here, the analysis is complicated somewhat because the Supreme Court has never attempted to define either of the two terms, nor has it had reason explicitly to distinguish between them. Nevertheless, a look at the leading qualification and manner regulation cases leaves no doubt that the two categories are at least intuitively distinct; apparently, the Court knows a qualification or manner regulation when it sees one.

In *Powell v. McCormack*, the House of Representatives sought to deny Adam Clayton Powell his seat for alleged unethical behavior[61] even though he had been duly elected and met the age, citizenship, and residency requirements enumerated in Article I. In an 8-1 decision, the Court held that the House is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[62] An exhaustive survey of parliamentary precedents, the constitutional convention and ratification debates, and past congressional practice led Chief Justice Warren to conclude that, although the Congress possesses the power to judge the qualifications of its own members,[63] it does not retain the authority to add qualifications lest it repeat the unfortunate excesses of its past.[64] Despite the thorough-

61. Powell was accused by a Special Subcommittee on Contracts of the Committee on House Administration of deceiving House authorities about travel expenses, making illegal salary payments to his wife, and asserting an unwarranted immunity from the processes of the New York courts. *Powell*, 395 U.S. at 489-92.

62. *Id.* at 522. Justice Stewart dissented, arguing that the seating of Powell in a subsequent Congress mooted the controversy. *Id.* at 559-63 (Stewart, J., dissenting).

63. *See* U.S. CONST. art. 1, § 5. "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members." *Id.*

64. The Court catalogued the occasions on which Congress has excluded a duly elected member, characterizing them as "erratic," *Powell*, 395 U.S. at 545, and noting that the fact "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Id.* at 546-47. The Court also noted the exclusion of John Wilkes, who was expelled from the Parliament in 1763 for publishing vehement criticism of a peace treaty with France. Wilkes was elected to three subsequent

ness of the opinion and its unequivocal holding, nowhere did the Court describe the attributes of a qualification.[65]

In *Storer v. Brown*,[66] the Court considered a California statute that denied two independent candidates access to the general election ballot because each had been a member of a major political party within the preceding year. These congressional hopefuls challenged the regulation as both an impermissible manner regulation and an attempt to add a fourth qualification. Writing for the majority in a 6-3 decision, Justice White dismissed the qualification argument as "wholly without merit" in a footnote.[67] Choosing instead to analyze and uphold the statute as a manner regulation, he concluded that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."[68] Like Chief Justice Warren before him, Justice White made this choice of framework without explanation.

Although neither *Powell* nor *Storer* explicitly discusses the difference between a qualification and a manner regulation, at least six distinctions may be crafted in an attempt to capture the unspoken line that separates them. These distinctions are significant because they facilitate reasoned analysis on the question of whether a term limit should be considered a qualification or a manner regulation. The first two—based upon the severity of the restriction and the directness with which it regulates the congressional office—are sure to be offered by term limit opponents because they suggest that term limits are qualifications. As we shall see, however, both prove illusory in light of existing case law. The second pair—distinctions based upon the timing of the regulation and its generality—are formal distinctions that only partially delineate the boundary between a qualification and a manner regulation. Nevertheless, to the extent that these two distinctions have explanatory power, they favor labelling a term limit a

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Parliaments and each time they refused to seat him. *Id.* at 527-29.

65. The Court declined to discuss whether Article 1, section 3, clause 7, which authorizes the disqualification of any person convicted in an impeachment proceeding; Article 1, section 6, clause 2, which prohibits a person "holding any Office under the United States" from being a "Member of either House during his Continuance in Office;" and section 3 of the Fourteenth Amendment, which disqualifies any person who has engaged in insurrection or rebellion against the United States, should be considered "qualifications" within the meaning of Article 1, section 5. *See Powell*, 395 U.S. at 520.

66. 415 U.S. 724 (1974).

67. *Id.* at 746 n.16.

68. *Id.* at 730.

manner regulation. The final duo—distinctions based upon judicial considerations and a measure's invidious potential—prove the most useful. Although they are not the distinctions upon which courts have traditionally relied, we argue that they, too, demonstrate that a term limit should be considered a manner regulation.

1. Severity

Although not explicitly suggested by *Powell* or *Storer*, a "qualification" seems intuitively to denote a substantive pre-condition or a severe bar to the attainment of office.[69] By contrast, a "manner" regulation evokes images of a mere procedural mechanism designed to ensure that candidates receive a spot on the ballot only after having satisfied certain safeguards. Seizing upon this intuition, commentators have argued that a term limit is a qualification because of the severity with which it precludes individuals from candidacy or office-holding.[70]

Albeit intuitive, a distinction based upon severity cannot withstand scrutiny. Upon closer inspection, the constitutionally enumerated qualifications prove not to be particularly difficult to attain. Moreover, courts have consistently upheld as manner regulations state election procedures that inarguably pose substantial barriers to office-holding. Finally, the Hatch Political Activity Act (hereinafter the "Hatch Act"),[71] which effectively bars federal employees from running for the Congress, and political gerrymandering have been treated as permissible manner regulations. Each of these permissible manner regulations poses an obstacle to the attainment of office at least as severe as the enumerated qualifications and more severe than the term limit that we defend. Thus, the perceived severity of a term limit presents no reason to label it a qualification.

The intuition that a qualification is inarguably severe or perma-

69. Representative Jim Kolbe (R-AZ), in a recent op-ed piece, argues that manner regulations involve only "election procedures," while the qualifications clauses govern the "substance of office-holding." *See* Jim Kolbe, *Term Limits Are Unconstitutional*, WALL ST. J., Feb. 13, 1992, at A19. Kolbe claims that, because term limits affect the substance of office-holding, they are unconstitutional qualifications. Like many others who distinguish between substance and procedure, however, Kolbe neglects to explain what he means by those terms. In the context of Article I, we think that "substance" must be closely aligned with severity or permanency and "procedure" can only mean less severe or permanent. For simplicity's sake, then, we eschew the "substance" and "procedure" labels and instead discuss the distinction as one based upon severity.

70. *See id.*; Corwin, *supra* note 60.

71. 5 U.S.C. §§ 7321-27 (1980) [hereinafter the "Hatch Act"].

nent is belied merely by examining the three enumerated in Article I. The residence qualification is easily mutable and the age and citizenship requirements are less mutable only by degree; they are not qualitatively different. Accordingly, any attempt to portray a qualification as self-evidently stringent finds little support in the Constitution itself.[72]

Moreover, the ballot access cases demonstrate that a state may severely regulate candidates in their attempts to become office-holders. Consider again the regulations upheld in *Storer* in comparison with those struck down in *Powell*. Adam Clayton Powell was forced to sit out for one Congress; the subsequent Congress allowed him to take his seat. Likewise, the two congressional hopefuls in *Storer* had to wait two years until the next congressional election to renew their candidacies. As Justice Brennan pointed out in dissent, the California regulation had the effect of forcing an affiliated candidate to declare his independent status seventeen months before the general election.[73] The Justice found this "an impossible burden to shoulder" in the context of a two-year congressional term.[74] Despite the measure's severity, however, even Justice Brennan would have stricken it as violative of First Amendment associational rights, not as creating a fourth qualification.

Two other examples also undercut the severity distinction. In *American Party of Texas v. White*,[75] the Court considered a Texas statute that denied a party access to the ballot in congressional races unless it had garnered 2% of the vote in the previous general election or had filed petitions signed by more than 1% of the voters who cast votes in that election. In upholding the statute as a manner regulation, the Court found itself "unimpressed with arguments that burdens like those imposed by Texas are too onerous."[76] Even if it had found the support requirements unduly burdensome, the Court would have stricken them as violative of the First Amendment or of the Equal

72. The three constitutionally enumerated qualifications are best explained as procedural proxies for characteristics that the Framers hoped that successful candidates would possess. Wilson Carey Nicholas, a Virginia Federalist, argued that the age, residence, and citizenship qualifications "create a certainty of [candidates'] judgment being matured, and of being attached to their state." 3 ELLIOT'S DEBATES, *supra* note 27, at 8. In a rough sense then, age serves as a proxy for maturity and wisdom; residence bespeaks an attempt to ensure representativeness; and the citizenship requirement is a stand-in for patriotism or nationalism.

73. *See Storer*, 415 U.S. at 758 (Brennan, J., dissenting).

74. *Id.*

75. 415 U.S. 767 (1974).

76. *American Party*, 415 U.S. at 787.

Protection Clause, not as an impermissible qualification.[77]

Likewise, in *Williams v. Tucker*,[78] a three-judge district court considered a Pennsylvania law precluding candidates who lost in the primary election for Congress from obtaining a position on the general election ballot. Dismissing as "totally without merit"[79] the argument that the prohibition constituted a qualification, the court upheld the law on the ground that "a State has a legitimate interest in regulating the number of candidates on the ballot."[80]

Beyond the ballot-access cases, there are other strong suggestions that severity is not a reason to label an election procedure a qualification. The Hatch Act, passed by the Congress in 1939, explicitly prohibits most federal government employees from "[b]ecoming a partisan candidate for, or campaigning for, an elective public office."[81] This outright ban, which of course includes campaigns for congressional office, was first upheld by the Supreme Court in *United Public Workers v. Mitchell*.[82] Despite subsequent lower court decisions striking down portions of the Hatch Act (apparently on the assumption that *Mitchell* was outdated),[83] the Court reaffirmed its constitutionality in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*.[84] As in *Storer*, the Court in *Letter Carriers* considered First and Fourteenth Amendment challenges to the Hatch Act at length and concluded that the Hatch Act promoted legitimate state interests in maintaining an independent civil service.[85] Yet, despite the absolute nature of the ban on candidacy, neither the parties nor the Court ever suggested that it constituted a qualification for office.

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77. *Cf.* Anderson v. Celebrezze, 460 U.S. 780 (1983) (striking down a 5% support requirement as violative of the First Amendment).

78. 382 F. Supp. 381 (M.D. Pa. 1974).

79. *Id.* at 388.

80. *Id.*

81. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973).

82. 330 U.S. 75 (1947).

83. *See* Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Gray v. Toledo, 323 F. Supp. 1281 (N.D. Ohio 1971); Bagley v. Washington Township Hosp. Dist., 421 P.2d 409 (Cal. 1966); Minielly v. State, 411 P.2d 69 (Or. 1966).

84. 413 U.S. 548 (1973). The Court also upheld an Oklahoma statute that essentially imposed the Hatch Act's prohibitions upon Oklahoma state employees. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

85. The Court stated the interest in creating an independent bureaucracy: "Government employees [will] be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their [political] superiors rather than to act out their own beliefs." *Letter Carriers*, 413 U.S. at 566.

Finally, a look at the Court's treatment of political gerrymandering also undercuts the severity distinction. While a state legislature may effectively prevent a particular candidate from ever seeking congressional office—or even effectively remove an incumbent—through redistricting legislation, at no point has the Court considered even the most contorted political gerrymander a *de facto* qualification for office; all have been analyzed as manner regulations.[86]

In sum, the enumerated qualifications are less severe than the manner regulations that the Court has upheld to date. Indeed, permissible manner regulations prohibit minor party candidates, primary losers, federal employees, and those not favored by state redistricting from running even in their first congressional election. Thus, the perceived severity of a term limit that relegates a twelve-year incumbent to run a write-in campaign presents no principled reason to label it a qualification.

2. Directness

In a second distinction, a few courts have relied upon the directness with which a state election restriction affects the congressional office to separate a qualification from a manner regulation. In *Signorelli v. Evans*,[87] for example, the Second Circuit observed that a New York statute requiring a state judge to resign from the bench before running for Congress only indirectly impinged upon the conduct of congressional elections. Contrasting this "resign to run" provision with laws requiring a congressman to reside in the district from which he was elected, the court upheld the resign-to-run statute because New York had sought to "regulate the . . . office that [the state official] holds, not the Congressional office he seeks."[88]

Seizing this distinction, one could argue that a state-imposed term limit would be unconstitutional because it directly regulates a congressional election. This argument, however, simply proves too much; to argue that an election regulation is unconstitutional by virtue

86. In Davis v. Bandemer, 478 U.S. 109, 127 (1986), the Court declared an enormously high standard for stating a cognizable equal protection cause of action in political gerrymandering cases: plaintiffs have to prove both intentional discrimination and a pattern of discriminatory impact. Indeed, the Court has acknowledged that states are not expected to draw up districts without regard to their political effect: "The reality is that districting inevitably has and is intended to have substantial political consequences." Gaffney v. Cummings, 412 U.S. 735, 753 (1972).

87. 637 F.2d 853 (2d Cir. 1980).

88. *Id.* at 859.

of its directness is flatly inconsistent with the assignment in Article I, section 4, of primary responsibility for the regulation of congressional elections to the states. Moreover, the Court's approval of severe and direct ballot-access restrictions in *Storer*, *American Party*, and other cases also demonstrates that a distinction based upon directness is ill-conceived. Thus, the directness of a measure cannot cause it to be labelled a qualification.

3. The Timing of the Restriction

A third possible distinction between a qualification and a manner regulation is suggested by the fact that the only two Supreme Court cases analyzing the qualifications clauses—*Powell* and *Bond v. Floyd*[89]—involved refusals to seat representatives who had already been duly elected. By contrast, manner regulations invariably precede the election that they purport to police. Thus, one could argue that qualifications operate to exclude candidates after an election, while manner regulations precede it.

This *ex post/ex ante* distinction fully explains why the Court in *Powell* looked to the qualifications clauses to order the seating of Powell; because he had already been duly elected, no argument about impermissible election regulation was possible. Nevertheless, the *ex post/ex ante* distinction does not demarcate the categories in all circumstances. It is easily conceivable that an *ex ante* restriction could be analyzed as a qualification. If the Congress, for example, passed legislation requiring congressional candidates to be at least forty-years old before running, there is little doubt that the measure's constitutionality would be judged to be a qualification because of its obvious parallel to the constitutionally enumerated qualifications and the holding in *Powell*.[90]

To the extent that a distinction based upon the timing of a restriction has explanatory power, however, it favors term limitations like Colorado's that are applied only prospectively.[91] Because a pro-

89. 385 U.S. 116 (1966).

90. Indeed, district and state courts have summarily stricken state election restrictions as impermissible additional qualifications when those regulations created unavoidable similarities to the three constitutionally enumerated qualifications. *See* Exon v. Tiemann, 279 F. Supp. 609, 613 (D. Neb. 1968) (overturning district residency requirements for representatives because "[s]tates have no authority to add qualifications to those set forth in Article 1, Section 2."); State *ex rel* Chavez v. Evans, 446 P.2d 445 (N.M. 1968); Hellman v. Collier, 141 A.2d 908, 911 (Md. 1958); State v. Crane, 197 P.2d 864 (Wyo. 1948) (concluding that the state constitution cannot modify the eligibility criteria for the Senate).

91. *See supra* note 20.

spective term limit would not operate to prohibit existing long-term incumbents from continuing in office, using this distinction, a term limit would be labelled a manner regulation.

4. The Generality of the Restriction

One reason why we fear *ex post facto* legislation—that the measure will target an individual or small group—combined with the facts of *Powell*, suggests yet another possible difference between a qualification and a manner regulation. The argument would be that, as happened in *Powell*, a qualification could be used more easily to preclude a single person whom the legislature disliked. By contrast, a manner regulation, because of its general application, cannot be tailored as narrowly without significantly greater cleverness.

Although this individual/general distinction may have some descriptive force with regard to *Powell*, it does not present a particularly solid basis for distinguishing between the two categories. Clever politicians have used many tools to preclude individuals or an identifiable type of individual from running or winning. When challenged, these tools have consistently been reviewed as manner regulations.

For proof, we need look no farther than this year's presidential primary headlines to witness the difficulty that Pat Buchanan and David Duke had in gaining a place on many state ballots. Although specifically designed to exclude non-mainstream, relatively late-coming candidates, party rule, ballot-access restrictions have nonetheless been consistently evaluated as manner regulations.[92]

Note again, however, that because the Colorado term limit is not a mechanism for targeting individuals, to the extent that a distinction based upon generality of application has power, it favors labelling a term limit a manner regulation.

5. Judicial Considerations

To this point, the possible distinctions that we have explored between qualifications and manner regulations have been partially descriptive at best. From the cases discussed, however, one useful

92. For example, David Duke was denied a spot on the ballot for the Georgia Republican primary largely on the ground that a party has the right to choose its own candidates. That denial was upheld by the Eleventh Circuit. *See Duke Loses Appeal to Win Spot on Ga. Primary Ticket*, UPI, Jan. 23, 1992, *available in* LEXIS, Nexis Library, UPI File. Under the same theory, Patrick Buchanan was denied a spot on the South Dakota primary ballot. *See* John Hanchette, *ACLU Fights to Get Duke, Buchanan on Primary Ballots*, Gannett News Service, Jan. 9, 1992, *available in* LEXIS, Nexis Library, GNS File.

observation does emerge: the Supreme Court has chosen to construe the qualifications clauses extremely narrowly. The Court has instead examined the vast majority of election restrictions as manner regulations, regardless of their severity or directness.

This conclusion is best illustrated by contrasting several older lower court decisions striking down state election laws as impermissible qualifications with more recent Supreme Court decisions analyzing and upholding similar provisions as manner regulations.[93] These older decisions, which rejected, for example, a New Mexico requirement that a party candidate must have been a member of his party for at least a year prior to the primary election,[94] simply assumed that the proper mode of analysis was as a qualification. By contrast, the Supreme Court itself has seriously considered the possibility of a qualifications clauses violation in only two cases, *Powell* and *Bond*, and viewed all other state election restrictions as time, place, and manner regulations. In so doing, the Court has implicitly overruled some of these earlier state decisions and cast doubt on the validity of others.[95] Thus, the Court's practice strongly suggests that a state election law will be considered as a manner regulation unless it presents unavoidable analogies to the three constitutionally enumerated qualifications.

At least to a legal realist, this choice of framework makes good sense. The qualifications clauses, as construed in *Powell*, are a blunt weapon; once a court determines that a restriction creates a qualification, it must invalidate the offending provision. A court has no discre-

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93. *See, e.g., In re* Opinion of the Judges, 116 N.W.2d 233 (S.D. 1962) (governor and lieutenant governor not eligible for other office during term); State *ex rel.* Handley v. Superior Court of Marion County, 151 N.E.2d 508 (Ind. 1958) (governor not eligible for U.S. Senate); Riley v. Cordell, 194 P.2d 857 (Okla. 1948) (state supreme court justice not eligible to run for nonjudicial position); State *ex rel.* Wettengel v. Zimmerman, 24 N.W.2d 504 (Wis. 1946) (state judge not eligible for other office); Buckingham v. State *ex rel.* Killoran, 35 A.2d 903 (Del. 1944) (state judges forbidden from running for other positions until six months after the expiration of their term); State *ex rel.* Sundfor v. Thorson, 6 N.W.2d 89 (N.D. 1942) (candidate defeated in primary not eligible to run for same office in general election); Stockton v. McFarland, 106 P.2d 328 (Ariz. 1940) (state judge not eligible for federal office); Chandler v. Howell, 175 P.2d 569 (Wash. 1918) (state judge not eligible for other office).

94. *See* Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972).

95. *Storer* at least implicitly overruled the cases cited *supra* note 93, striking down provisions requiring a period of party affiliation as imposing a "qualification." Likewise, Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974), casts serious doubt on the New Mexico decision. Finally, Clements v. Fashing, 457 U.S. 957 (1982), suggests that the cases cited *supra* note 93, striking down "resign to run" statutes as qualifications, are also incorrect.

tion to permit a qualification with salutary characteristics. By contrast, the Equal Protection and First Amendment inquiries used to evaluate manner regulations are much better suited for separating unduly discriminatory or chilling legislation from election regulations that advance legitimate state interests.

This distinction suggests that, because a term limit presents a difficult classification dilemma and its effects upon incumbents and voters are complex, a court would likely rely upon its more subtle instrument. Thus, a distinction based upon judicial considerations demonstrates that a term limit is better considered a manner regulation.

6. Invidious Potential

Finally, one might distinguish between a qualification and a manner regulation based upon the evils that might follow from their abuse. In other words, this distinction focuses on the hopes and fears motivating courts as they choose a constitutional framework for analyzing a term limit. In the drafting and interpretation of Article I, the Framers and the Court have shared a common hope of fostering fair and open elections. In the qualifications cases, however, the threat to that hope was very different from the threat posed by state-imposed manner regulations.

With respect to qualifications, the Framers and the Court were preoccupied with preventing the Congress from wielding the power to control the composition of its own membership, a fear we will label congressional self-aggrandizement or self-perpetuation. Indeed, so strong was this fear that the Framers assigned the states primary authority to regulate the manner of elections.[96] By virtue of that assignment, a state-drafted manner regulation cannot present the possibility of congressional self-aggrandizement. Thus, in the manner regulation cases, the Court has been wholly concerned with ferreting out regulations that impermissibly discriminate or otherwise violate the right to free expression or association.

Both the Framers' debates and the Court's opinion in *Powell* demonstrate that the qualifications clauses were drafted and have been construed out of a fear of congressional self-aggrandizement. The present Article I, sections 2, 3, and 5, were adopted only after significant debate. On August 8, 1787, the Convention delegates unanimous-

96. *See supra* text accompanying notes 45-47.

ly adopted qualifications of age, citizenship, and residency.[97] On August 10, the Convention debated a proposal to give the Congress "authority to establish such [additional] uniform qualifications of the members of each House . . . as . . . shall seem expedient."[98] The delegates rejected this proposal that same day largely out of a fear that a Congress permitted to set the qualifications of its own members might permanently ensconce itself in office by limiting new entry. For example, Hugh Williamson of North Carolina worried that if a majority of the Congress should happen to be "composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body."[99] Similarly, James Madison reminded the delegates that "the abuse" Parliament had made of its power to fix qualifications "was a lesson worthy of our attention. They had made the changes . . . subservient to their own views, or to the views of political or Religious parties."[100] Madison concluded, and a majority of delegates apparently agreed, that the authority to set additional qualifications would vest "an improper and dangerous power in the Legislature."[101] Rejecting the proposal by a 7 to 4 vote, the Convention instead permitted the House to be only "the Judge of the . . . qualifications of its own members."[102]

Likewise, the Court in *Powell* was worried that a Congress with the power to augment the trio of constitutionally enumerated qualifications might wield it for self-insulation and aggrandizement rather than for promotion of the common good. The Court's review of history clearly impresses upon the reader the likelihood of abuse. In fact, the Court concludes its own brief analysis by recognizing that "[t]o allow [the power to create additional qualifications] to be exercised under the guise of judging qualifications, would be to ignore Madison's warning . . . against 'vesting an improper & dangerous

97. 5 ELLIOT'S DEBATES, *supra* note 27, at 391.

98. *Id.* at 377-78, 402. The initial proposal by the Committee of Detail was that the "Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." *Id.* at 377-78. Gouverneur Morris, however, moved to strike "with regard to property" from the Committee's proposal. His intention was "to leave the Legislature entirely at large" to fix qualifications. *Id.* at 404. Both the original proposal and Morris' motion were rejected by votes of 7-3 and 7-4, respectively. *Id.*

99. *Id.* at 404.

100. *Id.*

101. *Id.*

102. *Id.* at 378, 406; U.S. CONST. art. IV, § 4.

power in the Legislature.'"[103]

By contrast, when a state regulates the manner of a congressional election, the potential for legislative self-insulation and aggrandizement is present only indirectly, if at all. A temporary majority in the Congress would have to solicit support from a majority of state legislatures to enact manner regulations that favored the current incumbents. The difference in constituencies and the sheer number of states and people involved makes this sort of invidious collusion improbable. As long as the dominant party, interest group, or popular sentiment on important issues continues to vary widely among the states, any faction in the Congress will encounter extreme difficulty in attempting to insulate itself using state election regulations.

This is not to say, however, that a majority in any given state will not try to ensure that its representatives reflect its own partisan biases. Indeed, it would be peculiar if a temporary state majority did not seek to replicate its views in its congressional representatives. Self-replication, however, is distinct from self-perpetuation and the former has, at least historically, proven to be tolerably restrained by our nation's diversity. Accordingly, the Court has used an equal protection and/or First Amendment analysis to measure the constitutionality of state-imposed manner regulations.[104] Instead of searching for legislative self-aggrandizement, the Court has looked to see if the manner regulations impermissibly classify, discriminate, or impinge upon rights of expression or association.[105]

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103. *Powell*, 395 U.S. at 547-48. In *Powell*, Chief Justice Warren noted that "[a] fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'" *Id.* at 547. It would be a mistake, however, to emphasize this statement as the animating rationale of the decision because of its context. As mentioned, the opinion takes an extensive excursion through history, while confining its own analysis to a single concluding paragraph. Indeed, it would be fair to say that Chief Justice Warren let history speak for itself. If letting the people choose whom they please were the animating principle of *Powell*, the ballot access cases show that it would prove too much; restricting independent candidates or requiring candidates to demonstrate significant support before allowing them a place on the ballot surely, though permissibly, confines the people's ability to choose. *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

104. In offering this distinction, we do not presume to suggest that state legislation may never create a qualification. Certainly, were a state to pass a statute purporting to modify the age, residency, or citizenship requirements for the Congress, a court almost certainly would strike it down because of its obvious parallel with one of the constitutionally enumerated qualifications. In such a case, however, the question of whether to label the restriction a qualification or a manner regulation answers itself. Where the choice of labels is not self-evident, a distinction based upon invidious potential provides a meaningful rationale upon which to base the choice.

105. The intricacies of this analysis, as well as how a term limit such as the one we

Storer provides a specific example of the inquiry that courts pursue when evaluating a manner regulation. As mentioned, the California statute at issue in *Storer* imposed a "flat disqualification" from the various primaries upon any candidate who had been affiliated with a major party at any time within twelve months of the primary that he wished to enter.[106] The Court first noted that a decision in the election law context is "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'"[107] Then it went on to list a variety of legitimate state interests that it found were promoted by the statute, including interests in "maintaining the integrity of the electoral process," "ensuring significant support for each candidate on the ballot," and "preventing splintered parties and unrestrained factionalism."[108] Concluding that these state goals easily outweighed any interests that a particular candidate might have in immediate access to the ballot, the Court did not hesitate to uphold the regulation.

To the extent that a term limit will be judged a qualification or manner regulation by its invidious potential, a term limit clearly falls within the broad category of manner regulations. Even a cursory glance at the attributes and objectives of a term limit makes clear that it does not present the possibility of congressional self-perpetuation or aggrandizement. Indeed, it is intended to counteract such evils.

Proponents have suggested four sorts of interests that they seek to promote through such congressional term limits:

- levelling the playing field in an election process that provides incumbents with practically insurmountable advantages;

- ensuring that elected representatives truly represent and are representative of the community that elected them;

- preventing corruption in office; and

- broadening opportunities for participation in public

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propose is likely to fare under it, will be discussed *infra*, Section III.

106. *Storer*, 415 U.S. at 733.

107. *Id.* at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

108. *Id.* at 731, 735-36.

service.[109]

A court reviewing a term limit would find no reason to determine that such a measure vests an "improper and dangerous" power in the Congress. To the contrary, a term limit would strip long-term members of that body of their privileges. A court would, however, need to evaluate carefully whether a term limit unduly discriminates against long-term incumbents or frustrates the expressive and associational rights of incumbents or voters. Thus, a term limit fits squarely within the category of manner regulations as defined by invidious potential.

C. *Conclusion*

In this section, then, we have seen that whether a term limit should be considered a qualification or a manner regulation presents a complex question of labelling and categorization. Rejecting facile distinctions based upon severity or directness as not sustainable in light of existing case law, we have instead argued that distinctions based upon judicial considerations and a regulation's invidious potential present a reasoned basis upon which to affix the manner regulation label to a term limitation.

III. BEYOND ARTICLE I: FIRST AND FOURTEENTH AMENDMENT OBJECTIONS

If courts do indeed classify term limits as manner restrictions, opponents are left facing the following question: what other constitutional objections can be leveled against state-imposed limits on congressional service? The answer is not immediately apparent from the text of the Constitution because the Framers failed to include any explicit protection of political rights in their document.[110] In fact,

109. The Colorado amendment does not explicitly recite each of these rationales, but states only that term limits are intended to "broaden the opportunities for public service," and the need to "assure that members of the United States Congress from Colorado are representative of and responsive to Colorado citizens." COLO. CONST. art XVIII, § 9(1). While it fails to mention explicitly the vast advantages that incumbents enjoy and the anti-corruption aspect of term limits, one might argue that these rationales are implicit within the proposal's demand for representative representatives.

The California initiative, limited only to state legislators, does a more thorough job of reciting the reasons for term limits, emphasizing that "the Founding Fathers established a system of representative government based on free, fair, and competitive elections," and that term limits are necessary to "restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office . . . ." CAL. CONST. art. IV, § 1.5.

110. One might attempt to argue that Article IV, section 4, wherein a "[r]epublican

the only remaining provisions that offer opponents any serious hope of thwarting a term limit are the First and Fourteenth Amendments.

In this section, we turn to consider the strength of potential free speech and equal protection arguments. In so doing, the proper conclusion comes quickly into focus: to the extent that the free speech and equal protection doctrines have been used to fashion political rights, they do term limit opponents little or no good. Once over the qualifications hurdle, term limits are, in a real sense, in the home stretch.

In coming to this conclusion, we take two steps. Because the level of scrutiny applied in First and Fourteenth Amendment adjudication frequently foreshadows the result on the merits, we first examine the standard of review that a court will likely employ to assess a term limit. We then apply it to the rights and interests term limit opponents might assert.

A. Standard of Review

It is familiar learning that the standard of review applied by the Supreme Court in the First Amendment and equal protection contexts has been in a state of flux.[111] Cases involving candidate and voter rights are no exceptions. They have varied from employing a rather narrow rationality review to invoking a somewhat stricter form of scrutiny.[112] In *Anderson v. Celebrezze*,[113] however, the Court has recently provided a new and comprehensive framework for analyzing all election regulation cases.

Anderson involved a challenge to an Ohio election law by both John Anderson, the 1980 Independent candidate for president, and voters inclined to vote for him. The law in question required the candidate to file 5,000 signatures by March 20 in order to appear on the November ballot. The Court found these regulations too onerous and, in striking them down, announced a three-step standard of review in election law cases, abondoning the "strict" and "rational"

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[f]orm of [g]overnment" is guaranteed, is an explicit protection of political rights. However, the courts have consistently refused to utilize the Guarantee Clause, claiming that judicial enforcement is precluded by the political question doctrine. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

111. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991).

112. *Compare, e.g., Storer*, 415 U.S. 724, *with* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807-11 (1969).

113. 460 U.S. 780 (1983).

labels altogether. Lower courts are now expected to

> first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. [They] must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by this rule. In passing judgment, [courts] must not only determine the legitimacy and strength of each of those interests, [they] also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is [a] reviewing court in a position to decide whether the challenged provision is unconstitutional.[114]

Under *Anderson*, then, courts are to balance the interests of candidates and voters against those motivating the state's actions. Accordingly, in addressing First and Fourteenth Amendment objections to term limits, we will follow the Court's guidance and (1) assess the character and magnitude of the asserted burdens imposed; (2) evaluate the interests advanced by the state as justification for the burdens imposed; and (3) consider whether the burdens are necessary to achieve the state's interests.

B. Burdens on Incumbents

Any analysis of the burdens imposed by a term limit must begin with the following basic question: who is harmed? There are only two conceivable "classes" of individuals affected by a term limit: incumbents whose jobs are at stake and voters whose choices might be narrowed. We turn to consider the magnitude of the burdens that each class might assert, beginning with office-holders.

Before doing so, one point must be recalled. No matter how severely a term limit might infringe upon an incumbents' First and Fourteenth amendment rights, Article I, section 4, inarguably authorizes the Congress to overrule any manner regulation. With such an obvious means of self-protection available to members of Congress, a court need not be particularly sympathetic to equal protection or free speech harms claimed by incumbents themselves.

If courts nonetheless choose to entertain objections by incumbents, three separate arguments derived from the First Amendment and Equal Protection Clause will likely be made. First, term limits arguably infringe upon a fundamental right to run for office. Second,

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114. *Id.* at 965-66.

they perhaps create an indefensible classification by distinguishing between incumbents and challengers. Third, they may impinge upon the right to speak and associate by limiting one's ability to run for office. As we shall see, however, each of these arguments will almost assuredly fail.

In 1968, when the Supreme Court first struck down a ballot access restriction, it did so because the regulation inappropriately discriminated against minority party candidates.[115] In the wake of that decision, some commentators rushed to conclude that the Court was prepared to announce—or already had announced—a fundamental right to candidacy derived from the Equal Protection Clause.[116] These conclusions were not merely wishful thinking; the Warren Court was, at the time, in the process of deriving several fundamental rights from the Equal Protection Clause.[117]

With the transition from the Warren Court to the Burger Court, however, came a new reticence about using equal protection analysis to craft fundamental rights.[118] In 1972, the Court made plain that it had not recognized a fundamental right to candidacy.[119] Reaffirming this conclusion recently in *Clements v. Fashing*,[120] the Court has made entirely clear that it will not strike down any legislative limitation on candidacy under the fundamental rights rubric.[121]

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115. Williams v. Rhodes, 393 U.S. 23 (1968).

116. *See, e.g.*, Jeffrey A. Babener, Note, *Durational Residence Requirements for State and Local Office: A Violation of Equal Protection?*, 45 S. CAL. L. REV. 996, 1009 (1972); Edward T. Hand, Note, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357, 367 (1973).

117. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (guaranteeing a fundamental right to interstate travel); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (guaranteeing a fundamental right to vote); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963) (guaranteeing access to the courts as a fundamental right); Griffin v. Illinois, 351 U.S. 12 (1956). Many even hoped that the Court might extend this fundamental rights analysis in bold new directions to guarantee welfare and other "necessities." *See, e.g.*, Frank I. Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

118. *See* Dandridge v. Williams, 397 U.S. 471, 487 (1970) (stating that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."); Lindsey v. Normet, 405 U.S. 56 (1972) (holding that there is no fundamental right to "decent shelter"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental right).

119. *See* Bullock v. Carter, 405 U.S. 134, 142-43 (1972).

120. 457 U.S. 957 (1982). "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Id.* at 963.

121. The Court has even received some support from the academic community for its refusal to extend fundamental rights analysis to candidacy. *See, e.g.*, *Developments in the*

Likewise, a suspect classification argument provides incumbents little hope for success. In *Clements*, the Court acknowledged that regulations discriminating against poor[122] and minority party[123] candidates are nearly always impermissible under the Equal Protection Clause. However, it quickly added that no other groups or classes identified to date merit such exacting scrutiny by the Court.[124] This stinginess with suspect classification analysis in the election context is emblematic of the Court's general movement away from close concern with regulatory groupings under equal protection analysis.[125] It also suggests that, because a term limit does not discriminate against poor or minority party candidates, it is free from classification-based objections. Indeed, a term limit affects a group far removed from the suspect class paradigm; Congress is, after all, rather heavily dominated by white (93%),[126] male (95%),[127] millionaires (11% of the House, 26% of the Senate).[128] It would, at the least, be ironic were incumbents to win protection under a constitutional doctrine initially intended to serve newly freed slaves.

Even so, incumbents have not been dissuaded from pressing classification-based claims. In *Clements*, incumbents specifically argued that a provision requiring incumbents to serve their full terms

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Law: Elections, 88 HARV. L. REV. 1111, 1135 n.81 (1975); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1098 n.5 (2d ed. 1988) (remarking that "there is something more than faintly odd, even in a country boasting that anyone can become President, about a society's describing as a 'fundamental right' an activity bound to be unthinkable for a vast majority of its members.").

122. *Clements*, 457 U.S. at 964-65; *see also* Lubin v. Panish, 415 U.S. 709 (1974).

123. *Clements*, 457 U.S. at 964-65; *see also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968).

124. *See Clements*, 457 U.S at 965.

125. Suspect and quasi-suspect classification analysis applies to restrictions based on race, ethnic origin, gender, and illegitimacy. The Burger and Rehnquist Courts have rejected numerous attempts to add additional classes to this list. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that the mentally retarded are not a suspect class); Harris v. McRae, 448 U.S. 297 (1980) (holding that wealth classifications do not trigger strict scrutiny); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that an age qualification does not demand strict review).

126. *See* Susan B. Glasser, *GOP Says Number of Black, Hispanic Seats Should Double to 68, But 44 More Realistic*, ROLL CALL, Apr. 29, 1991.

127. *See* Matthew Cossolotto, *True Democracy Requires Changing Hill Election System*, ROLL CALL, Dec. 2, 1991.

128. *See* Jeffrey Berman, *Filings Reveal 51 Members of House Qualify for Millionaires Club*, ROLL CALL, July 15, 1991; Craig Winneker & Jeffrey Berman, *More Than a Quarter of the Senate Qualifies for Millionaires' Club*, ROLL CALL, June 20, 1991.

before seeking another elective office improperly discriminated against them as a class—forcing them to sit out an election cycle while others could run. The Court quickly dismissed this argument, labeling the waiting period created by this "serve your term" provision a "*de minimis* burden."[129] The four-year exclusion from the printed ballot required by our term limit proposal seems hardly more substantial, given the twelve years that incumbents will be allowed to hold office and the constant availability of the write-in campaign—something that incumbents in *Clements* could not use.

Moreover, states impose regulations at least as severe as the rotational term limit on classes far less privileged than congressional incumbents without violating the Fourteenth Amendment. Some impose durational residency requirements requiring the newly-arrived to wait up to seven years before becoming eligible to run for state office.[130] Others specify minimum ages for candidacy.[131] Both types of requirements have been analyzed without reference to the suspect classification standard and upheld with relative ease. If states can force one class of citizens to endure these burdens before making an *initial* run for public office, it seems highly improbable that a four-year exclusion from the printed ballot, applicable only to those who have *already* served twelve years, will trigger equal protection concerns.

Moving to the speech-related burdens placed upon incumbents, we return to *Clements*. There the Court considered whether either the "serve your term" provision or one requiring certain elected officials to resign their offices before seeking another violated the First Amendment.[132] Although the regulations precluded many elected officials from becoming candidates when they wished, a majority of the Court noted that the rules

> in no way restrict appellees' ability to participate in the political campaigns of third parties. They limit neither political contributions

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129. *Clements*, 457 U.S. at 967.

130. *See, e.g.*, Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975) (upholding seven years for state senator); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973) (upholding seven years for governor); Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972) (upholding three years for state legislature).

131. *See, e.g.*, Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973) (upholding a requirement that city council candidates be twenty-five years of age); Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973) (upholding a requirement that school board members be eighteen years of age).

132. *Clements*, 457 U.S. at 972.

> nor expenditures. They do not preclude appellees from holding an office in a political party . . . . [A]ppellees may distribute campaign literature and may make speeches on behalf of a candidate.[133]

Thus, the Court found that whatever First Amendment rights elected officials enjoy, an unfettered right to candidacy simply is not included among them. The Court emphasized just how severely elected officials' free speech rights might be limited by noting that the provisions before it were "far more limited . . . than this Court has upheld" in *Letter Carriers* and *Broadrick*.[134] Like civil servants, then, elected officials may indeed have their speech activities curtailed rather substantially, even so far as to preclude participation in upcoming elections under certain conditions.

The question of how far states may go in burdening the speech activities of their elected officials may prove to be an interesting question. But, whatever the outer bounds, rotational term limits seem safely within those limits. They are, like the *Clements* regulations, less burdensome on speech and associational rights than the Hatch Act;[135] morever, they permit congressional incumbents to participate fully in the campaigns of third parties, a factor the Court considered significant in *Clements*. In sum, there is little term limit advocates need fear in any assertion of "candidate rights." Incumbents possess no fundamental right to candidacy, they are not members of an impermissible class, and they do not enjoy an unlimited First Amendment right to run.

C. *Burdens on Voters*

We now turn to consider the nature and extent of the impact term limits will have on voters. Significantly, unlike candidacy, the opportunity to vote *has* been deemed fundamental under the Equal Protection Clause.[136] What remains unclear, however, is what exactly this fundamental right entails and, thus, whether term limits infringe upon the exercise of that right.

One possible theory of the right simply holds that all votes must be counted equally. This theory has found expression in a recent Ninth Circuit decision, *Burdick v. Takushi*,[137] and fits well with the

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133. *Id.*
134. *Id.*
135. *See* "severity" discussion, *supra* Section II.B.1.
136. *See* Reynolds v. Sims, 377 U.S. 533 (1964).
137. 927 F.2d 469 (9th Cir.), *cert. granted*, 112 S. Ct. 635 (1991).

Court's analysis in other important right to vote cases.[138]

Under this theory, term limits as we imagine them are completely unobjectionable: all voters are treated alike in their inability to find the twelve-year incumbent on the ballot. Since there is no fundamental right to vote for a particular individual, nothing is lost by the imposition of a term limit. In fact, by allowing the write-in candidacy as we suggest, a state might actually provide voters more than is required by First and Fourteenth Amendment analysis.

Another theory of the right to vote, however, requires not only equal treatment, but also the opportunity to express one's preference for a particular candidate. Under this view, *Burdick* is wrongly decided. But, that said, the breadth of a right to vote for a particular individual under this view is not altogether clear. It could simply be that every voter must have the opportunity to write-in his chosen candidate's name at the ballot box. Or, more boldly, a right to vote for a specific individual could require access to the printed ballot for all interested candidates.

Proponents of the write-in interpretation have some reason for optimism. Despite *Burdick*, two courts have decided that the write-in option is encompassed within the fundamental right to vote.[139] Moreover, the Supreme Court has recently granted certiorari to consider *Burdick* this term.[140] In the end, whether this vision of the right to vote or that adopted in *Burdick* ultimately prevails matters little to our analysis as, under the provision we propose, long-term incumbents are free to conduct a write-in campaign.[141]

A broader construction of the right to vote, one perhaps requiring

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138. Courts have stepped in to protect the right to vote in two situations. The first is when states impose voter qualification regulations that unduly discriminate against a particular group's access to the franchise. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (holding that conditioning the right to vote in school board elections on the ownership of property is impermissible); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (holding that a poll tax violates the Equal Protection Clause). The second is when the state attempts to dilute the effectiveness of the votes of a particular class. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (holding that a bicameral legislature must be apportioned on a population basis). In both situations, the Court's concern has focused on the fact that the regulation in question allows some voters a greater voice at the polls than others.

139. *See* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989); Paul v. Indiana Election Bd., 743 F. Supp. 616 (S.D. Ind. 1990).

140. *See supra* note 137 and accompanying text.

141. Our reasons for suggesting the write-in as an important addition to the Colorado provision have now become clear: not only does it help a term limit look more like a manner regulation for Article I purposes, but it also allows states to hedge their bets on the eventual outcome of *Burdick*.

open ballot access, might well imperil a term limit. However, there is almost no chance that such a view of the right will ever be adopted. Unlike the other theories that we have discussed, no court has pursued this notion and it, like the directness distinction in Article I analysis, proves too much. If an absolutely open ballot were constitutionally required, then not only would term limits be prohibited, but the ballot access, Hatch Act, and "serve your term" cases would all have to be overruled because they permit substantial restrictions on the names that may be printed on the ballot. Were a right to vote construed so broadly, one might even argue that the constitutionally-granted power of the states to govern the manner of congressional elections under Article I, section 4, would become a nullity.

In sum, a term limit does not trammel the right to vote in either of its tenable interpretations. The right to vote, however, does suggest that a write-in provision may be an important addition to any term limit proposal.

D. The State's Interest

Now we consider the state interests advanced by a term limit, which, under *Anderson*, must be balanced against the rights of incumbents and voters. As mentioned above,[142] proponents have suggested four interests they seek to promote through term limits: levelling the electoral playing field, preventing corruption in office, ensuring that elected representatives truly represent, and broadening opportunities for participation in public service.

An examination of the case law reveals that these interests are rational—even compelling—goals for government to pursue. In *Austin v. Michigan Chamber of Commerce*,[143] the Supreme Court considered a Michigan statute prohibiting corporations from using general treasury funds to support candidates for state office, but permitting them to make such expenditures from segregated funds used solely for political purposes. In upholding the regulation, the Court emphasized that, while it placed a significant burden on corporate speech, the statute was an important and legitimate attempt to control "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . . Corporate wealth can unfairly influence elections."[144] It was, thus,

142. *See supra* note 109 and accompanying text.
143. 494 U.S. 652 (1990).
144. *Id.* at 660.

deemed a legitimate state purpose to prevent corruption and the unfair influence of monied interests in the democratic system—something term limits are specifically designed to do.

These same anti-corruption and level playing field arguments were employed by the Court in *Buckley v. Valeo*[145] to uphold a $1,000 limit on individual contributions to candidates for federal office. Not only was the regulation deemed a reasonable attempt to prevent actual corruption in office, but it was also accepted as a legitimate weapon to combat even

> the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In [*Letter Carriers*] the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."[146]

Thus, the Court will allow absolute bans on direct corporate contribution, severe caps on campaign contributions, and a near-total elimination of political activity by civil servants, all to the end of eliminating corruption—and perhaps even its appearance—in government.

The legitimacy of promoting representativeness in government has also been recognized by the Court. In upholding the *Clements* measure requiring certain elected officials to resign before running for another office, the Court found that states have a legitimate interest in preventing state office-holders from neglecting their duties or from making decisions that might advance their own political ambitions rather than the pubic good.[147] Lower courts faced with the application of such "resign to run" statutes against candidates for federal—not just state—office have come to exactly the same conclusion.[148] Further, we note that a concern for representativeness played an enormous role in *Letter Carriers* as well. The only possible way to ensure representative and responsive civil servants, the Court con-

145. 424 U.S. 1 (1976).
146. *Id.* at 27 (citation omitted).
147. Clements v. Fashing, 457 U.S. 957 (1973).
148. *See, e.g.*, Signorelli v. Evans, 637 F.2d 853 (1980).

cluded, was to limit drastically their associational rights.[149]

This same concern with representativeness was also an impetus behind many of the ballot-access regulations. Afraid that late-coming independent candidates are often prompted "by short-range political goals, pique, or personal quarrel,"[150] courts have reasoned that ballot access regulations excluding such candidates from the ballot help prevent the "bleed[ing] off [of] votes" from candidates properly on the ballot.[151]

The rationality of an attempt to limit the effects of entrenched incumbency finds support in the federal and in state constitutions. The Twenty-Second Amendment[152] limiting presidential terms, along with similar state provisions covering governors, are powerful testimony that the limitation of incumbent terms is indeed sound public policy.[153] Interestingly, state constitutional limits on gubernatorial terms have been challenged under the Equal Protection Clause of the federal Constitution in much the same fashion a congressional term limit might be.[154] They have, of course, been universally upheld, with courts acknowledging that states have a significant interest in eliminating "[t]he power of incumbent officeholders to develop networks of patronage," and "fears of an entrenched political machine which could effectively foreclose access to the political process."[155] Also important, these limits have been acknowledged by courts to help "stimulate criticism within political parties" and "insure a meaningful, adversary, and competitive election."[156] If such state provisions are inoffensive to the federal Constitution, and their rationales accepted, there is indeed a strong base of precedent to suggest that the congressional term limits now proposed would also pass mus-

149. *See Letter Carriers*, 413 U.S. at 565. "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.*

150. *Storer*, 415 U.S. at 735.

151. *Id.*

152. U.S. CONST. amend. XXII, § 1.

153. Much emphasis has been placed on the fact that these limitations are expressed in constitutional amendments rather than legislative enactments. However, for our purposes here—discerning the significance of the governmental interest in term limits under an *Anderson* balancing test—this distinction has little relevance.

154. *See, e.g.*, State *ex rel.* Maloney v. McCartney, 223 S.E.2d 607 (W. Va.), *appeal dismissed sub nom.* Moore v. McCartney, 425 U.S. 946 (1976); Maddox v. Fortson, 172 S.E.2d 595 (Ga.), *cert. denied*, 397 U.S. 149 (1970).

155. *Maloney*, 223 S.E.2d at 611.

156. *Id.*

ter.[157]

E. The Necessity of Imposing Restrictions

The final step in the *Anderson* test requires an inquiry into the "necessity" of burdening incumbents' and voters' First and Fourteenth Amendment rights.[158] It explicitly requires the "weighing [of] all these factors" to determine whether a challenged provision is constitutional.[159]

On one end of the balance, the character and magnitude of the First and Fourteenth Amendment rights affected by term limits seem not at all profound. To the extent that a right to candidacy has been judicially developed, it seems almost exclusively concerned with guarding against regulations that create invidious classifications, especially those based on wealth and minority party status. A term limit regulation does not discriminate on either basis or, for that matter, on any other basis traditionally the subject of heightened scrutiny.

Likewise, term limits have little impact on the right to vote. If *Burdick* proves to have been rightly decided, term limits will actually have no impact, as all voters will be equally unable to vote for a long-term incumbent. If *Burdick* proves to have been wrongly decided, and the right to vote does include a right to vote for a particular person, the analysis changes slightly, but the result does not. Voters will not encounter an incumbent's name on the printed ballot, and will instead be required to write in the incumbent's name, taking extra care with their exercise of the franchise. But there is no indication from existing law that the right to vote includes the right to have one's favored incumbent printed on the ballot. Thus, even if *Burdick* is wrong, the right to vote likely constitutes nothing more than the right to write and no damage is done by the limit we suggest.

On the other side of the balance, strong governmental interests are promoted by term limits, in our view—in fact, some of the most basic and important it may pursue. Maintaining a representative de-

157. At this point, opponents might attempt to argue that the governmental interests explored in this section might justify federal legislation to limit terms, but cannot be used to justify state action on what is "purely" a federal matter. As we have discussed above, however, Article I, section 4, does not permit such a wooden view of federalism in the election context. Instead, it explicitly recognizes the interest that states have in the election of members from their own soil by allowing them broad regulatory powers over those elections. *See supra* notes 45-47, 58, 96 and accompanying text.

158. *Anderson*, 460 U.S. at 789.

159. *Id.*

mocracy and limiting the influence of unfair electoral advantages have moved legislatures and courts to enact and approve bold measures in the past that restrict certain individuals at least as severely as a term limit. In sum, once over the qualifications hurdle, the fight on the First and Fourteenth Amendment grounds does indeed look promising for term limit proponents.

IV. STATE LEGISLATIVE TERM LIMITS

Although the debate over the constitutional status of congressional term limits promises to continue without a definitive judicial resolution for several years,[160] recent developments in the California courts and basic notions of federalism virtually assure state legislative limits a positive reception in court. Three states have already passed limitations on state office-holders;[161] two of these even impose lifetime bans, not mere rotation schemes.[162] Further, all three deny state legislators even the opportunity to conduct write-in campaigns. On the state level, however, such variations are not likely to prevent their judicial affirmance.

The case for term limitations on state office-holders is simpler to build than the case for their federal counterparts in large part because the qualifications clauses, by their own terms, apply solely to congressional elections. Consequently, state term limits do not require that we engage in the vexing task of drawing analytical lines between various sections of Article I, or to explore the boundaries of *Powell* and *Storer*.

In fact, the only serious constitutional objections opponents can level against state limits stem from the First and Fourteenth Amendments. We have, however, already considered these arguments in Section III with reference to federal limits and found that they provide opponents with little ammunition. To the extent that a term limit impairs recognized free speech and equal protection interests at all, it does so only minimally. Moreover, the governmental interest motivating the imposition of a limit finds strong precedential support. Any

160. A definitive ruling may be some time in coming, in part because Colorado chose, and presumably other states adopting federal term limits will choose, to apply their provisions only prospectively. *See* COLO. CONST. art. XVIII, § 9(1).

161. These states are California, Colorado, and Oklahoma. *See* CAL. CONST. art. IV, § 2(a); COLO. CONST. art. V, § 3(2); OKLA. CONST. art. 5, § 17A.

162. These are California and Oklahoma. *See supra* note 161. Colorado has chosen to apply a rotational scheme to its state legislature similar to the one it imposes on its federal representatives.

further discussion of why and how state limits ought to survive First and Fourteenth Amendment challenges, thus, might seem cumulative. Still, there are two additional factors uniquely relevant to limitations on state office-holders that we have not yet discussed and that are of such importance that they deserve mention.

First is a recent decision of the California Supreme Court involving what may prove to be the nation's strictest limitation.[163] The California provision holds state senators to eight years in office and assembly members to six, contains no write-in provision, and is a lifetime ban.[164] Despite the severity of these restrictions, the court found the First and Fourteenth Amendment objections raised to be completely unavailing under an *Anderson* analysis:

> On balance . . . the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them . . . . It is true, as petitioners observe, that respondents have not offered evidence to support all of the various premises on which [the initiative] is based. But as the United States Supreme Court pointed out . . . a state need not demonstrate empirically all of the various evils that its regulations seek to combat . . . . *In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections" and "encourag[ing] qualified candidates to seek public office" is invalid as an unwarranted infringement of the rights to vote and to seek public office.*[165]

The California experience, thus, bolsters our conclusion that the assertion of the First and Fourteenth Amendment rights pose few problems for a limitation initiative. It also suggests that, at least on the state level, limitation provisions need not necessarily include rotational and write-in devices in order to ensure their constitutionality. Thus, the Colorado rotational concept for state officers may be copied, but may not be needed.

The truly ambitious might also argue that the California decision paves the way to include lifetime bans in, and delete the write-in provision from, the federal limit we propose. But, we fear this may fail to appreciate fully the Article I analysis. While the lifetime ban and the write-in prohibition may pass scrutiny under the First and

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163. *See* Legislature of the State of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 1992 U.S. Lexis 1555, 60 U.S.L.W. 3615 (March 9, 1992).

164. CAL. CONST. art. IV, § 2(a).

165. *Eu*, 816 P.2d at 1328-29 (citations omitted) (emphasis added).

Fourteenth Amendments,[166] a federal limit must also be classified as a manner regulation. As discussed above, the difference between impermissible qualifications and permissible Article I, section 4, regulations, is more one of degree than one of kind; thus, any procedures that can be added to a term limit to move it closer to the paradigmatical section 4 manner regulation and further from the traditional qualifications of sections 2 and 3 should be included in order to pose courts with the most favorable case first. Still, the California decision does suggest that states have enormous latitude in crafting their own internal limitation provisions.

Our confidence in the conclusion that states enjoy substantial discretion in establishing their own election procedures is reinforced by the second factor specially relevant to state term limits: the federalism concerns raised when one uses the United States Constitution to regulate how states organize their own legislatures. The Supreme Court has itself stated that, "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices."[167] From this general concern with the power of the states to structure their own governments has grown a body of law evidencing a serious disinclination to alter internal state election requirements. Despite substantial constitutional objections, courts have, among other things, permitted states to develop highly restrictive mechanisms for filling state legislative vacancies,[168] to impose severe durational residency requirements on newcomers,[169] and to mandate minimum ages for running for elective office.[170] Likewise, courts have intervened to protect state interests when the federal government has attempted to impose its own ideas of how state government should be organized.[171]

Though federalism concerns do not trump equal protection or First Amendment concerns or obviate the need to conduct an *Anderson* balancing test, they surely must be counted in the balance. Just

166. Again, the necessity of a write-in provision may hinge on the outcome of *Burdick*. *See supra* Section III.C.

167. Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (citations omitted).

168. *See, e.g.*, Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1981).

169. *See supra* note 130 and accompanying text.

170. *See supra* note 131 and accompanying text.

171. *See, e.g.*, *Mitchell*, 400 U.S. 112 (holding that the federal government may not dictate a minimum age to vote in state elections).

how heavily they weigh becomes evident in the Court's decision in *Oregon v. Mitchell:*

> [T]he Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the State's power to govern themselves . . . . In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.[172]

No finer examples of the cautious approach courts have exhibited towards internal state election regulations can be found than the state durational residency cases. Courts have upheld election regulations preventing newcomers from seeking their first elective office for up to *seven* years after arrival in state.[173] It would be rather incongruous if such severe limitations were upheld, but a term limit affecting only the political opportunities of those who have already had a chance to serve several years was not.

In sum, the constitutional analysis for state term limits follows the *Anderson* analysis laid out in Section III, but does so with two added factors in the balance, both of which press heavily in the state's favor. The California experience and the federalism concerns involved in the state context powerfully suggest that, whatever the eventual outcome of cases challenging federal term limits, term limits will have a profound impact on the way in which state governments are organized and operate.

CONCLUSION

Term limits raise enormous questions about our basic notions of citizenship and representative democracy. They represent a dramatic rejection of the nation's present legislative scheme and its dependence upon seniority, rank, and the professional Congressman. They suggest, too, a move back toward an ideal long-discarded—that of the citizen-legislator.

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172. *Id.* at 126; *see also* Clements v. Fashing, 457 U.S. 957, 975 n.4 (Stevens, J., concurring). "In defining the interests in equality protected by the Equal Protection Clause, one cannot ignore the State's legitimate interest in structuring its own form of government. The Equal Protection Clause certainly was not intended to require the States to justify every decision concerning the terms and conditions of state employment according to some federal standard." *Id.*

173. *See* Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975).

Our contribution to the ongoing debate about the wisdom of imposing term limits is relatively minor. We do not purport to provide any answers to the questions of democratic theory raised. We do not suggest that one representative ideal is superior to another. We write only to dispel a myth that has detracted attention from such central concerns: that the enactment of term limits is futile as courts will quash them. In our view, a strong argument can indeed be made that state-imposed term limits are constitutional—that they do not constitute a blatant "end run around the Constitution."[174]

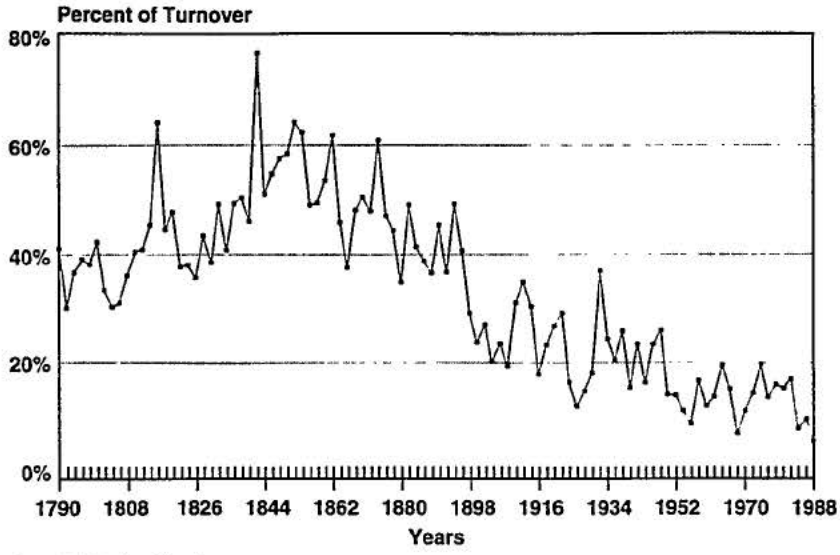
As we have discussed, the absence of a term limitation provision in the Constitution itself hardly bespeaks an intention on the part of the Framers to foreclose their subsequent legislative imposition. Article I doctrine, upon which term limits opponents so heavily rely, indicates that limits are more likely to be deemed legitimate manner restrictions than inappropriate qualifications. First Amendment and equal protection guarantees offer incumbents extremely little hope. And state legislative limits seem bound for success in our courts.

In the end, we believe that the fate of term limits may not be decided by the courts as nervous incumbents so hope, but in a fashion far more familiar to those they would displace: through the ballot box.

174. Kolbe, *supra* note 69.

APPENDIX

Turnover Rates In The House



Source: Calculated from information contained in Congressional Research Service Report

TURNOVER RATES IN THE HOUSE OF REPRESENTATIVES

Year	% Turnover	Year	% Turnover	Year	% Turnover
1790	41.5%	.858	49.6	1924	17.9
1792	30.8	1860	53.5	1926	13.6
1794	37.1	1862	61.5	1928	16.3
1796	39.6	1864	46.2	1930	19.5
1798	38.7	1866	38.2	1932	37.7
1800	46.2	1868	48.3	1934	25.6
1802	34	1870	50.6	1936	21.8
1804	31	1872	48.2	1938	26.9
1806	31.7	1874	60.6	1940	17
1808	36.6	1876	47.3	1942	24.6
1810	40.9	1878	44.7	1944	17.9
1812	41.3	1880	35.5	1946	24.6
1814	45.6	1882	49.2	1948	27.1
1816	63.7	1884	41.9	1950	15.8
1818	44.8	1886	39.4	1952	15.6
1820	47.9	1888	37.2	1954	12.9
1822	38.2	1890	45.9	1956	10.6
1824	38.5	1892	37.4	1958	18.2
1826	36.2	1894	49.4	1960	13.8
1828	43.7	1896	41.2	1962	15.4
1830	39	1898	30	1964	20.9
1832	49.3	1900	24.9	1966	16.8
1834	41.2	1902	28	1968	9
1836	49.4	1904	21.5	1970	12.9
1838	50.4	1906	24.6	1972	16.1
1840	46.3	1908	20.7	1974	21.1
1842	76	1910	32	1976	15.4
1844	51.1	1912	35.6	1978	17.7
1846	54.7	1914	31.3	1980	17
1848	57.4	1916	19.3	1982	18.6
1850	58.2	1918	24.4	1984	9.9
1852	63.8	1920	27.8	1986	11.5
1854	62	1922	30.1	1988	7.6
1856	49.2				

Policy Analysis

Cato Institute Policy Analysis No. 178: Will the Gentlemen Please Yield?--A Defense of the Constitutionality of State-Imposed Term Limitations

September 24, 1992

Neil Gorsuch, Michael Guzman

Neil Gorsuch and Michael Guzman are recent graduates of the Harvard Law School.

Executive Summary

The recent rash of congressional retirements has led many politicians and pundits to speculate that the term limit movement will prove to be nothing more than a passing fad. They argue that the likely election of over 100 new House members this fall will satisfy even the most disenchanted voter's appetite for change. This claim, however, greatly underestimates a series of developments now taking place at the grass-roots level across the country.

Indeed, recent events suggest that, rather than waning, interest in term limits continues to grow. California and Michigan, home of two large and powerful congressional delegations, will include federal term limit initiatives on their ballots this November, and as many as a dozen other states, including Florida, are contemplating similar moves. Public support for term limits hovers around 75 percent in the polls, and activists across the country have formed and funded bipartisan national organizations dedicated to their propagation.[1] In sum, it appears that term limits will likely remain on the national political agenda for quite some time.

Nervous incumbents, perhaps hoping that the courtroom will prove more hospitable than the ballot box, have already attempted to shift the debate over term limits from their merits to questions about their constitutionality. Rep. Larry Smith (D-Fla.), for example, recently used the services of the House Counsel's office--at taxpayer expense--to prepare a legal brief challenging a term limit initiative in his home state. Last fall, California state legislators brought, and lost, a lawsuit aimed at invalidating a term limit California voters imposed on their state representatives and senators in 1990. And most recently, the Massachusetts legislature has refused to allow a term limit initiative on the ballot until the state's supreme court renders an advisory opinion certifying the measure's constitutionality.

In short, term limit opponents appear increasingly willing--perhaps even anxious--to avoid any debate over the merits of state-imposed term limits, embracing instead the comfortable notion that it is pointless to consider a patently unconstitutional measure. House Speaker Thomas Foley put the proposition most succinctly: "Any constitutional lawyer worth his salt will tell you [term limits are] a sham."[2]

We beg to differ. Although the constitutional case for term limits is not beyond doubt, it can hardly be characterized as frivolous. Hoping to move the ongoing debate over term limits from the legal realm to a discussion of their merits, we argue here that a state-imposed limit on the terms of that state's congressional delegation is constitutionally permissible.

We begin this study with an examination of U.S constitutional history and find that a term limit is entirely consistent with the Framers' intentions. Recognizing that men are not angels, the Framers of the Constitution put in place a

number of institutional checks designed to prevent abuse of the enormous powers they had vested in the legislative branch. Bicameralism, frequent elections, staggered terms, differing qualifications, shared and exclusive powers, and state control over election procedures are all examples of the mechanisms the Framers crafted with the hope of ensuring a responsive yet responsible legislature. A term limit, we suggest, is simply an analogous procedure designed to advance much the same substantive end.

Similarly, the text of the Constitution leaves room for term limits. Article I, section 4, explicitly grants the states wide latitude to determine the times, places, and manner of congressional elections. This provision, in our judgment, fully empowers states to enforce term limits on members of their congressional delegations. Moreover, a term limit is harmonious with our constitutional guarantees of free speech or equal protection.

Before proceeding further, however, it would be well to explain exactly what we will defend. Although various term limit proposals have been suggested, we will defend a measure similar to the initiative the voters of Colorado recently approved as an amendment to their state constitution--the only congressional term limit actually enacted to date. Colorado's amendment limits United States senators and representatives to twelve years in office, allowing them to run again only after a four-year "rotation" out of office.[3] The amendment applies prospectively in that it affects only those congressmen elected after 1990.

We would add one important provision to the Colorado amendment, however: an incumbent would be allowed to conduct a write-in candidacy at any time. Thus, the term limit we defend would remove an incumbent from the printed ballot after twelve consecutive years but leave him the option to run as a write-in candidate.[4]

We defend this slightly amended version of the Colorado term limit, including the number of years permitted, only because it is the first such measure actually to have been approved by a state's voters. In truth, fewer terms--such as six consecutive years for members of the House, as reflected in most proposals currently before the voters--may be perfectly acceptable. In any case, however, the constitutional issues should not turn on the number of terms a particular measure allows.

Historical Perspective

Opponents of term limits frequently emphasize the absence of a limit on congressional terms in the Constitution as evidence that the Framers intended to preclude such a measure.[5] This argument ignores both the principles of government that influenced the Framers and the concrete analogs to term limits that they included in the Constitution. Although a limit was not written into the Constitution, its absence suggests not that the Framers thought one inimical to their project but only that it was unnecessary in light of the numerous restrictions they had imposed on the national legislature.

James Madison, in The Federalist no. 51, reminds us of the Framers' basic views on human nature's tyrannical possibilities, and their danger for a government composed of men:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[6]

Put simply, institutional constraints on the power of government--in Madison's parlance, "auxiliary precautions"--were, to the Framers, necessary preconditions for liberty. A dependence on popular elections, while surely the first line of defense in securing and maintaining a free society, cannot reasonably be expected to suffice.

Thus, when the Framers outlined the nature and responsibilities of the legislative branch, they established a number of safeguards to control the significant power they had vested in that body. Bicameralism, size of membership, term lengths, staggered terms, differing qualifications, shared and exclusive powers, and state control over election procedures are all examples of the mechanisms they deployed in the hope of "obliging [government] to control itself."

Like those restraints, term limits were also a familiar device. Before drafting and ratifying our present Constitution, several states had constitutional limits on the terms of their legislators.[7] Delegates under the Articles of Confederation were also limited to a maximum of three one-year terms during any six-year period.[8]

Hoping to continue a tradition of limited terms, Edmund Randolph proposed a rotation scheme at the Federal Convention in Philadelphia that would have prevented members of the House from serving consecutive terms.[9] Two days after its introduction, however, Randolph's rotation proposal was set aside, along with several other provisions concerning the legislative branch, because it entered "too much into detail for general propositions."[10] Legislative rotation was never the subject of recorded debate at the Federal Convention, and on June 12, 1787, the delegates quietly voted to drop a rotation requirement.[11]

A rotation scheme, of course, was only one means the Framers considered for curbing the self-aggrandizement and disregard for the electorate that long-term incumbents often display. To address such problems, they adopted relatively short terms for all elected federal officials; indeed, the Framers settled on a six-year Senate term only after debating proposals for a tenure "during good behavior" of nine years, seven years, and four years.[12] Likewise, they fixed terms in the House at two years after considering proposals of three years and one year.[13] The presidential term was also reduced to four years after proposed terms of life tenure, twenty years, fifteen years, eight years, and seven years were debated and rejected.[14] John Adams gave an eloquent explanation of these decisions:

> [E]lections, especially of representatives and counselors, should be annual, there not being in the whole circle of the sciences a maxim more infallible than this, "where annual elections end, there slavery begins." These great men . . . should be elected once a year--like bubbles on the sea of matter borne, They rise, they break, and to that sea return.[15]

Having mandated frequent elections, it was virtually inconceivable to the Framers that many incumbents would be able to win continual reelection.[16] Rather, the common assumption that frequent elections would produce a high degree of turnover was plainly evident in the debate over the length of tenure for representatives. Anti-Federalist "John DeWitt," for example, argued in favor of a one-year term for representatives despite his belief that two-thirds of the members would be new each term.[17] James Madison, likewise assuming that "new members . . . would always form a large proportion" of the House, urged longer terms to allow newcomers time to learn their job.[18]

The Framers' decision to stagger the terms of senators further demonstrates the common assumption of significant turnover.[19] Advocates of staggered terms viewed them as a mechanism both for ensuring that not all members would be new at the same time[20] and for creating at least a limited degree of accountability by compelling one-third of all senators to run biennially.[21] Of course, a staggered term cannot accomplish either of those goals if incumbents regularly win reelection.

The Framers added yet another check on the ability of the Congress to insulate itself from its constituents by explicitly assigning the states primary authority to regulate the "Times, Places and Manner" of congressional elections.[22] Recognizing that election procedures could be used to shape and control the Congress, many argued that state regulation was necessary or else representatives and senators might favor a certain group or class most like themselves. For example, Brutus wrote:

> The proposed Congress may make the whole state one district, and direct that the capital (the city of New York, for instance) shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class.[23]

On the other hand, ardent Federalists like Madison and Hamilton believed that the power to regulate elections must be vested at least in part with the Congress lest the states manipulate the rules to advance parochial interests or to subvert the national government altogether by simply refusing to hold elections.[24]

Understanding that power over election procedures was too important to be left to chance, the Framers of the Constitution adopted a compromise that placed primary authority with the states but empowered the Congress to override undesirable regulations. This designation is important because it allows states to shape districts, restrict access

to the ballot, establish a runoff system, or otherwise regulate congressional elections. Nevertheless, the Congress may nullify or replace any regulation it finds unpalatable.

In sum, to prevent a stagnant and unresponsive legislature, the Framers adopted relatively short terms of office on the assumption that frequent elections would produce a high amount of turnover. They staggered Senate terms and also vested the states with primary authority to regulate elections. Given those and other institutional controls, the absence of a term limit in the Constitution should not be read as strong evidence that the Framers intended to preclude its later legislative enactment. Rather, a better explanation for the absence of a limit is that most Framers simply thought a rotation scheme unnecessary.

Of course, there were still a few anti-Federalists and others who objected to the lack of a rotation for the Congress. During the Virginia ratification debate, for example, George Mason warned that:

> Nothing is so essential to the preservation of a republican government as a periodical rotation. Nothing so strongly impels a man to regard the interest of his constituents as the certainty of returning to the general mass of the people, from whence he was taken. . . . It is a great defect in the Senate that they are not ineligible at the end of six years.[25]

Similarly, Thomas Jefferson felt that the absence of rotation, along with the omission of a bill of rights, was one of the two largest flaws in the Constitution.[26] The majority of delegates, however, apparently believed that the measures they had already enacted were sufficient.[27]

In fact, the majority's assumptions proved correct for quite some time. In the first House election after George Washington was elected president, 40 percent of the incumbents were defeated.[28] Indeed, there was a tradition, lasting through the first half of the nineteenth century, for members of the House to serve only four years and for Senators to serve only six. Abraham Lincoln, for example, stepped down after serving one term in the House and did not run for office again until he sought the presidency.[29] Perhaps because of this tradition, 40 to 50 percent of the Congress typically left office in every election until the Civil War.[30]

Only after the Civil War--in part because the establishment of standing committees in the Congress made seniority more important--did House seniority begin to rise. From 1860 to 1920, the average length of service doubled from four to eight years. By 1991, twenty House members had held office for at least twenty-eight years.[31] When the 57th Congress convened in 1901, for the first time less than 30 percent of its members were freshmen. In 1981, when the 97th Congress convened, only 17 percent of the members were newly elected. By contrast, when the 101st Congress convened, fewer than 8 percent were newcomers.[32]

Clearly, the Framers' underlying assumption about the length of elective service no longer reflects reality. Indeed, the statements of some anti-Federalists warning against a permanent legislature now appear to have been prophetic. Given the current lack of congressional turnover and the concomitant increase in length of legislative service, the Framers' apparent reason for rejecting a rotation scheme--that it was unnecessary to ensure turnover--no longer applies.

Article I Objections

Having decided that the Framers did not intend to preclude a state-imposed term limit, we now will determine whether the Constitution presents any barriers to such a limit. In this section, we will examine the most serious constitutional objection to a term limit: that it violates the strictures of Article I. We conclude that Article I does not proscribe but, in fact, offers ample textual authority for the enactment of a term limit.

Background

Article I, sections 2 and 3, which are referred to here as the "qualifications clauses," establish three qualifications for membership in the Congress: at the time of their election, (1) members of the House of Representatives must have attained the age of twenty five and Senators must be at least thirty; (2) members of the House and Senate must be U.S. citizens for at least seven and nine years, respectively; and (3) members of both houses must be inhabitants of the state from which they were elected. Article I, section 4, deals with the regulation of congressional elections. As mentioned,

it assigns states the task of regulating the "Times, Places and Manner" of congressional elections, albeit subject to congressional override.

Opponents of term limits commonly insist that a term limit would impose a de facto fourth qualification upon the Congress--namely that a candidate not be a long-term incumbent. The reason for their argument is obvious: if labeled a qualification, a term limit would not likely survive constitutional scrutiny because in Powell v. McCormack[33] the Supreme Court held that the Congress may not supplement the three enumerated qualifications.

Adopting the logic of their argument, however, one could conclude that any election regulation creates a qualification. For example, a requirement that a candidate gather a given number of signatures before gaining access to the ballot could be cast as imposing a fourth qualification that he demonstrate a quantifiable amount of popular support for his candidacy. Thus, the question whether a term limit ought to be considered a qualification must be answered by analysis, not by conclusory labeling.

In our view, a term limit is better considered a regulation affecting the "manner" of an election than a qualification. As a manner regulation, a term limit is constitutional because states have explicit textual authority to regulate congressional elections under section 4. It is worth noting at this point that since Congress may override a state election regulation at will under section 4, a state could not enact a term limit without congressional acquiescence. In sum, if we are correct in considering a term limit as a manner regulation, Speaker Foley has nothing to complain about save his own inability to muster a congressional majority to defeat it.

Some have argued that even if a term limit is deemed a qualification, a state may still enact one under the power reserved to it by the Tenth Amendment. In making that argument, they point out that at least the Supreme Court's literal holding in Powell does not stand in the way: On its facts, Powell dealt with a qualification enacted by the Congress, not by a state.[34] That argument may have something to recommend it from a philosophical standpoint. However, because the Court has tended to regard the Tenth Amendment's reservation of powers to the states as "but a truism"[35] and because Powell's reasoning appears to forbid all but constitutionally enumerated qualifications, we think an argument for term limits grounded in the express authority of Article I, section 4, will more likely prevail.

Distinguishing Between a Qualification and a Manner Regulation

The question before us, then, is one of classification: Is a term limit an impermissible qualification under Powell or a permissible manner regulation under Article I, section 4? To answer that question, we must ask another: How have courts used the terms "qualification" and "manner restriction"? Here, the analysis is complicated somewhat because the Supreme Court has never attempted to define either of these terms; nor has it had reason to distinguish explicitly between them. Nevertheless, a look at the leading qualification and manner regulation cases leaves no doubt that the two categories are at least intuitively distinct; the Court, it seems, knows a qualification or a manner regulation when it sees one.

In Powell v. McCormack, the leading qualification clause case, the House of Representatives sought to deny Adam Clayton Powell his seat for alleged unethical behavior even though he had been duly elected and met the age, citizenship, and residency requirements enumerated in Article I. An exhaustive survey of parliamentary precedents, the constitutional convention and ratification debates, and past congressional practice led the Court to conclude that the House is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[36] Despite the thoroughness of the opinion and its unequivocal holding, however, nowhere did the Court describe the attributes of a qualification.[37]

In Storer v. Brown,[38] the leading manner regulation case, the Supreme Court considered a California statute that denied two independent candidates access to the general election ballot because each had been a member of a major political party within the preceding year. These congressional hopefuls challenged the regulation as both an impermissible manner regulation and an attempt to add a fourth qualification. The Court dismissed the qualification argument in a footnote as "wholly without merit."[39] Choosing instead to analyze and uphold the statute as a manner regulation, it concluded that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."[40]

Although neither Powell nor Storer discussed explicitly how one might differentiate between a qualification or a manner restriction, at least five possible analytical distinctions might be drawn from these cases. We will attempt to explain those distinctions and explore what impact they might have for a term limit. The first two distinctions, which are based upon the restriction's severity and the directness with which it regulates the congressional office, are sure to be suggested by term limit opponents because they tend to favor labeling a term limit as a qualification. Yet, as we shall see, neither distinction can explain fully the differences between a qualification and a manner regulation that are evidenced in the case law. The third distinction--relating to the timing of a regulation--only partially differentiates between a qualification and a manner regulation; to the extent that it has some explanatory power, however, it favors labeling a term limit a manner regulation. The final distinctions relating to judicial considerations and a measure's invidious potential prove the most useful in marking the boundary between a qualification and manner regulation. Moreover, they convincingly demonstrate that a term limit is best considered a manner regulation.

Severity. Although not stated explicitly in Powell or Storer, a qualification seems intuitively to denote a substantive precondition or a severe bar to the attainment of office. By contrast, a manner regulation evokes images of a mere procedural mechanism designed to ensure that candidates receive a spot on the ballot only after satisfying certain requirements. Seizing this intuition, commentators have argued that a term limit is a qualification because of the severity with which it precludes individuals from candidacy or officeholding.[41]

Albeit intuitive, a distinction based upon severity cannot withstand scrutiny. Even a quick examination of the three enumerated qualifications belies the argument that they must necessarily be severe or permanent. The residence qualification is easily mutable; at most a congressional hopeful would need only a few days to comply with it. The age and citizenship requirements are less mutable than the residency requirement only by degree; they are not qualitatively different. Accordingly, any attempt to portray a qualification as obviously stringent finds little support in the Constitution.

Moreover, the ballot access cases demonstrate that a manner regulation may severely restrict candidates who attempt to become officeholders. Consider again the severity of the qualification struck down by the court in Powell in comparison with the manner regulations upheld in Storer. Adam Clayton Powell was forced to sit out for one Congress; the subsequent Congress allowed him to take his seat. Likewise, the two congressional hopefuls in Storer had to wait two years until the next congressional election to renew their candidacies. As Justice William Brennan pointed out in dissent, the California regulation had the effect of forcing an affiliated candidate to declare his independent status seventeen months before the general election.[42] The justice found this "an impossible burden to shoulder" in the context of a two-year congressional term.[43] Yet despite the measure's severity, he would have stricken it as violative of the First Amendment--not as creating a fourth qualification.

Beyond the ballot access cases, there are other strong indications that severity is not a reason to label an election regulation a qualification. The Hatch Act[44] passed by Congress in 1939 explicitly prohibits most federal government employees from "[b]ecoming a partisan candidate for, or campaigning for, an elective public office."[45] This outright ban, which of course includes campaigns for congressional office, was first upheld by the Supreme Court in United Public Workers v. Mitchell.[46] Despite subsequent lower court decisions striking down portions of the Hatch Act (apparently on the assumption that Mitchell was outdated),[47] the Court reaffirmed its constitutionality in United States Civil Service Commission v. National Association of Letter Carriers.[48]

As in Storer, the Court in Letter Carriers considered First and Fourteenth Amendment challenges to the Hatch Act at length and concluded that it promoted legitimate state interests in maintaining an independent civil service. Yet, despite the severe ban on candidacy, neither the parties nor the Court ever suggested that the Hatch Act created an additional qualification that a congressman not be a government employee.

Finally, a look at the Supreme Court's treatment of political gerrymandering also undercuts the severity distinction. Even though a state legislature, through redistricting, may effectively prevent a particular candidate from ever seeking congressional office or even can effectively remove an incumbent, at no point has the Court considered even the most contorted political gerrymander a de facto qualification for office. All gerrymanders have been analyzed as manner regulations.[49]

In sum, the enumerated qualifications are less severe than the manner regulations the Court has upheld to date. Indeed, permissible manner regulations prohibit minor party candidates, primary losers, federal employees, and those not favored by state redistricting from running even in their first congressional election. Thus, even if a term limit that relegates an incumbent to run a write-in campaign is deemed a "substantive" or "severe" burden to officeholding, this presents no principled reason to label it a qualifica- tion and, hence, unconstitutional.

Directness. In a second distinction, a few courts have used a "directness" test to separate a qualification from a manner regulation. Simply stated, they have held that if a state election procedure directly affects federal office, then it is a qualification. By contrast, if the procedure affects the federal office only indirectly, then it is per- missible as a manner regulation. In Signorelli v. Evans,[50] for example, a federal court of appeals observed that a New York statute requiring a state judge to resign from the bench before running for Congress only indirectly impinged upon the conduct of congressional elections. Contrasting this resign-to-run statute with laws requiring a congressman to reside in the district from which he runs, the court upheld the resign-to-run statute because, with it, New York had sought to "regulate the ... office that [the state official] holds, not the Congressional office he seeks."[51]

With this distinction, one could argue that a state-imposed term limit would be an unconstitutional qualification because it directly regulates a congressional election. But the premise of this argument--and the entire directness rationale--is flatly wrong. To argue that an election regulation is unconstitutional by virtue of its directness completely ignores the express constitutional assignment of primary responsibility for the regulation of congressional elections to the states in Article I, section 4. Moreover, the Court's approval of manner regulations directly regulat- ing the attainment of federal office--such as the direct ballot access restrictions in Storer--only reaffirms that a distinction based upon directness cannot hold. Thus, al though a term limit might directly regulate the attainment of congressional office, this hardly provides cause for deeming it a qualification.

The Timing of the Restriction. A third possible ground upon which to distinguish between a qualification and a manner regulation is suggested by the fact that the only two Supreme Court cases analyzing the qualifications clauses--Powell and Bond v. Floyd[52]--involved refusals to seat representatives who had been duly elected. By contrast, manner regulations invariably precede the election they purport to police. Thus, one could argue that qualifications (at least in their historical operation) act to exclude candidates after an election, while manner regulations precede it.

That said, the ex-post/ex-ante distinction does not demarcate the categories in all circumstances. One can easily conceive of a prospective restriction that would be deemed a qualification. If the Congress, for example, passed legislation requiring congressional candidates to be at least forty years old before running, the act would probably also establish a qualification because of the obvious parallel with constitutionally enumerated qualifications and the decision in Powell.[53]

To the extent that a distinction based upon the timing of a restriction has explanatory power, however, it suggests that term limits like Colorado's, which are applied only prospectively, are permissible manner regulations.[54] Because a prospective term limit would not operate to prohibit existing long-term incumbents from continuing in office but would only apply to those elected in the future, a court using this distinction would be likely to label a term limit a manner regulation.

Judicial Considerations. To this point, the possible grounds we have explored for distinguishing between a qualification and a manner regulation have been at best only partially descriptive. From the cases discussed, however, one useful observation does emerge: the Supreme Court has chosen to construe the qualifications clauses extremely narrowly. Indeed, it has used these clauses to strike down a legislative act only twice. By contrast, the Court has put Article I, section 4, to ample use, examining the vast majority of election regulations, at least implicitly, as manner regulations regardless of their severity or directness.

This conclusion is best illustrated by contrasting several older lower court decisions striking down state election laws as impermissible qualifications with more recent Supreme Court decisions upholding similar provisions as manner regulations.[55] Those older decisions--one of which, for example, rejected a New Mexico requirement that a party candidate must have been a member of his party for at least one year before the primary election[56]--simply assumed that such restrictions fell into the qualifications category. By contrast, the Supreme Court itself has viewed virtually all

state election restrictions--including party affiliation requirements much like New Mexico's--as time, place, and manner regulations. In so doing, the Court has effectively overruled some of the earlier decisions and has cast doubt upon the validity of others.[57] In sum, the Court's practice, unlike that of lower courts in the past, strongly suggests that a state election law will be considered a manner regulation unless it presents unavoidable analogies to the three constitutionally enumerated qualifications.

The decision to employ the qualifications clauses only sparingly makes good sense. They are a blunt weapon: Once a court determines that a restriction creates a qualification, it must automatically invalidate the offending provision. It has no discretion to permit a qualification, even one with salutary characteristics. By contrast, analyzing a provision as a manner regulation allows a court more flexibility. Even though a state may regulate the manner of congressional elections pursuant to Article I, Section 4, such a regulation, of course, may not discriminate against political minorities or chill the protected speech of candidates or voters in violation of the First and Fourteenth Amendments. Thus, in accord with contemporary Supreme Court jurisprudence, when evaluating a manner regulation, a court must balance the good created by that measure against any potential or actual harm the measure might cause.

In sum, the Supreme Court has preferred using the man- ner regulation rubric to a qualifications analysis--employing a scalpel rather than a mallet--when reviewing state-enacted election regulations. This observation of the Court's trends and preferences bodes well for term limits and suggests that they will more likely be treated as manner restrictions.

Invidious Potential. Finally, one could classify a restriction as either a qualification or a manner regulation based upon the evils that might follow from its abuse. In the drafting of Article I and the adjudicating of subsequent qualification and manner regulation cases, the Framers of the Constitution and the Supreme Court have shared a common hope of fostering fair and open elections. Abuse of the power to set qualifications, however, presents a very different threat to that hope than the threat posed by abuse of state-imposed manner regulations. If the Congress were allowed to set its own qualifications for membership, it might be tempted to use that power for self-aggrandizement or self-perpetuation. By contrast, if a state were to abuse its power to regulate the manner of congressional elections, the result would be discrimination against a class of voters or potential candidates.

The Framers' debates at the Federal Convention demonstrate that the qualifications clauses were drafted and had been construed out of a fear of congressional self-aggrandizement. After a lengthy discussion, the delegates rejected a proposal to allow the Congress to set additional qualifications.[58] They refused to give the Congress such power largely out of fear that a Congress permitted to set the qualifications of its own members might permanently ensconce itself in office by limiting new entry. For example, Hugh Williamson of North Carolina worried that if a majority of the Congress should happen to be "composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body."[59] Similarly, James Madison warned that to give the Congress the authority to set additional qualifications would vest "an improper and dangerous power in the Legislature."[60]

In Powell, the Supreme Court, too, was concerned that a Congress with the power to augment the constitutionally enumerated qualifications might wield it for self-insulation and aggrandizement rather than for promotion of the common good. The Court's review of our constitutional history in that decision clearly impresses upon the reader the likelihood of congressional abuse. In fact, the Court concludes its brief analysis by recognizing that "[t]o allow [the power to create additional qualifications] to be exercised under the guise of judging qualifications, would be to ignore Madison's warning."[61]

By contrast, when a state regulates the manner of a congressional election, the potential for legislative self-insulation and aggrandizement is present only indirectly, if at all. To enact manner regulations that favored current incumbents, a temporary majority in the Congress would have to solicit support from a majority of state legislatures. The difference in constituencies and the sheer number of states and people involved makes this sort of invidious collusion improbable. As long as the dominant party, interest group, or popular sentiment continues to vary widely among the states, any faction in the Congress will encounter extreme difficulty when attempting to insulate itself using state election regulations.

This is not to say, however, that a majority in any given state legislature will not try to ensure that its congressional representatives reflect its own partisan biases. Indeed, it would be peculiar if a temporary state majority did not seek to

replicate its views in its congressional delegation. Self-replication, however, is distinct from self-perpetuation, and the former has historically, at least, proven to be tolerably restrained by our nation's diversity. Accordingly, the Supreme Court has used an equal protection and/or First Amendment analysis to measure the constitutionality of state-imposed manner regulations. Instead of searching for legislative self-aggrandizement, the Court has looked to see if the manner regulations impermissibly classify, discriminate against, or encroach upon rights of expression or association.

To the extent that a term limit can be judged either a qualification or a manner regulation by virtue of its invidious potential, it clearly falls within the broad category of manner regulations. Even a cursory glance at the attributes and objectives of a term limit makes clear that it does not present the possibility of congressional self-perpetuation or aggrandizement. Indeed, it is intended to counteract such evils.

Proponents have suggested that a congressional term limit might:

* level the playing field in an election process that otherwise provides incumbents with practically insurmountable advantages;

* ensure that elected representatives truly represent and are representative of the community that elected them;

* prevent corruption in office; and

* broaden opportunities for participation in public service.

A court reviewing a term limit would find no reason to determine that such a measure vests an "improper and dangerous" power in the Congress. To the contrary, a term limit would strip long-term members of that body of their privileges. Nevertheless, as it does with all manner regulations, a court should evaluate carefully whether a term limit unduly discriminates against long-term incumbents or frustrates the expressive and associational rights of incumbents or voters. In sum, with respect to the mischief it could work, a term limit fits squarely within the category of manner regulations.

Summary

We have seen that the question of whether a term limit is labeled a qualification or a manner regulation determines its constitutional viability under Article I. Bearing that in mind, we have examined a variety of grounds on which one might distinguish between a qualification and a manner regulation. We have rejected superficial distinctions based upon severity or directness as unsustainable given current case law. Instead, we have argued that distinctions based upon judicial concerns and a regulation's invidious potential present the soundest way to capture the difference between manner restrictions and qualifications. That said, we have gone on to show that under either of those rubrics a term limit can be properly understood only as a manner restriction.

Beyond Article I: First and Fourteenth Amendment Objections

If a term limit is indeed considered a manner regulation, opponents are left to search for other constitutional objections. The only other textual provisions offering any serious hope for thwarting a term limit, however, are the speech and associational rights embodied in the First Amendment and the equal protection concerns found in the Fourteenth Amendment. Yet a careful application of those provisions, as we shall see, provides long-term incumbents very little quarter.

Standard of Review

Any discussion of a free speech or equal protection challenge to a term limit regulation must begin by ascertaining just how closely a reviewing court is likely to examine the regulation: will it "strictly scrutinize" the limit initiative or merely check to see if it is "reasonable"? Although the Supreme Court's jurisprudence regarding appropriate standards of review has been widely criticized by academics of all stripes, the utility of determining how a court will examine a regulation cannot be minimized. The standard of review employed by a court in the First and Fourteenth Amendment

contexts has, to date, nearly always foreshadowed its disposition on the merits: the stricter the scrutiny applied, the more likely a measure is to fail.

In 1983 in Anderson v. Celebrezze,[62] the most recent pronouncement on the standard of review for election regulations, the Supreme Court set forth guidelines that augur well for a term limit. Making plain that it does not demand a "strict" review of most election regulations, the Court stated that lower courts need only conduct a general balancing of all interests involved. Specifically, it instructed courts to (1) assess the asserted burdens upon the First and Fourteenth Amendment rights of candidates and voters, (2) evaluate the interests put forward by the state as justifi- cations for imposing those burdens, and (3) consider whether the burdens are necessary to achieve the state interests.

Burdens on Incumbents

Following the Anderson test, we begin by examining the burdens placed on incumbents by term limit legislation. It seems likely that incumbents will make three distinct arguments based on the First and Fourteenth amendments: first, that a term limit infringes upon their "fundamental right" to run for office; second, that it creates an indefensible classification, discriminating against long-term officeholders; third, that it encroaches upon their right to speak and associate by limiting their ability to run for office. As we shall see, however, none of those arguments is persuasive.

In 1968, when the Supreme Court first struck down a ballot access regulation, it did so on the ground that the regulation inappropriately discriminated against minority party candidates.[63] In the wake of that decision, some commentators suggested that the Court was prepared to announce --or already had announced--that there is a "fundamental right" to run for office rendering all regulation of that right subject to a searching form of scrutiny.[64] Those suggestions proved misguided, however, as in 1972 the Court made plain that it had not recognized any such right.[65] More recently, in Clements v. Fashing,[66] the Court put to rest any doubt about the potential viability of a "fundamental right" to candidacy when it held that restrictions on candidacy need bear only a rational relationship to a legitimate state end. Thus, it seems evident that any challenge to a term limit on this basis is likely to fall on deaf ears.[67]

Likewise, the argument by incumbents that a term limit impermissibly discriminates against them as a class will almost assuredly fail. The Court has found that when states enact election laws discriminating against poor[68] and minority party[69] candidates, strict protections under the equal protection clause are warranted. To date, however, it has found no other groups that qualify for such treatment; moreover, in other contexts, the Court has generally declined to find new classes or groups deserving of heightened protection.

Incumbents, of course, would have a hard time convincing a court that they fit within the two suspect classifications firmly established by the Supreme Court. Congressional incumbents are largely a group of white (93 percent),[70] males (95 percent),[71] who also happen to be disproportionately rich (11 percent of the House are millionaires, and 26 percent of the Senate also enjoy this status)[72]; it would be ironic at the very least were they to plead successfully for protection under a constitutional clause initially intended to serve newly freed slaves.

Despite the irony of it, incumbents have not been dissuaded from pressing classification-based claims. In Clements v. Fashing,[73] for example, incumbent officeholders specifically argued that a provision preventing some of them from seeking another elective office until the terms of their present posts had expired improperly discriminated against them as a class. This "serve your term" provision, they claimed, unconstitutionally disabled them from running for office over periods as long as two years. The Court quickly dismissed this argument, calling a two-year waiting period a "de minimis burden."[74] The four-year exclusion from the printed ballot required by our term limit proposal seems hardly more substantial--especially given the availability of the write-in campaign (something unavailable to the incumbents in Clements).

Moving to the speech-related burdens upon incumbents, we again examine Clements. There the Court considered whether a "serve your term" provision or another measure requiring certain elected officials to resign their office before seeking another (known as a "resign to run" regulation) violated the First Amendment.[75] Although both measures precluded many elected officials from becoming candidates, a majority of the Court noted that

> [They] in no way restrict appellees' ability to participate in the political campaigns of third parties. They limit neither political contributions nor expenditures. They do not preclude appellees from holding an office in a political party. . . . [A]ppellees may distribute campaign literature and may make speeches on behalf of a candidate.[76]

Thus, the Supreme Court found that whatever First Amendment rights elected officials enjoy, they do not necessarily include an unfettered right to candidacy. The Court emphasized just how severely elected officials' free speech rights might be limited by noting that the provisions before it were "far more limited . . . than [those] this Court has upheld" in Letter Carriers and Broadrick.[77] As with civil servants, the speech and activities of elected officials may be curtailed rather substantially, even so far as to preclude participation in future elections under certain conditions. While it may be interesting to speculate about just how far states may go in burdening the speech activities of their elected officials, a term limit seems safely within the constitutional limits established by Letter Carriers whose severe restrictions were discussed previously.

Burdens on Voters

We now turn to consider the impact a term limit might have on voters. Unlike candidacy, the opportunity to vote has been deemed a "fundamental right" under the equal protection clause.[78] The relevant questions thus become: What are the contours of this fundamental right, and how does this right affect the term limit we propose?

One might initially and intuitively imagine that the right to vote requires states to allow voters to express their preference for any individual they wish. Under this view, a term limit might at first glance appear problematic to the extent that it prevents voters from selecting long-term incumbents who have exceeded their allotted terms. The limit we propose, however, overcomes this objection with its addition of a write-in provision. Simply put, no voter is precluded from expressing a preference for any candidate, including a long-term incumbent; he need only write in the candidate's name.

That said, the Supreme Court has recently indicated that the fundamental right to vote is far more limited than one might first imagine. In Burdick v. Takushi,[79] the Court considered a voter's challenge to a Hawaiian election regulation banning all write-in candidacies. Finding no fundamental right to vote for any individual one wishes and noting that the state provided ample means for interested candidates to obtain a spot on the printed ballot, the Court held Hawaii's ban to be perfectly acceptable.[80]

If the right to vote does not necessarily encompass a write-in ballot and the concomitant opportunity to choose any candidate in the general election, what does it mean? The likeliest view is that it simply prohibits states from discriminating against a particular individual or group in providing access to the franchise and from diluting the effectiveness of the votes of disfavored individuals or classes. All voters and votes must be treated equally. This view of the right was espoused by the court of appeals in Burdick[81] and satisfactorily explains the case law developed to date.[82] Of course, a term limit--even one without a write-in provision--poses no threat to this view of the right: all voters are treated alike in their inability to find the twelve-year incumbent on the ballot.

To summarize, Burdick makes plain that the right to vote does not encompass the right to choose any individual one wishes; consequently, a term limit that removes an incumbent from the ballot poses no immediate problems for voters' rights. Indeed, term limit legislation that includes a write-in provision may afford voters more protection than the First and Fourteenth Amendments themselves require.

The State's Interest

We now consider the state interests advanced by a term limit that, under the Anderson test, must be balanced against the rights of incumbents and voters. As mentioned, proponents have suggested that four objectives might be promoted through a term limit: a level electoral playing field, prevention of corruption in office, truly representative elected representatives, and broadened opportunities for participation in public service.

Courts have found that a state has rational--even compelling--interests in pursuing these goals. In Austin v. Michigan Chamber of Commerce,[83] the Supreme Court considered a Michigan statute prohibiting corporations from using

general treasury funds to support candidates for state office but permitting them to make such expenditures from segregated funds used solely for political purposes. Upholding the regulation, the Court recognized that it placed a significant burden on corporate speech but emphasized that it was an important attempt to control "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form. . . . Corporate wealth may unfairly influence elections."[84] In other words, a state has a valid, even significant, interest in preventing corruption and unfair influence in the electoral process.

Promoting representativeness in government has also been sanctioned by the Supreme Court. Upholding the Clements "resign to run" statute, the Court found that states have a legitimate interest in preventing state officeholders from making decisions that might advance their own political ambitions rather than the public good.[85] Lower courts faced with the application of the resign-to-run statutes against candidates for federal office have come to exactly the same conclusion.[86]

The concern with representativeness was also an impetus behind many of the ballot access regulations. Afraid that latecoming independent candidates are often prompted "by short-range political goals, pique or personal quarrel," courts have reasoned that ballot access regulations excluding such candidates from the ballot help prevent the "bleed[ing] off [of] votes" from candidates that command a more popular support.[87]

The rationality of an attempt to limit the effects of an entrenched incumbency and broaden political opportunity also finds support in federal and state constitutions. The Twenty-second Amendment limiting presidential terms, like state provisions capping the tenure of governors, is powerful testimony that term limitation is indeed sound public policy.

Interestingly, state constitutional limits on gubernatorial terms have been challenged under the equal protection clause of the federal Constitution in much the same fashion as a congressional term limit might be.[88] Such limits have been universally upheld, with courts acknowledging that states have a significant interest in both eliminating "[t]he power of incumbent officeholders to develop networks of patronage" and assuaging "fears of an entrenched political machine which could effectively foreclose access to the political process."[89] Also important, they have been deemed to help "stimulate criticism within political parties" and "insure a meaningful, adversary, and competitive election."[90] Because these provisions have been deemed inoffensive to the First and Fourteenth Amendments of the federal Constitution, there is good reason to believe that a congressional term limit would also pass muster.

The Necessity of Imposing Restrictions

The final step in the Anderson test requires an inquiry into the "necessity" of burdening incumbents and voters' First and Fourteenth Amendment rights.[91] It explicitly re quires the "weighing [of] all the factors"[92] to determine whether a challenged provision is constitutional.

On one end of the balance, the burden of a term limit on First and Fourteenth Amendment rights does not seem great. The right to candidacy has been construed narrowly; essentially, courts try to guard against regulations creating classifications based only upon wealth or minority party status. A term limit regulation does not discriminate on either basis or, for that matter, on any other basis traditionally the subject of heightened scrutiny. Likewise, after Burdick, a term limit will have little or no impact on the right to vote because all voters will have equal difficulty in voting for a long-term incumbent.

On the other side of the balance, a term limit promotes strong societal interests. The hope of maintaining a representative democracy and limiting the influence of unfair electoral advantages has moved legislatures and courts to enact and approve bold measures in the past that restrict certain individuals at least as severely as a term limit. In sum, once over the qualifications hurdle, the fight on First and Fourteenth amendment grounds looks very promising for term limit proponents.

Conclusion

Term limits raise substantial questions about our notions of citizenship and representative democracy. They signify a dramatic rejection of the legislative scheme that has emerged over the course of the twentieth century, with its dependence upon seniority, rank, and the professional congressman. However, we do not purport to provide any

answers to the questions term limits raise about democratic theory. Rather, we write only to dispel a myth that has distracted attention from such central concerns: that the enactment of a term limit is futile because a court will quash it as unconstitutional.

As discussed, the absence of a term limitation provision in the Constitution hardly bespeaks an intention on the part of the Framers to foreclose the subsequent legislative imposition of term limits by the states. Article I doctrine, upon which term limit opponents rely so heavily, indicates that a limit is more likely to be deemed a constitutional manner restriction than an inappropriate qualification restriction. Moreover, the First and Fourteenth Amendment guarantees offer incumbents little hope.

In the end, we believe that the fate of term limits will not be decided by the courts, as nervous incumbents might wish, but in a fashion far more familiar to those they would displace--through the ballot box.

Notes

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[1] Gloria Borger, "Can Term Limits Do the Job?" U.S. News & World Report, November 11, 1991, p. 34.

[2] "Term Limits: The Talk of the Town," The Hotline, Octo ber 21, 1991.

[3] Article XVIII, section 9[1], of the Colorado Constitu tion provides in pertinent part:

[N]o United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative shall serve more than six consecutive terms in the United States House of Representatives. . . . Terms are considered consecutive unless they are at least four years apart.

[4] In practical terms, allowing a write-in candidacy hardly saps a term limit of its efficacy, but it does provide some hope for a twelve-year incumbent who believes he has a man date. As of 1982, four write-in candidates had won congres sional seats. See Facts on File World News Digest (available in Lexis), November 5, 1982.

[5] See, for example, Steven Greenberger, "Democracy and Congressional Tenure," DePaul Law Review 41 (1991): 37, 38.

[6] C. Rossiter, ed., The Federalist Papers no. 51 (New York: 1961), p. 322 (J. Madison).

[7] Pennsylvania Constitution of 1776, Chapter II, section 8; see also Virginia Constitution of 1776, paragraph 4 (cre ating a rotation system for the senate).

[8] Articles of Confederation, Article V, clause 2.

[9] See Jonathan Elliot, ed., The Debates on the Adoption of the Federal Constitution (Philadelphia: J. P. Lippincott Co., 1836), vol. 5, p. 127. [hereinafter Elliot's Debates].

[10] Ibid., at 137.

[11] See Max Farrand, ed., The Records of the Federal Conven tion of 1787 (New Haven, Conn.: Yale University Press, 1966), vol. 1, p. 217.

[12] See Elliot's Debates, vol. 5, at 241-45.

[13] Ibid., at 224-26.

[14] Ibid., at 358-68.

[15] John Adams, The Political Writings of John Adams, G. Peek, Jr., ed. (New York: Macmillan, 1985), p. 134.

[16] Madison observed that "[a] few of the members [of the House], as happens in all such assemblies, will possess superior talents; will, by frequent re-election, become members of longstanding." The Federalist Papers no. 53 (New York: C. Rossiter, ed., 1961), p. 359 (J. Madison). Madison clearly envisioned, however, that most of the seats would be continually occupied by new members. Contrasting the con tinual reelection of the delegates to the Continental Con gress chosen by their state legislatures with the proposed popularly elected representatives in the House, he argued: "their re-election is considered by the legislative assem blies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle." (Emphasis added) Ibid.

[17] See Philip Kurland and Ralph Lerner, The Founders' Con stitution (Chicago: University of Chicago Press, 1987), vol. 2, p. 51 (hereinafter Founders' Constitution).

[18] Elliot's Debates, vol. 5, at 225.

[19] See Article I, section 3 ("Immediately after [the Sena tors] shall be assembled in Consequence of the first Elec tion, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year").

[20] Elliot's Debates, vol. 5, at 224-25 ("[i]n order to pre vent the inconvenience of an entire change of the whole number [of Senate members] at the same moment, [Mr. Dickin son] suggested rotation, by an annual election of one third").

[21] In the Massachusetts ratification debates, Mr. Ames ar gued that although "the senators are seated for six years, they are admonished of their responsibility to the state legislatures. If one third new members are introduced, who feel the sentiments of their states, they will awe that third whose term will be near expiring." Elliot's Debates, vol. 2, at 46-47.

[22] Article I, Section 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regula tions, except as to the Places of chusing Senators").

[23] See Kurland and Lerner, Founders' Constitution, p. 251.

[24] See Elliot's Debates, vol. 5, at 401-02 ("The necessity of a general government supposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices").

[25] Elliot's Debates, vol. 3, at 485. Patrick Henry like wise lamented that "[t]he only semblance of a check is the negative power of not reelecting them. This sir, is but a feeble barrier, when their personal interest, their ambition and avarice, come to be put in contrast with the happiness of the people." Elliot's Debates, vol. 3, at 167.

[26] Commenting on the proposed Constitution in a letter to James Madison, Jefferson wrote, "[another] feature I dis like, and strongly dislike, is the abandonment, in every instance, of the principle of rotation in office." H. A. Washington, ed., The Writings of Thomas Jefferson (1853), vol. 2, p. 330.

[27] Of course, there were also some Framers of the Constitu tion who adamantly opposed the principle of rotation. For example, Alexander Hamilton remarked that "in contending for rotation, the gentlemen carry their zeal beyond all reason able bounds. I am convinced that no government, founded on this feeble principle, can operate well." Elliot's Debates, vol. 2, at 320. Speaking against rotation for the presiden cy, Gouverneur Morris argued that "[i]t formed a political school, in which we were always governed by the scholars, and not by the masters." He believed that the problem of representativeness could best be addressed by a popularly elected president and moved that each voter should "vote for two persons, one of whom at least should not be of his own state." Elliot's Debates, vol. 5, at 366-67.

[28] See John H. Fund, "Term Limitation: An Idea Whose Time Has Come," Cato Institute Policy Analysis no. 141, October 30, 1990, p. 3.

[29] This was apparently the result of an informal agreement with his political rivals. Such agreements were common and evidenced a vigorous party system. See ibid., p. 4.

[30] See ibid.

[31] Trudy Pierce, Term Limitation: The Return to a Citizen Legislature (Washington: Citizens for Congressional Reform Foundation, 1991), p. 14.

[32] See ibid.

[33] 395 U.S. 486 (1968).

[34] See, for example, John C. Scully, "Congressional Term Limitation--It's Constitutional for the States to Act" (Washington Legal Foundation) (on file with authors).

[35] United States v. Darby, 312 U.S. 100, at 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered").

[36] Powell, at 522.

[37] The Supreme Court declined to discuss whether Article I, section 3, clause 7, which authorizes the disqualification of any person convicted in an impeachment proceeding; Arti cle I, section 6, clause 2, which prohibits a person "hold ing any Office under the United States" from being a "Member of either House during his Continuance in Office"; and Sec tion 3 of the Fourteenth Amendment, which disqualifies any person who has engaged in insurrection or rebellion against the United States, should be considered "qualifications" within the meaning of Article I, section 5. See Powell, at 520.

[38] 415 U.S. 724 (1974).

[39] Ibid., at 746, note 16.

[40] Ibid., at 730.

[41] Rep. Jim Kolbe (R-Ariz.), in a recent editorial piece, argued that manner regulations involve only "election proce dures," while the qualifications clause governs the "sub stance of office-holding." See Jim Kolbe, "Term Limits Are Unconstitutional," Wall Street Journal, February 13, 1992, p. A19. Kolbe claims that term limits affect the substance of officeholding and he therefore believes that they are unconstitutional qualifications. Like many others who dis tinguish between substance and procedure, however, Kolbe ne glects to explain what he means by those terms. In the context of Article I, we think that "substance" must be closely aligned with severity or permanency and "procedure" can only mean less severe or permanent. For simplicity's sake as much as anything, we eschew the "substance" and "procedure" labels and instead discuss the distinction as one based upon severity.

[42] Storer, at 758 (Brennan, J., dissenting).

[43] Ibid.

[44] 5 U.S.C. section 7324(a)(2).

[45] Section 733.121(6). The Hatch Act may technically per mit independent candidacies, but in prohibiting any engage ment in partisan fundraising or party activities, it pre vents individuals from participating in aspects of political life crucial to mounting an effective campaign, even as an independent. Thus, what it gives with one hand, it takes away with the other.

[46] 330 U.S. 75 (1947).

[47] See Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973); Hobbs

v. Thompson, 448 F.2d 456 (5th Cir. 1971); Gray v. Toledo, 323 F.Supp. 1281 (N.D. Oh. 1971); Bagley v. Washington Town ship Hosp. Dist., 65 Cal.2d 499, 421 P.2d 409 (1966); Minielly v. State, 242 Ore 490, 411 P.2d 69 (1966).

[48] 413 U.S. 548 (1973). The Supreme Court also upheld an Oklahoma statute that essentially imposed the Hatch Act's prohibitions upon Oklahoma state employees. See Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[49] In Davis v. Bandemer, 478 U.S. 109 (1986), the Supreme Court declared an enormously high standard for stating a cognizable equal protection cause of action in political gerrymandering cases: plaintiffs have to prove both inten tional discrimination and a pattern of discriminatory im pact. Indeed, the Court has acknowledged that states are not expected to draw up districts without regard to their political effect: "The reality is that districting inevita bly has and is intended to have substantial political conse quences." Gaffney v. Cummings, 412 U.S. 735, 753 (1972); see also Badham v. Eu, 109 S.Ct 829 (1989).

[50] 637 F.2d 853, 858-60 (2d Cir. 1980).

[51] Ibid., at 859.

[52] 385 U.S. 116 (1966).

[53] Indeed, district and state courts have summarily stricken state election restrictions as impermissible addi tional qualifications when those regulations created un avoidable similarities to the three constitutionally enumer ated qualifications. See Exon v. Tiemann, 279 F.Supp. 609, 613 (D. Neb. 1968) (overturning district residency require ments for representatives because "[s]tates have no authori ty to add qualifications to those set forth in Article 1, Section 2"); State ex rel Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968) (same); Hellman v. Collier, 217 Md. 93, 98, 141 A.2d 908, 911 (1958) (same); State v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948) (concluding that state constitution cannot modify the eligibility criteria for the Senate).

[54] See, for example, Colorado Constitution, Article XVIII, section 9(1) ("This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991").

[55] See, for example, Stockton v. McFarland, 56 Ariz. 138, 106 P.2d 328 (1940) (state judge not eligible for federal office); Buckingham v. Killoran, 42 Del. 405, 35 A.2d 903 (1944) (state judges forbidden from running for other posi tions until six months after the expiration of their term); Handley v. Superior Court of Marion County, 238 Ind. 421, 151 N.E.2d 508 (1958) (governor not eligible for U.S. Sen ate); Sundfor v. Thorson, 7 N.D. 246, 6 N.W.2d 89 (1942) (candidate defeated in primary not eligible to run for same office in general election); Riley v. Cordell, 200 Okla. 390, 194 P.2d 857 (1948) (state supreme court justice not eligible to run for nonjudicial position); In re Opinion of the Judges, 79 S.D. 585, 116 N.W.2d 233 (1962) (governor and lieutenant governor not eligible for other office during term); Chandler v. Howell, 104 Wash. 99, 175 P.2d 569 (1918) (state judge not eligible for other office); Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946) (same).

[56] See Dillon v. Fiorina, 340 F.Supp. 729 (D.N.M., 1972).

[57] Storer at least implicitly overruled the cases cited in note 55 that struck down as qualifications provisions re quiring a period of party affiliation. Likewise, Williams v. Tucker casts serious doubt on Dillon v. Fiorina. Final ly, Clements v. Fashing suggests the cases cited in note 55, which strike down as qualifications resign-to-run statutes, are also incorrect.

[58] Elliot's Debates, vol. 5, at 391, 377-78, 402-04.

[59] Ibid., at 404.

[60] Ibid.

[61] Ibid., at 547-48.

[62] 460 U.S. 780 (1983).

[63] Williams v. Rhodes, 393 U.S. 23 (1968).

[64] See, for example, Note, Southern California Law Review 45 (1972): 996, 1009; Note, University of Chicago Law Review 40 (1973): 357, 367.

[65] See Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Clements, at 963 ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny'") (citations omitted).

[66] Clements, at 963.

[67] The Supreme Court has even received some support from the academic community for its refusal to extend "fundamen tal rights" analysis to candidacy. See, for example, "De velopments in the Law: Elections," Harvard Law Review 88 (1975): 1117, 1135, n. 81. Laurence H. Tribe, American Constitutional Law, 2d ed. (Mineola, New York: Foundation Press, Inc., 1988), p. 1098 at note 5 ("[T]here is something more than faintly odd, even in a country boasting that any one can become President, about a society's describing as a 'fundamental right' an activity bound to be unthinkable for a vast majority of its members").

[68] See Lubin v. Panish, 415 U.S. 709 (1974).

[69] See Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Storer v. Brown, 415 U.S. 724 (1974); American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Tucker, 393 U.S. 23 (1968).

[70] See Susan B. Glasser, "GOP Says Number of Black, His panic Seats Should Double to 68, but 44 More Realistic," Roll Call, April 29, 1991.

[71] See Matthew Cossolotto, "True Democracy Requires Chang ing Hill Election System," Roll Call, December 2, 1991.

[72] See Jeffrey Berman, "Filings Reveal 51 Members of House Qualify for Millionaires Club," Roll Call, July 15, 1991; Craig Winneker and Jeffrey Berman, "More Than a Quarter of the Senate Qualifies for Millionaires' Club," Roll Call, June 20, 1991.

[73] 457 U.S. 957 (1982).

[74] Ibid.

[75] Ibid., at 967.

[76] Ibid., at 972.

[77] Ibid.

[78] See Reynolds v. Sims, 377 U.S. 533 (1964).

[79] 1992 LEXIS 3404 (1992).

[80] Ibid.

[81] Burdick v. Takushi, 927 F.2d 469, 473 (9th Cir. 1991) ("Burdick does not have a fundamental right to vote for a particular candidate; he is simply guaranteed an equal voice in the election of those who govern").

[82] Courts have stepped in to protect the right to vote in two scenarios, both of which evidence their concern that no voter have a greater voice at the polling place than any other. They have struck down state attempts to impose voter qualification regulations discriminating against a particu lar group's access to the franchise. See, for example, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (poll tax violates equal protection clause); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (con ditioning right to vote in school board elections on proper ty ownership is impermissible). Likewise, they have inter ceded when states attempt to dilute the effectiveness of the votes of a particular class. See, for example, Reynolds v. Sims, 377 U.S. 533 (1964) (bicameral legislature must be apportioned on a population basis).

[83] 110 S.Ct. 1391 (1990).

[84] Ibid., at 1397-98.

[85] Clements, at 957.

[86] See, for example, Signorelli v. Evans, 637 F.2d 853 (1980).

[87] See, for example, Storer, at 735-36.

[88] See, for example, State ex rel. Maloney v. McCartney, 223 S.E.2d 607 (W.Va. 1976), app. dism. sub nom. Moore v. McCartney, 425 U.S. 946 (1976); Maddox v. Fortson, 172 S.E.2d 595 (Ga. 1970).

[89] Maloney, at 611.

[90] Ibid.

[91] Anderson, at 789-90.

[92] Ibid.

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Rule of The Constitutional Case for Term Limits

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Body

Voters in 14 states yesterday had a unique opportunity to send a message of change. In addition to electing a president and members of Congress, they also decided whether to limit the terms their congressional representatives may serve.

While the results are not known at this writing, it's clear any successful term limit will face a legal challenge from incumbents loath to yield their seats. Indeed, House Speaker Tom Foley has said that he will carry the case against term limits to the Supreme Court. Term limits, he insists, are unconstitutional: "No, none, no legal case can be made for them."

We beg to differ. An excellent legal case can in fact be made for the constitutionality of term limits. The crucial constitutional point is that term limits are similar to other election regulations that courts have approved.

Most of the term limit proposals on the ballot yesterday do nothing more than restrict a long-term incumbent's access to the ballot. Rather than flatly forbidding an incumbent who has served more than the allowed number of terms from running again, most simply deny him a spot on the printed ballot for a period of four years. During this period, an incumbent may wage a write-in candidacy and, of course, retain his seat if he wins. (Three current members of Congress -- Rep. Ron Packard, Rep. Joe Skeen and Sen. Strom Thurmond -- won their seats as write-ins.)

While forcing an incumbent to run a write-in campaign significantly hurts his chances for re-election, it does not prevent him from running. Many ballot-access regulations have equally severe consequences for aspiring candidates, and the courts have upheld them.

The Constitution gives states clear authority to impose ballot-access rules. Article I, Section 4 specifically empowers states to regulate the "manner" of congressional elections. States have consistently used this authority to enact comprehensive procedures for gaining access to the ballot. These state-enacted "manner regulations" have survived a variety of legal challenges.

In Storer v. Brown (1974), for example, the Supreme Court considered a California regulation denying ballot access to any independent candidate who had been a registered member of a political party within the past year. Although the rule effectively required two congressional candidates to wait a full term before they could obtain a spot on the ballot -- much as a term limit would compel a long-term incumbent to wait two terms -- the court easily approved it.

Likewise, a district court approved the Pennsylvania ballot-access law that forced Rep. Lawrence Williams to sit out a term. When Mr. Williams lost the Republican primary in May 1974, he tried to secure a place on the November ballot as an independent, but a state rule precluded any primary loser from the general election ballot. Mr. Williams fought the regulation in court without success.

The Supreme Court has consistently upheld manner regulations at least as severe as term limits. In Davis v. Bandemer (1986), the court approved virtually all state political gerrymandering schemesno matter how hard on individual candidates. It did so despite the fact that state legislatures often draw wildly contorted district lines specifically to deny certain individuals any realistic hope of winning, and despite the fact that these lines often remain in place for 10 years or more until the next census and redistricting.

A rarely discussed constitutional detail also gives courts little incentive to invalidate term limits. Although Article I authorizes states to regulate congressional elections, it also authorizes Congress to override any manner regulation by a simple majority vote. Why then, a court might wonder, should it protect incumbents from their constituents when incumbents have in hand the power to protect themselves?

Opponents of term limits argue that term limits are not ballot-access regulations but qualifications for office.

This is an attempt to place term limits in a different legal category. The Constitution lists three qualifications for members of Congress: He must be of a requisite age, a U.S. citizen for an established period and an inhabitant of the state he represents. Opponents say term limits effectively add a fourth qualification: namely, that no candidate may be a long-term incumbent.

If viewed as a qualification, a term limit would almost certainly be unconstitutional. The Supreme Court in Powell v. McCormack (1969) concluded that Congress may not add to the established qualifications. In that case, the House had refused to seat Adam Clayton Powell Jr. citing his alleged ethical improprieties. The court, however, ordered the House to seat Powell, arguing that if Congress could set its own qualifications for membership it might use those powers to exclude duly elected representatives for any number of politically motivated reasons.

But the attempt to label term limits as "qualifications" overlooks the fact that the regulation at issue in Powell flatly banned an elected representative from office. Term limits leave incumbents free to wage write-in campaigns and to regain a ballot spot after a few years.

More important, the Supreme Court has already rejected the argument that state ballot-access regulations are really qualifications. In Storer, Justice Byron White dismissed that argument as "wholly without merit." Even Justice William Brennan's dissent in that case, which emphasized the "impossible burden" California had placed on independent candidates, never suggested that the ballot-access procedures at issue constituted qualifications.

Indeed, as both Storer and Williams show, judges have been reluctant to view ballot-access regulations as qualifications. They sense correctly that they would be stepping into a legal morass. There are a huge number of ballot-access rules, and a clever lawyer can argue that any of them creates some sort of qualification. Even the simple requirement that an independent candidate gather a certain number of signatures before being included on the ballot -- a requisite in nearly every state -- could be described as imposing a fourth qualification that he demonstrate quantifiable popular support.

Finally, the attempt to label a term limit as a qualification ignores constitutional history. The Framers fixed the three exclusive qualifications because they feared that Congress might enact a host of invidious membership rules designed to ensconce some groups on Capitol Hill and bar others. Term limits pose none of these dangers. They are motivated by the same ideals that motivated the Framers -- a desire to secure broad political participation and promote a representative legislature.

Mr. Gorsuch is a Marshall Scholar at Oxford. Mr. Guzman is a legal assistant at the Iran-U.S. Claims Tribunal in The Hague.

Notes

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Cover drawing
by Angela Hsieh

In lumine tuo . . .

Stone Age Conservatives

—Governor Mario Cuomo
referring to *The Morningside Review*

Founded in 1982 by several College undergraduates, *The Morningside Review,* "a quarterly journal of opinion," has enjoyed a rather colorful, although short, history at Columbia. While publishing only six issues in the past four years, the *Review* has been villified, praised, respected, and scorned. Its editors have received written threats against their lives. It has been ostracized by bureaucrats in Low Library and Ferris Booth Hall who wish that it would indefinitely discontinue publication. Yet, the *Review* was founded with a relatively innocent (though somewhat audacious) goal in mind; to raise the level of thoughtful and intelligent discussion on campus. Four years later, this is still the goal of a new staff of *Review* editors.

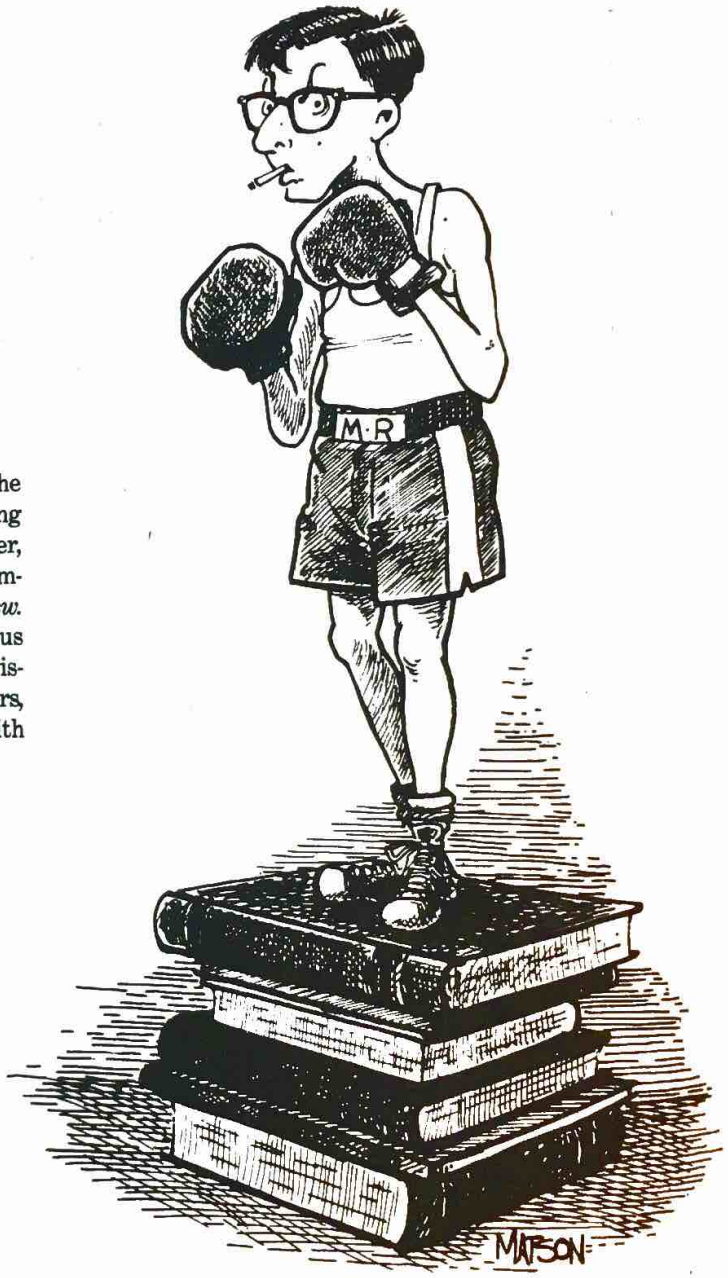
In the microcosm of Columbia, many times conservative and moderate opinions are ridiculed or silenced. The left, and the far left have become the central combatants; and too often, they oppose each other with mindless banter which is supposed to represent intelligent debate. Although this can occasionally be interesting and often amusing, it is certainly endemic to Columbia and other like universities. The voices of the left and the far left do not exclusively shape the so-called "real world." Conservative and moderate views cannot be ignored.

However, this does not mean that *The Morningside Review* is entrenched in any particular ideology. To paraphrase an old Jim Watt joke, the editorial staff is composed of two conservatives, one liberal, a Randian objectivist, and a Burkian tory. Regardless of the political or artistic bias of the author, articles which are original in thesis, intelligently argued, and well written will be published in the *Review.* Quality, of course, is the most important factor. The controversial and the outrageous will never be ommitted. If the editors are successful, you will be informed, amused, and provoked by *The Morningside Review.*

Read on. Tasteful comments and suggestions are encouraged and will be printed.

—G.R.M.

We want to pick a fight.



The Morningside Review is looking for people to step into the ring and help us fight the battle of ideas. We count among our readers people like Jeane Kirkpatrick, Hilton Kramer, Norman Podhoretz and Robert Bartley. Even the Gipper himself has nice things to say about *The Morningside Review.* If you'd like to help us continue publishing this pugnacious magazine, come to one of our meetings, or write to 206 Lewisohn Hall, Columbia University, New York, NY 10027. Writers, artists, editors, businesspeople—we need you all. So get with it and come out fighting with *The Morningside Review.*

An *intellectual* fight.

Barnard Girl Makes Good

An Interview with Jeane Kirkpatrick

Roderic Richardson and Lawrence Delaney

MR: One sometimes hears that in presidential administrations, people are constantly living in a state of crisis and that officers in the administration don't have much time to think about bigger issues. Did you take time off or have you resigned in order to give yourself time to think and re-evaluate?

JK: It isn't really because of a constant crisis but that at the top or near the top there are many people who do not have much time for reflection on larger issues, for re-thinking any questions. I think one lives off an intellectual capital—information and understanding—which one has accumulated earlier in one's life. It is certainly true that I feel very deeply the need to step back and do some assimiliating of the incredible array of data that I have been exposed to in the last four and a half years and do some deeper and heavier thinking than I have done for several years.

MR: You came into government from academia. Do you think that coming from a strong theoretical background was helpful?

JK: Enormous help, enormous help . . . let me be specific. The problem of the United States in the United Nations was extremely uncomfortable, and as you know, US influence and prestige in the UN had sunk so low that some of our best friends didn't want to be seen with us. The problem of changing that was the first problem. I believe frankly that I could not have dealt with that had I not been a political scientist, had I not spent years of my life studying the situations and thinking about how you study political situations. What I did . . . above all, was to analyze the problem, including the kinds of interactions, the kinds of actions . . . what made the process work as well as it did, who was using what kind of leverage to produce the kinds of outcomes that were produced. Once I understood the kinds of leverage that were being exercised in the system to produce the outcomes there, then I realized that we didn't have any leverage like that and if we were going to have any developing system we had to create new kinds of leverage. The whole analysis problem was a direct reflection of my lifetime experience as a professional political scientist. First, analyze the problem; second, at every stage identify collective mechanisms, trying to apply them and evaluating their effectiveness, adjusting them in terms of that evaluation. It's inconceivable to me that we could have made any progress in the UN had I not had that theoretical background.

MR: What exactly do you think the cause was of our sinking so low in the UN?

JK: I think it came about in the mid-60s, with the influx of large numbers of new nations, and with the emergence of what might be called bloc politics. The establishment of the non-aligned blocs was the first step in the development of bloc politics in the world. The US permitted a system of bloc politics, you might call it party politics, to develop. In the UN there is a multiparty system, and we are a country without a party. Parties largely control the agenda and the votes and rule outside that system. So there is a structural basis for our input into the UN system. For us to be effective we have to break through that bloc system. Why did we let that happen? I asked myself that a great deal. I think the reason we let it happen was that we brought to the UN some extremely idealistic, utopian assumptions about what the world body was going to be like, and we imagined that people were going to behave, nations would behave, rather like idealized persons in a New England town meeting. Sort of a global town meeting with each person considering alternatives and reaching conclusions based on the commitment of more peace and well-being for all people, and we kept behaving as though that's what the reality was. But a very dirty game of politics developed around the thing. Hardball politics in which we simply were not a part. Now another reason for that I think, another aspect of American culture that developed, in that it is inappropriate for a great power to use power.

MR: Self-flaggelation?

JK: Self-flaggelation. I remember one of the very first meetings I went to when the UNESCO vote was being considered, a toast was proposed and the toast went as follows: "The noble art of losing face may someday save the human race." And what he was suggesting . . . he was trying to lay on some people the obligation to lose face for some higher good. Actually, if there had been a higher good it might be worth the occasional losing of face, but there was a kind of ideology that developed according to which it was our duty to continue to lose face. And, in fact, the outcomes produced were not effective outcomes. They didn't help anybody.

MR: How do you think President Carter's overall foreign policy reflected itself in the United Nations? And how did it get, do you agree, to continue that decline?

JK: The decline had in fact begun a long time before that. It began in the 60s, and it accelerated during the Carter period certainly. The works of a Third World ideology were already present, and they were greatly developed during the Carter period. One of the most interesting and important negative aspects of what happened in the Carter period was that more and more of the most radical members of the Third World were taken as the spokesmen for the Third World. Truth is most of these Third World states aren't radical at all. But only the radicals were really taken to be the legitimate spokesmen for the Third World. Andy Young meeting with

the PLO, accommodation to the most radical Third World states and accommodation to the most radical ideologies. 1975 to 1980 was the period in which there was a great acceleration of radicalism . . . a new economic order was developed, the global negotiation strategy was developed, the non-aligned nations became fairly radicalized through Cuba and Castro's election for President. Then the idea that the Soviet Union is the natural ally of the less developed countries and so forth. That all happened in that '75'80 period, which coincided with the Carter years, and certainly the passive acquiescence of the Carter representatives made a significant contribution to it.

MR: How does it reflect on Carter's overall foreign policy?

JK: Well, first the assumption that the radical Third World states were spokesmen for less developed countries . . . I think that's one very important factor of the continual subdenigration of the United States and in the systematic denial of the Soviet dictatorship. I think that something like Andrew Young's comments about Angola, that the Cuban presence contributed to stability, that was certainly an example of having lost a healthy wariness of communism.

MR: So you'd say that Carter essentially bought the toast that you mentioned before, that it was a grace to save face?

JK: Well, sure.

MR: How did you go about changing that?

JK: The first step was observing the patterns that were there, analyzing them, concluding that the next step was to communicate to the rest of the world that the United States no longer acquiesed on the proposition that we should be accepted as responsible for everything that was imperfect or undesirable in the world. We adopted a deliberate policy of if the United States were attacked we would defend ourselves. We would seek no confrontations, but if attacked we would defend ourselves. That, and if it was deemed, an appropriate counter-attack. The Ethiopian foreign minister, for example, attacked the US for an hour about human rights violations, denying the franchise for minorities, and I took the floor and responded, pressing him on his country's denial of the most basic human rights. We not only analyzed the charges against us but also undertook always to defend ourselves. I think our work was divided into three phases. One—confrontation—giving notice that the United States will no longer be the scapegoat for injustices propagated by others. Second, during a phase which lasted about 18 months, was creating instruments of influence for global lobbying. And the third phase is the enjoyment of the earlier two phases.

MR: Do you see optimistic results for your successor with the conditions you've laid down?

JK: I think it's certainly possible, I can't say what my successor will do. I think that the patterns of careful identification and concern for US national interests is vital. Global lobbying in relationship to them, consistent contact with the Congress and deliberation between bilateral and locallateral relations, including US economic assistance for example, and active participation in the politics of the UN. Do all those things and I think you'll get positive results.

MR: Do you believe democracy to be a suitable and effective form of government for every nation on earth? Have you ever encountered conditions where democracy might be counter-productive or irrelevant?

JK: I would say democracy is the only form of good government. I think it's an appropriate goal for nations to strive to.

MR: Well, do you think then there are some cases it's just not possible?

JK: Well it's not possible where there are people who are determined to use force to assume power but I do not believe that there is such a thing as an incapacity of peoples for freedom or self-government. I think in fact a lot of highly traditional governments and highly traditional societies have very high degrees of consultation and participation structured into the local government. Obviously since most governments are not democracies it is not easy, but I do not think it's possible for one of them to say, about a people, that they are not capable of democracy. John Stuart Mill talked about stages that the people should go in order to be ready for democracy. But I do not believe that our later experience confirmed that. I think, for example, of the strength of democratic institutions in India, which is a society with widespread illiteracy, very high degrees of diversity and linguistic diversity.

MR: How can the United States win in a revolutionary flashpoint when its arguing for patience and the development of long term democratic goals, when you have a utopian ideology preaching instant bliss?

JK: I want to say something about this "utopian ideology" promising instant gratification. We need to be very clear that communism does not expand on the appeal of its utopianism. While the appeal of the utopian ideology plus the promise of power and indulgence in violence probably attracts the elites, there is no instance of peoples having been persuaded by the promises of instant gratification under communist utopianism to submit themselves to that system. Communism expands and maintains power by force. How did the Sandinistas come to power in Nicaragua? It sure didn't have anything to do with the appeals of utopianism to the people of Nicaragua—except perhaps for the role that that played in the tiny group of Sandinista/FSLN leadership, who then utilized violence and deception to win power.

It's very hard, particularly for us intellectuals to remember that we really aren't fighting ideas with Marxism—one can fight ideas with Marxism in the classroom—but what spreads in the world is not an "ism"; it is violence and deception used to impose the power of a particular group on a society.

MR: Why do you think that good Christians, like Jimmy Carter, find themselves so susceptible to that type of earthly utopia, when they have a firm belief in the afterlife?

JK: Yes, I think that's right. That's where I think ideology plays its role in creating useful fools. I think there is a certain kind of affinity between certain kinds of "social gospel" Christianity and secular progressivisms.

I think this whole thrust of liberation theology in Protes-

tant and Catholic thought is profundly dependent on the notion of the possibility of achieving salvation in this world. There is, I think inevitable in liberation theology, a translation of Christianity's redemptive message into a secular spirit. I think that it is just inevitable that one sees then also the transfer of responsibility qua the individual to the collectivity, the nation, or class, and salvation in this world.

MR: Do you believe in the perfectibility of mankind?

JK: As I read history, it seems to me that human nature is constant. What makes it possible for us to read Sophocles with empathy and understanding is this constancy. I'd say that this constancy of human nature, over time, with all flaws, would argue against perfectibility.

MR: Henry Kissenger said in 1974 "As a historian I must realize that the United States, as all great powers in history, must one day decline." Would you make such a statement? Do you think anything in history is inevitable?

JK: Of course nothing in history is inevitable. It's true that certain institutions, such as democracy; communism or what have you tend to develop in certain ways, but what one is looking for is the reason for the success or failure of will in key sectors of society. You have to realize that things happen largely because people act, or fail to act—or in the case of communist or repressive societies—are empowered to act while all others are powerless. The irony of course, is that doctrines of historical inevitability have a profound effect on the will of peoples to act. The doctrine of inevitable decline—and the "blame-the-West-first" syndrome—has been one of the chief causes of paralysis among the Western elites. The Carter administration, in the UN and abroad, always tried to play the part of the benign, declining power, which earned them nothing but disrespect, and were prevented by this philosophy from acting in the nations best interest—often bending over backwards to castigate American allies and bringing Marxists like the Sandinistas to power, whom they later had to repudiate.

MR: So you don't believe in an such inevitable decline of the West?

JK: I think it depends on us. That's one of the reasons I've been working so hard, because I really believe it depends on us.

MR: Do you think there is a trend towards democracy, at least in Latin America?

JK: In Latin America, certainly. It is terribly interesting to note that the trend towards democracy in Latin America occurred at almost the same time, only slightly later than the dramatic trend towards democracy in Spain and Portugal—the mother countries and the grounds of that political tradition.

MR: What other signs of that sort of trend do you see?

JK: Not many.

MR: Are they confined to this hemisphere?

JK: Yes, at least for now, though I think there are some other interesting and constructive . . . and pretty optimistic trends outside of this hemisphere, including the rise of resistance movements in Africa and Asia and so forth . . . but I don't think they are necessarily trends to democracy as to commitment to national independence and self-determination that we generally recognize as good.

MR: You mentioned the various resistance movements around the world. President Reagan has pledged himself publicly to support "Freedom-fighters from Afghanistan to Nicaragua." The freedom-fighters who seem to be closest to victory are reputed to be the RENAMO group in Mozambique. However, in Mozambique, the United States, under the aegis of "constructive engagement," is not only supporting the freedom-fighters, but the State department wants to give military aid to the Marxist government.

JK: They've given quite a bit of economic aid already . . .

MR: Yeah, and counterinsurgency training to government troops. Isn't this a blatant contradiction in Administration policy?

JK: I hope not. The State Department with Chester Crocker apparently believe in it, as do the Portuguese apparently believe that the government of Mozambique is progressively alienated from its ties to the Soviet Union and is being turned towards United States, the West, and away from the Soviet bloc. *I hope they're right.* I hope they're right.

MR: Have you heard that the Marxist dictator, Samora Machel, has Cuban and East German bodyguards?

JK: Yes, I hope they're right, I hope they're right. There was one week last year when $10 million in US emergency food aid was arriving in Mozambique by boat, and in the same week 17 new MIG-23's—you know, I'm never sure if it's 23 new MIG-17's or 17 new MIG-23's—from the Soviet Union were delivered in Mozambique. In the same week . . . I hope they're right.

MR: Wouldn't that run counter to everything you've said in *Dictatorship and Double Standards*?

JK: I'll tell you, I have not followed that scene as closely as Chester Crocker has. I have some real respect for Chet. We were Georgetown colleagues together. I repeat, I hope he's right. Maybe if I knew everything he knew about the situation, I would make the same decision. Not knowing everything that he knows, then it looks to me as though the probabilities are the other way—and my own inclination would be to do nothing whatsoever to assist the government. Personally, I would rather see that government fall, and be replaced by another government which did not have those kinds of ties to the Soviet Union. But I hope they're right, since that's what we're doing.

MR: If America is going to support resistance movements, don't you think it's important that we find resistance movements that can actually win?

JK: Yes! I think some of them may win like Savimbi in Angola. In Ethiopia, the resistance movement is also very strong.

Continued on page 19

The State Department vs. Afghanistan

Neil M.T. Gorsuch

When considering the nuances of the State Department's policy toward the ongoing crisis that is Afghanistan, one might often recall Mark Twain's famous opening lines to *Huckleberry Finn*: "Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot." There appears little plot or logic to the sequence of actions and inactions over the last seven years that formulate State Department "policy" regarding the Afghan people; though this Administration has consistently and admirably called for an end to the Breschnev doctrine, little in fact has been done to transform that general call into reality for Afghans.

Over the last few years the Soviets and the People's Democratic Party of Afghanistan (P.D.P.A.) have established a most effective, albeit deadly, "Agricultural Policy" for Afghanistan. According to the State Department's own publication, "Afghanistan: Five Years of Tragedy," "Severe food shortages exist in various areas of Afghanistan, in part because food has been deliberately burned and livestock destroyed." The result of this is, unsurprisingly, starving people; the experts at Foggy Bottom estimate that "half a million Afghans are in imminent danger of starvation." These conditions are similar to those in Ethiopia; this "Agricultural Policy" seems to be a revival of a favorite Stalin tactic: elimination by starvation — a clean, quiet, cheap method to dispose of unwanted masses.

Additional atrocities of the P.D.P.A. involve basic — very basic — human rights. The State Department reports in "Human Rights in Afghanistan," a December 1984 pamphlet, that "there is no freedom of speech, press, assembly or movement in areas controlled by the Kabul regime and the Soviets . . . Afghans in regime-controlled areas live in fear of arbitrary arrest or detention by the secret police (the KHAD — similar to the KGB) . . . If a trial takes place, prisoners are assumed guilty at the outset, are denied counsel, and are seldom allowed the right of cross examination of prosecution witnesses. Defendants are not often acquitted."

If this Kafka-esque lifestyle is not appalling enough, the military techniques and attacks of the Soviets will surely round out the picture. Forget that the Afghan War stands as the first time since World War II the Soviets have pursued a large-scale military attack; forget that this is the first time since 1945 high-saturation bombing has been employed. But do not forget that, as the December 1984 publication states, the Soviets "drop antipersonnel mines (often disguised as . . . toys) aimed at wounding and maiming Afghan citizens [especially youth]." The Soviets do not intend to kill with this technique, but merely to slow the ever increasing number of adolescents who take up arms with the Mojahedin rebels by rendering them unable to use their hands and arms to hold guns. Do not forget that some ten thousand Afghan children, as documented by a May 1984 A.P. press report, have been taken to the Soviet Union for up to "ten years of indoctrination into Communism and the Soviet way of life." And, finally, remember the abduction and murder of America's own ambassador to Kabul, Adolph Dubs, in 1979.

The effects of these transgressions are hard to tabulate in human terms. But a few figures that begin to illustrate the harsh realities of Afghanistan include the estimated $432 million damage done to that country's economy, an amount that equals one half the total set by the Kabul regime for "economic development" over the next twenty years; the meager yearly per capital income of $200 U.S. dollars; the 4.5 million who have fled the country (over a quarter of the pre-war population) and who now comprise one quarter of the world refugee population; and the 2 million natives killed in seven years of war.

With the knowledge of our President's personal abhorrence for totalitarianism and with an understanding of Afghani "life" under Soviet occupation, a full view of the State Department's blundering and incoherence in policy-making can be considered in context.

The State Department has chosen to work diplomatically solely through the Government of Pakistan. Pakistan has led the way in U.N. resolutions on Afghanistan and has spoken up loudly in numerous other forums. But, because Pakistani interests are not necessarily always those of Afghans or Americans, the State Department is forced to abide by daily shifts in policy. Pakistan and Afghanistan have rarely been on excellent diplomatic terms: a boundary dispute has always been a difficulty and now, with 2.8 million refugee Afghans in their country, Pakistanis are becoming more anxious about their strained economy than about an end to the war.

Because of a dedication to the Pakistani lead, the State Department has not vocally complained about the "International" Red Cross' inability to obtain access to Afghanistan. Presently, only card-carrying members of the P.D.P.A. may receive medical treatment; all others are forced to take the highly illegal fourteen day journey over treacherous mountain passes into Pakistan to receive medical attention. The State Department further refuses to allow or support American doctors who wish to travel inside Afghanistan at their own expense to aid the wounded. Because Pakistan does not support these moves, some two million have died without the benefit of modern medicine.

In a perhaps even more stunning display of inaction, the State Department was unable to spend a mere $2 million allocated by Congress in the Fall of 1984 until April of this year; only since August have they begun to spend a portion of an additional $6 million which was allocated in November 1984. Sen Gordon Humphrey (R-NH) argues that "For fiscal 1986 and 1987, it is the intent of Congress that $15 million of humanitarian assistance be given to the Afghan people. That authorization, by the way, was not sought by the Administration, but rather was provided on the initiative of Congress. When consultations with the Administration began . . . the State Department objected to legislative language which stipulated 'not less than $15 million,' claiming that it would have trouble spending that much money! . . . Time is something the people of Afghanistan do not have much of, and yet taking time appears to be the one thing the State Department is prepared to do in providing aid to Afghanistan."

These sorry examples of misdirection and inertia, though perhaps amazing, are not the end of the story. The most dangerous set of actions and inactions by State may well allow for the P.D.P.A. to gain "international recognition" as a legitimate government — their main goal over the last seven years as the State Department itself reported in "Background Notes" of 1985.

First, the United States has made no complaint to the world community that Afghanistan, though inactive, still remains a member of both the World Bank and the International Monetary Fund. These two organizations are ordinarily open only to legitimate, recognized governments; to allow Afghanistan to remain associated with them is giving the Kabul regime free points in their quest for world-wide approbation.

Second, an American diplomatic presence exists in Kabul. Many have argued that our mission, with no ambassador, acts mostly as an intelligence-gathering post; this cannot be denied but only questioned as to its effectiveness. Since no one from the mission is allowed to leave the capital city, little information not available from other sources can be obtained by continuing an official presence there. In fact, America may be giving away more than she gets in return. The P.D.P.A., the same body that claims "The only violations of human rights are committed by . . . counter revolutionaries . . . (and) their imperialist, hegemonist and other reactionary masters," can happily announce to the world that even the Grandad of Imperialists, America, recognizes its legitimacy by her diplomatic presence. The State Department, however, gets second-hand information that it could simply otherwise obtain from bases in Pakistan.

Third, Afghanistan recently held "elections" in an attempt to claim adherence to articles 19 and 21 of the Universal Declaration of Human Rights and Provisions of the U.N. charter. Though the elections were necessarily a farce, the U.S. made no attempt to bring the world's attention to this fact.

Continued on page 21

Individual Rights and Today's Feminist Movement

Andrew L. Levy

Originally, Mr. Levy's article was meant to be part of a two article point-counter-point. Seeking an interesting, informative piece arguing in favor of the current women's movement, a representative from The Morningside Review *approached a high-ranking administrator from the Columbia College Women's Center. Two rather interesting meetings took place; the Women's Center flatly refused.*

In the first meeting, this spokeswoman for the Women's Center displayed an unusual amount of indecisiveness when confronted with the opportunity of expounding her views on important women's issues in a nationally circulated journal. Before she could commit a few hundred words to print, she insisted that the entire "business staff" of the Women's Center would have to carefully consider the offer.

Several weeks later, after the "business staff" had convened, this same representative of the Women's Center refused to write the article. When asked why, she did not mince words. Calling the Review *"racist" and "homophobic" (what about sexist?), she attempted to articualte a rebuff: "we don't want to have anything to do with you." After questioning her accusation of racism and correcting her improper use of the word "homophobic," the* Review *representative asked her to document this slander. She confessed that she had never read the* Review *but insisted that it had been the "business staff" which had put these unfounded thoughts into her head. Still, the "business staff" has not been able to substantiate their anti-*Review *bias. Prejudice? The Women's Center!? Not them!!*

To anyone who is interested in defending the current women's movement, our offer still stands. But please, this time, no business staffs.

—G.R.M.

Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

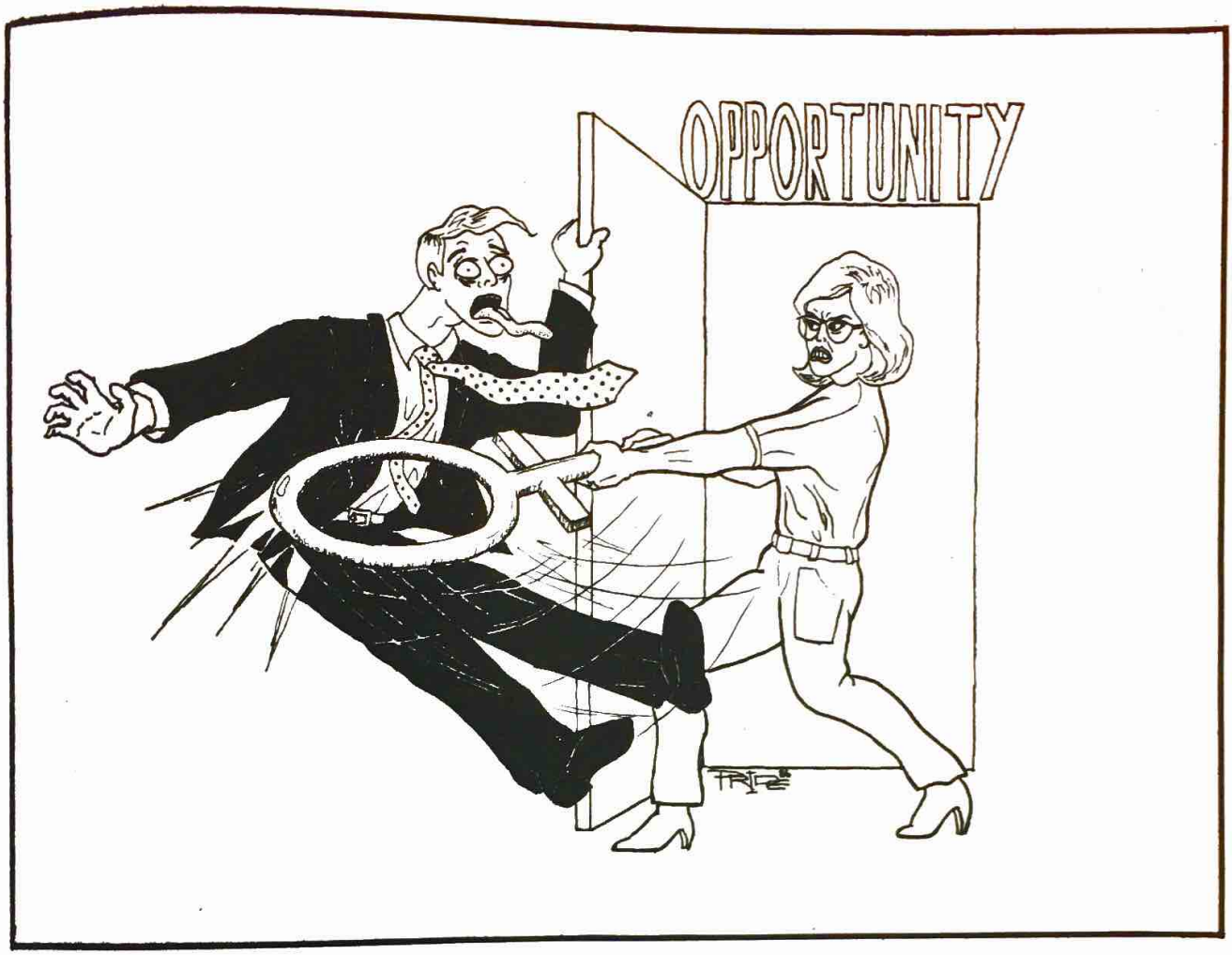
—Proposed Equal Rights Amendment, 1972

Modern feminism has come a long way from its beginnings in the 1960's, and its heyday in the 1970's. What was once a strong fight for the end of government sponsored inequality has become a weak, whining demand for government *enforced* superiority. The Equal Rights Amendment, once the central issue of concern to the women's movement, is all but dead, and so-called "comparable worth" now takes its place at the movement's helm. This shift from asking for what is a natural right — equality under the law — to demanding special favors which put others at a disadvantage is both irrational and startling. Logic would dictate that after the feminists' bid for equality through legislation was denied, they would not then turn their efforts towards the establishment of regulations which would counteract the natural equality of the free market. This is exactly what they *have* done, and it is because of this that the cause of feminism is steadily losing its influence and importance in American life.

Throughout the 1970's, the centerpiece of the women's movement was the Equal Rights Amendment. The ratification of the amendment would have meant full equality of rights for women in every issue in which the federal or state government played a role. The amendment was debated and eventually passed in 1972 by a large majority of both the Senate and the House of Representatives. However, under the procedures set forth in the Constitution, any amendment must be ratified by two-thirds of the states, and ERA had seven years in which to gain such ratification. It fell three states short, yet after the time period had elapsed, Congress, by simple majority vote, extended the deadline to 1982. The amendment still failed to gain the support of two-thirds of the states, and is now a symbol of the decline of feminism. It is interesting to note that a poll taken by the National Opinion Research Center in 1977 showed 68 percent of the population strongly in favor of the ERA, a fact which apparently did little to convince the state legislatures which voted against ratification. In addition, almost every poll taken shows that a higher percentage of men than women favor the amendment, a fact which does little to help support the claims of organizations such as the National Organization for Women (NOW) that they represent the majority of women.

There are a variety of reasons why men would be more inclined to favor the ERA. With the passage of the amendment, women would be eligible for the draft, alimony laws might be changed, and other, possibly detrimental (in the eyes of many women) laws could be enacted. Although many women would be happy to take the bad with the good, many others are not. The idea of giving up the comfortable status quo is unfortunately frightening to many women; these are the women who do not wish to be liberated, and prefer a sedate, tranquil existence based on traditional standards.

A point which must be made clear is that the passage of the Equal Rights Amendment should only have made sexual discrimination *by the government* illegal. This is a just and noble ideal, and none which should have been and still should



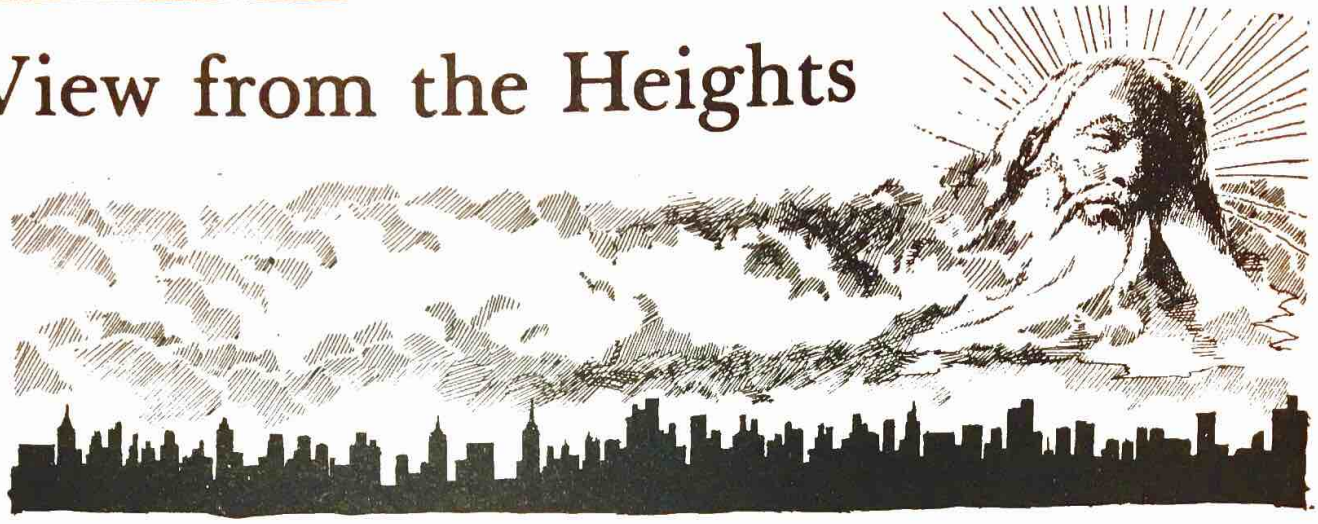
be implemented. However, the amendment should not give the government the right to force individuals to run their private affairs *including businesses*, in a sex-blind manner; rather, it should apply, as it states, only to those actions in which the government has a hand. In other words, a private businessman should have the right to hire only males if he so desires: the business is his, not the government's. In affairs concerning the government (i.e., the hiring of the police force, appointment of judges, etc.), no discrimination should be allowable under law. However, this does not mean that standards should be lowered for physical fitness tests for the police, fire-fighters, or any other group entrusted with the safety of the general public: to do so would not only allow less qualified people entrance to these jobs, but would also endanger lives.

This of course may be entirely moot; the Republican platform of 1984, on which Ronald Reagan was elected, and over which his wing of the party had almost complete control, did not support the ERA, and the Reagan administration is almost consistently opposed to the amendment. Dissenters in the administration lost their most influential spokesperson when Margaret Heckler was removed from her position as head of the Department of Health and Human Services. With the mood of the country incredibly pro-Reagan, the resurrection of the Equal Rights Amendment is extemely doubtful.

With the downfall of the ERA, the feminists have turned their efforts to other proposals. Most of these have failed to capture public support, for a variety of reasons. Abortion, an issue on which perhaps a plurality of Americans agree with the feminist position (freedom of choice), is not perceived by many people as a "feminist" issue; rather, it is viewed as an issue of religion, private versus public morality, and/or *individual* rights. While organizations such as NOW view abortion as a central feminist concern, and consider all those who oppose it as being anti-women's rights, this is not the case. In fact, we can return to the case of Margaret Heckler as a

Continued on page 21

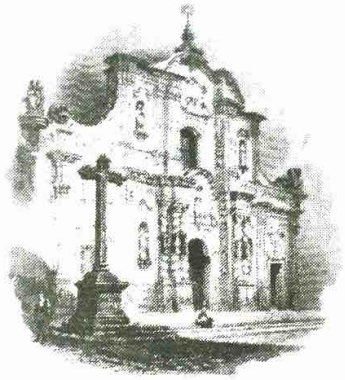
View from the Heights



Ode to Samantha Smith
(a poetry gap)

Samantha, you were like a little
star flashing over the planet
planet
On the sky covered with dark
clouds, under the stare of
kind and evil eyes.
Explosions made the stars
tremble, and the laser beam
scanned the sky.
But Samantha believed that it
was still not to late to save
the Earth.
The wall of hatred and
misunderstanding was
getting taller,
But we do not forget the names
of those who were our allies
yesterday. . .
The child had died, but she had
time enough to shake the
minds and souls of people.
Despite the stars trembling of
explosions and the laser
beam scanning the sky, We
also believe it is not too late
to stop the insane
conspiracy
It is naive to try to intimidate
Russians.
It has always been and always
will be like this.
But today, we stretch our arms
to all your friends,
Samantha.

Julia Drunina
Pravda



The Little Church Around the Corner

Is homosexual behavior contrary to Christian morals? That was the topic of debate at Riverside Church over the summer, where the indefatigable senior minister, Rev. William Sloane Coffin, again championed progressive, er, values. He was challenged by Rev. Channing Phillips, who maintained that such behavior does not quite square with Biblical teaching. How was the debate settled? The Board of Deacons held a plebiscite to resolve the issue once and for all. Guess what they decided? Mainline Protestantism's version of *mater et magistra*, no doubt.

No More Apartheid, No More Satyagraha

Some evidence that imprisoned African National Congress leader Nelson Mandela may not be (or have been) the Gandhi clone we all imagined him as during last spring's blockade of Hamilton Hall — which, indeed, was renamed Mandela Hall for the duration of the blockade — is contained in a letter, in Mandela's handwriting, introduced into evidence during his teason trial. The letter reads, in part, "We Communist Party members are the most advanced revolutionaries in modern history . . . The enemy must be completely crushed and wiped out from the face of the earth before a Communist world can be realized."

Mandela has been coy about his Communist leanings since his imprisonment began, but it should be kept in mind that he and co-conspirators went to jail for planning the manufacture, and use, of "seven types of bombs: 48,000 anti-personnel mines, 210,000 hand grenades, petrol bombs, syringe bombs and bottle bombs."

Comfortably Numb

The Union of Concerned Psychotherapists (UCPP) held a seminar a while back at the west side's Ethical Culture Society "to explore with Nuclear Insiders and Psychological Analysts the Dynamics of Nuclear Numbness." After Honorary President Dr. Robert Jay Lifton's introductory speech, a host of speakers gave their opinions on different aspects of the Numbness. There was even something for the Concerned Woman who might seek to influence American arms policy. Dr. Zvi Lothane suggested that she could follow the example of Lysistrata. We refrain from comment.

Sovern on Gentrification

Columbia President Michael I. Sovern, in an interview which appeared in *The New York Times* Week in Review section, Sunday, September 8:

> . . . The only part of the [New York City] renaissance that is troublesome to us is that as the city has become more attractice and more people want to live here, the costs and availability of housing have become a problem, not just to us but to everybody.

A Columbia Fairytale

In a recent publication, the Dean of Students offered the following as one example of what constitutes "Sexual Harassment":

> Mark, a gay student, lives in a four-person suite. Although his straight suitemates feel free to ask their girlfriends to spend the night, Mark is ridiculed and told to move out after inviting his friend Steve to stay over.

Human-Animal Liberation Front (H.A.L.F.) Update

Yes, indeed, HALF held another of their famous meetings this Fall at which James Mason, animal liberator spoke on what he sees as the two greatest downfalls of man in the twentieth century: vitamins and antibiotics.

Because the use of these man-made substances has allowed farmers to increase the number of animals they can safely raise in greatly reduced space, factory farming has become a reality. Mr. Mason warns all that America should reject factory farming; and he cites Holland's experience as one reason why:

> Holland has stopped the production of factory farming becasue it has become over-ridden with pig and poultry manure.

Books

Peter Cachion, Kim Ohnemus, Sarvar Patel

Choosing Elites
Robert Klitgaard
Basic Books ($19.95)

Each Spring, behind closed doors, admissions officers at the most sought-after colleges and graduate schools in America decide a question of considerable moment: Whom to select? The alumni of these schools are represented out of all proportion among the business, governing, and professional classes. Who will be awarded the next set of tickets into the national elite? In answering that question, admissions officers are guided by two criteria. They are to select a student body capable of academic excellence and they are to ensure that the student population is "diverse" — a catch-all term invoked to justify the admission of some students who, though less qualified than others, are accepted in the hope that their presence in the institution will promote certain institutional goals.

Those for whom special allowances are made include athletes, children of alumni, and most controversially of all, racial and ethnic minorities.

There is a vast statistical literature on the relation of academic predictors to later performance, and the evidence is clear: Admitting lesser-qualified students results in a significant decline in the student body's overall academic performance (based on studies which show that scores on standardized tests such as the SAT tend to predict academic success in college rather reliably). Thus, the result of affirmative action is a less than optimally qualified population at the selective schools. The best schools must be especially careful in guarding their academic standards, for these are a major reason why the schools are desirable, and thus selective.

Administrators at selective schools setting out to make affirmative action policy, for example, might calculate the "marginal cost" of admitting an underqualified minority student and formulate a trade-off between the drop in predicted academic performance on the one hand, and the benefits of increased minority representation on the other. This is the argument Robert Klitgaard makes in *Choosing Elites*, a dense and authoritative study of selective admissions focusing on group representation and affirmative action. *Choosing Elites* is likely to infuriate many of its readers, for Klitgard's analysis, based on an exhaustive review of the statistical literature, exposes several educational fallacies, including the concept of "test bias" and the validity of measures of blacks' academic performance:

> Differences in [standardized test] scores cannot be attributed to predictive bias in the tests. Indeed, predictions made using test scores and high school grades actually overstate the later performances of blacks relative to whites. Compared to whites with the same test scores, blacks on the average under-perform in college, in graduate schools, and on some measures of job performance. The degree of this under-performance is from one-third to two-thirds of a standard deviation at typical right-tail institutions [those picking students whose scores register on the right or better-scoring side of the statistical bell curve].

Klitgaard also cites statistics which reveal that very few blacks have the high test scores and grades which characterize the majority of applicants to the selective schools. For example, "only 143 blacks who took the Graduate Record Examination (GRE) quantitative test in 1979-79 scored 650 or above, compared to 27,240 whites who did," Similarly, in the Fall of 1976, 13,190 students scored 600 or above on the Law School Admissions Test (LSAT) and had a grade average of "B+" or better; only 39 were blacks. And in 1983, only 570 blacks scored above 1200 on the SAT, out of a total of nearly 61,000 students who did that well.

It is obvious from looking at the numbers that the selective schools are dipping deep into the barrel to find many of the affirmative action admittees. Of all the characteristics sought in selective college applicants, none (except, perhaps, proficiency in football) is as valuable as membership in a preferred racial minority. Preferential admissions policies decisively shape the composition of the school's entering class: were it not for preferential treatment policies, the children of alumni in the Harvard class of 1975 would have been 6.1 percent rather than 13.6 percent, and blacks 1.1 percent rather than 7.1 percent. As Klitgaard, a former Harvard admissions director, reveals: "[A]t selective institutions being black frequently adds 40 to 50 percentage points to the probability of being admitted, other things equal." The dismaying discrepancies between the ability and performance of affirmative action admittees and the average student, says Klitgaard, must be taken into account in any discussion of what the "proper" level of affirmative action should be.

Klitgaard's strategy for calculating the optimal level of affirmative action ("accept[ing] more and more blacks up to the point where the benefits of an additional black student in terms of representation is equal to what we have to give up in terms of predicted academic performance") is couched in the economist's precise language. The marginal cost of admitting an underqualified student can be estimated (relying on the correlation between acadmeic indicators — high school grades and test scores — and performance). But what of the "benefits of representation," the other variable in the equation?

For some beneficiaries of preferential treatment, the bene-

fits to the institution are obvious. Football stars bring in revenue and raise school spirit (sic). Alumni are more likely to contribute if their children are given special consideration. The intangible benefits of admitting minority students are categorized as "diversity", though the same could be said for a son or daughter of any number of groups — e.g., Polish-Americans or farmers.

To be sure, Klitgaard makes a very tentative attempt to answer the question. He cites one possible benefit for which he thinks there is no evidence: the claim that blacks learn better when there are more of them in attendance at a school.

Another "possible benefit" is that "with the introduction of preferential treatment, members of minority groups may have been motivated to study harder, to aim higher and to perceive 'the system' as at least partially open to them." But the opposite may also be true: They may have been led to believe that it was not necessary to study harder or even hard in order to get admitted to Harvard.

Perhaps realizing the dilemmas and paradoxes which such a "marginal cost calculation" representation policy entails, Klitgaard calls for more weight to be given to academic merit in the admissions system. In most schools, the admissions officer combines the skills of publicist and military recruiter; but at elite schools like Harvard his responsibilities involve more academic forecasting and maximizing educational excellence. *Choosing Elites* concludes that of all the predictors available to the selective admissions officer, grades and test scores are the *only* ones that have any more than marginal predictive validity. The call for admissions based on "hard" (objective) measures of academic merit — "admissions by numbers" — is likely to revolt many. Klitgaard recognizes this and he acknowleges that subjective, "human" input into admissions decisions will remain necessary no matter how reliable academic indicators are or may become:

> Selections made by human beings, in lively disagreement using their best, if subjective, judgments on a variety of subjective data, is qualitatively different in this cultural dimension from selection by a computer based on standardized test scores. The declaration of what is being sought — vague and idealistic as that may be — and the involvement of the culture's best representatives — its "aristocracy" in the good sense — help to create and reinforce an institution's mission. This is so even if someone comes along and shows that what is sought cannot be reliably measured or effectively predicted among young people at the right tail.

As Klitgaard fully realizes, it is this subjective process that keeps affirmative action alive. At present, there is not a selection committee at any of the country's elite institutions that is not committed to admitting many more minority students than would be admitted on the basis of objectively determined scholastic merit. But that commitment will not last forever. There will be pressure to break it as discrimination recedes further into the nation's past. Even now admissions officers are capable neither of articulating the reasons why affirmative action is central to an elite school's "mission," nor of documenting affirmative action's benefits. With the erosion of the commitment, these failures will surely have their effect.

Meanwhile, critics of affirmative action — who do have studies in hand showing its drawbacks — will find an ever-widening audience. As a result, administrators who imagine that they have exclusive control over their admissions policies may begin to realize how bound they are to evolving standards of "justice" and "fairness" which may force a substantial rethinking of preferential treatment policies at the selective schools.

Peter Cachion

Education's Smoking Gun: How Teachers' Colleges Have Destroyed American Education
Reginald G. Damerell

Education's Smoking Gun is a scathing indictment of teachers' colleges by a man who taught in one for twelve years, spanning the 1970s. It is evident that his book is his way of venting his spleen at his former job, his colleagues, his students. His experience with "education" as practiced in a leading "graduate school of education" (stripped of rehtorical pomposity, a plain old teachers' college) has so enraged him that he has written a book which relies almost exclusively on generalizations and hyperbole to make its points. But the situation Reginald Damerell describes is so bad — the evidence of mis-, mal-, and non-feasance so widespread at the University of Massachusetts, where he taught — that this book is provocative reading for any educator, and perhaps even more, anyone thinking of becoming one.

Damerell begins his critique of teachers' colleges with a description of one of his students at the University of Massachusetts. "Mary," he tells us, is the least competent student in the class. She is enrolled at the university through the School of Education's special program for the "mature" students lacking bachelor's degrees. This despite the fact that she scored a 210 on the computation section of her GREs and a slightly higher 240 on the verbal section (based on a scale of 200 to 800). In addition to being admitted with such wretched scores, she has been granted a teaching assistantship. Mary has "incompletes" in two of her courses, but with the aid of independent study credits she still manages to graduate with an M.Ed. degree. In spite of the fact that, in Damerell's view, Mary is "innumerate and, at best semi-literate," she is now qualified to teach in our public schools. What we should have been able to predict, he adds, is that Mary is black.

A reader of Damerell's book might, at this point, be tempted to dismiss its author as a racist and close the cover on it once and for all. But it turns out that Damerell is the author of a previous book, published in 1968, *Triumph in a White Suburb*. This book tells the story of Teaneck, New Jersey in its progress toward becoming the first town in the nation to vote for integrated schools. Its heroes are those who over-

came their prejudices to make integration work. Around the time he wrote the book, Damerell also helped to elect Teaneck's first black councilman, worked for Bergen County Fair Housing as an evaluator, and received the Human Relations Award from the Urban League of Bergen County.

By his previous work, then, Damerell has firmly-established credentials as a fair-minded individual. If his present tone seems harsh, it is less because it is fueled by racism than by a profound disillusionment with the progress blacks have made since. Damerell's pen is provoked by the fact that Mary has only empty credentials instead of real achievements to show for herself. It is sharpened by the conviction that it is Mary, more than anyone else, who is cheated by this kind of "progress."

Damerell's views were formed in an era when educational opportunity represented the key to minority advancement. He is expressing his disappointment in an era in which, he says, procedural advancements for blacks have eclipsed substantive achievements; in which quotas have been pursued more vigorously than knowlege. Ironically, Damerell traces the deterioration in minority education back to the beginnings of the civil rights movement. Schools began opening their doors to blacks, but after decades of educational disadvantage, blacks were not prepared to compete in the most rigorous academic programs. Instead, they entered schools of education, where admission and graduation requirements were notoriously lower than they were in mainstream academic programs. When black professors and students were recruited by universities, they were recruited disproportionately into the schools and departments of education. By 1976, one-quarter of all B.A. degrees held by blacks were in the field of education; 56% of all black Ph.D.'s were in education.

In explaining the reasons for the comparatively lower standards of teachers' colleges, Damerell gets off the subject of race and onto such topics as learning theory, the professionalization of education, and the role of the humanities in teacher education. According to Damerell, the main reason for lax standards in schools of education is that they teach no body of knowledge, and "no base is necessary where nothing is to be added." Students can therefore gain access to teachers' programs where they lack the prerequisite background for others. Adding to the problem of having no common body of knowledge to be taught, consequently, is the absence of a common base of knowledge from which to draw.

Having had no body of knowledge, Damerell says, meant that schools of education had to create one. Lacking a foundation on which to build, what they came up with was pedagogy on stilts — or methodology without content. And there was born what Damerell refers to as "the educationist." Whereas the educator was one who knew the body of knowledge that had to be learned, and simply taught it, the educationist has all sorts of theories about how to teach, but no idea what needs to be learned. Educationists replaced the traditional "three Rs" with the more fashionable inventions of "visual literacy," "values clarification," and "life skills." They replaced knowledge with technique and ideas with issues. Ultimately, the educationist movement came to confuse educational goals with sociological visions. In place of traditional academic competence, students were given role models; in place of Americanism, ethnicity; and in place of the "melting pot," pluralism.

The effect of the educationist doctrine on education, as Damerell describes it, has been two-fold: teachers who can't teach and students who don't learn. As prospective teachers were exposed to more and more pedagogy and less and less academic subject matter, their proficiency in basic academic skills declined correspondingly. Damerell supplies examples: of one teacher who showed up for an interview without her license, explaining, "I didn't brung it"; of another who told a reporter, "I teaches English." There is also the fifth-grade teacher with an M. Ed. degree who sent home a note to a student's parent with the following message: "Scott is dropping in his studies he acts as if he don't Care. Scott want pass in his assignment at all, he had a poem to learn and he fell to do it." That students are as adversely affected as teachers by the existence of such illiteracy within the profession needs hardly be stated.

If part of the impetus for replacing the three Rs with visual literacy, values clarification, and all that accompanied them was to make education more easily accessible to all — both students and teachers — Damerell argues that it was not achieved without a price. The result, he says, was not so much a democratization of education as it was a levelling of educational standards, and the people who have been hurt the most have been the students and teachers from minority populations who were supposed to gain. Lowering standards has cost everybody, but those who have paid the highest price are those who cannot compete on equal footing with the rest of society because they have been denied precisely those basic skills in reading, writing, and thinking that are prerequisite to doing so. Mary suffers as much as her black students in this respect, and as a consequence must rely for her advancement upon gratuities rather than what she has legitimately earned.

Damerell concludes his attack on teachers colleges with a single recommmendation: Abolish them. He estimates the annual cost to the nation of supporting publicly-funded schools and departments of education at $1.2 billion. Were these funds redistributed to local school districts, or used to attract better teachers with higher salaries, state legislators might be putting them to better, and more accountable, use. Instead of earning educationist credentials, prospective teachers, Damerell argues, should be getting a vigorous liberal arts education, with a specialization in a particular field. Before becoming teachers, they should be required to pass a writing test, and after entering the profession, advancement should depend on performance rather than additional credentials. None of this would require a teachers' college.

There are 1,287 colleges and universities in the U.S. currently credentialling teachers. Clearly, Damerell's recommendation that educational programs be abolished would have a profound effect on the make-up of the educational establishment. Whether on not such a goal is politically feasible is not a question to be overlooked. Nevertheless, if we grant that Damerell is right — that teachers' colleges have had the per-

nicious effects he claims — then we have no choice but to agree with the moral force of his argument and to accept the propriety of his recommendations.

The major flaw of Damerell's book is that it does not contain the evidence needed in order to make such a judgment. The book is at once too big and too small for its purposes. On the one hand, it encompasses such a range of issues, and introduces so many considerations into the discussion, that the causal relationships between them become almost impossible to decipher. Damerell touches upon such issues as decentralization and affirmative action, visual literacy and reading development, bilingual education and standardized testing. While these are all areas of legitimate relevance to the problems of teachers colleges, they are discussed with such randomness that a clear picture never emerges as to the role teachers colleges have actually played in influencing such policies, or in being influenced by them. Damerell never adequately demonstrates that the colleges bear such a burden of guilt as to deserve to meet their demise. In the end, he has succeeded more in getting off a smattering of pot shots than in mounting a systematic attack on teachers education.

On the other hand, Damerell's book is quite a bit smaller than it makes itself out to be, for it depends almost exclusively for its material on Damerell's own experiences with the education profession. It deals not with schools of education as a whole, but the the University of Massachusetts School of Education in particular, and even more particularly with the School of Education's Media Program, of which Damerell was the director. This is not to dismiss the credibility of Damerell's experiences; it is only to suggest that they are, fundamentally, Damerell's experiences. We can conjecture, but we can not be sure, that they are the same experiences he would have had at Framingham State Teachers College or Columbia's Teachers College. Without a more well-rounded data base from which to draw, the generalizability of Damerell's conclusions remains limited.

And Damerell is prone to exaggeration. To wit: "Empty credentials are all that any school or department of education in any university in the United States gives to its graduates." I can name one exception; there must be others. Lacking adequate substantiation, such far-reaching claims only serve to undermine the reader's confidence in the author's argument, which often times seems less argued than, simply, argumentative. Damerell also has no qualms about naming names or attributing blame where he thinks it is due. This makes for some interesting and controversial reading. For many it will fail to be thought-provoking — it will merely provoke.

Damerell is at his best when he is simply recounting his own experiences. He would do better not to try to elevate them to the level of universal principle, especially when he hasn't sufficiently probed their causes.

At one point, Damerell tells a story about how, when he gave up a career in advertising to teach at the University of Massachusetts, his hair began falling out, eventually leaving him bald. He attributes this strange phenomenon to the repression of his realization that what he had taken up was a false profession. Now, it may very well be that Damerell's hair did fall out for this reason, but why we should believe so remains just as much a mystery as many of the reasons we should accept his theories about education.

Kim Ohnemus works for a private foundation in New York.

How to Make Nuclear Weapons Obsolete
Robert Jastrow
Little, Brown and Company ($15.95)

Robert Jastrow is one of the most recognizable proponents of the President's Strategic Defense Initiative (SDI). In articles appearing in *Commentary* and *New York Times*, Jastrow outlined arguments for and challenged arguments against SDI, which he concisely reports in *How to Make Nuclear Weapons Obsolete*, a lucid, if somewhat simple book written for the layman.

Jastrow, the founding director of NASA's Goddard Institute for Space Studies, confronts the pernicious ideology that sees arms control as the only hope for peace. This unfounded utopianism runs counter to the conclusions drawn by the bipartisan Scowcroft commission, which states that the Soviets "probably possess the necessary combination of ICBM numbers, reliability, accuracy, and warhead yield to destroy almost all the 1047 U.S. ICBM silos using only a small portion of their own ICBM force. The U.S. ICBM force now deployed cannot inflict similar damage." The arms limitation treaties of the '70s failed to reduce the nuclear threat and provide for greater international stability.

This ideology forces people into awkward positions. Julie Dahlitz, in the *Bulletin of Peace Proposals*, comments that, "SDI is inconsistent with the objectives of the 1972 Anti-Ballistic Missile (ABM) treaty, and its implementation would be in breach of specific provisions of that treaty." What Dahlitz doesn't cite throughout her article are Soviet violations of the ABM treaty, such as construction in central Siberia of a phased-array radar, which attached to a large computer can track incoming enemy missiles and assign interceptors to destroy them. This kind of radar is specifically prohibited by the ABM treaty. More significant is that these radars are huge devices taking years to construct. This means that the Soviets never had any intention to adhere to the ABM treaty.

It is this ideological bent which led the Union of Concerned Scientists (UCS) to do some hasty calculations and some embarrassing recalculations. The UCS is a group of university physicists who have a strong bias against the SDI program, apparent in light of all the errors committed by the UCS which according to Jastrow "go in one direction only — toward

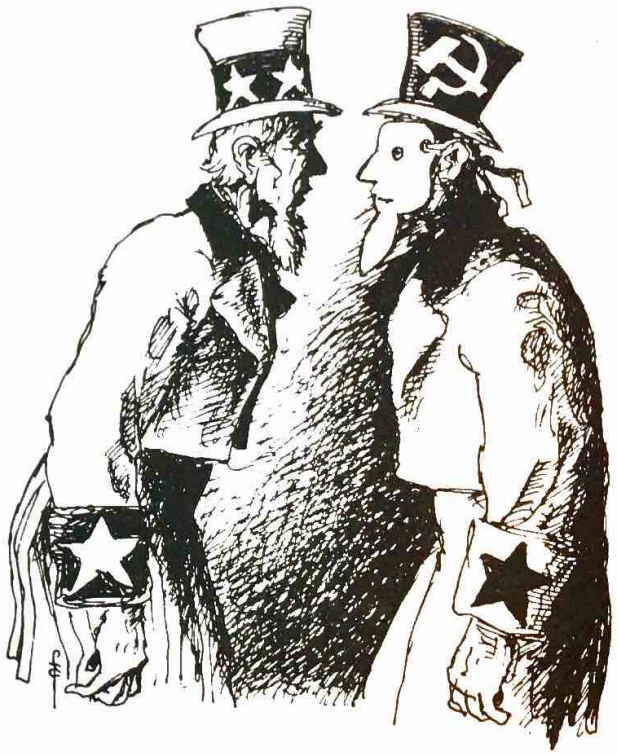
making the President's plan seem impractical, costly, and ineffective." One such error was in the number of satellites needed for the boost-phase defense. Satellites are the expensive items in the SDI program, and the need for thousands of them would indeed push the cost into trillions, making SDI impractical. The first UCS calculation of 2400 satellites was soon lowered to 800, and with further criticism to 300, and finally to 162 satellites. Jastrow says that "their answer, which started out at 2400 satellites, seemed to be converging to a result in the neighborhood of 100 satellites, which is where the professionals had pegged their results all the while."

Another error which makes a promising technology, the neutral particle beam, seem absurd, was the weight of the linear accelerator, a device used to generate the neutral particle beam. The UCS estimated it to be 40,000 tons which indeed makes the idea of towing it into space impractical. The true figure, now admitted by the UCS, is 25 tons which is about the same as the payload of the space shuttle. Jastrow chides, "when theoretical physicists joust over ideas, a factor of 2 hardly counts; a factor of 3 matters a bit; factors of 10 begin to be important; factors of 100 can win or lose an argument; and factors of 1000 begin to be embarrassing." (For an exchange of words between Jastrow, UCS, and other critics see the letter section of the March 1985 issue of *Commentary*.) Lowell Wood at the Lawrence Livermore laboratory enjoined, "In spite of having failed to make their anti-SDI case to their well informed colleagues in technical discourse, these critics continue to advocate their rejected positions to the public in impassioned terms, immune from the criticism of their technical peers."

In this small 150 page book, Jastrow advocates that the U.S. should follow a long term program of intensive research culminating in the deployment of an almost perfect (99.8% effective) defense. On the short term Jastrow wants the U.S. to deploy a two layered defense by the early 1970's, conservatively estimated to be 90% effective and costing around $60 billion. The defense for the early 1990's will be based on the off-the-shelf smart bullet technology. "The defense will consist of two layers — a boost-phase defense that tackles the Soviet missiles as they rise above the atmosphere, and terminal defense that intercepts the warheads at the end of their trajectories, as they descend toward their targets in the U.S.," says Jastrow. The boost-phase defense will be based in space with satellites stored with smart bullets that will be fired at Soviet missiles. Using radar or heat waves, a smart bullet locks in on its target and destroys it. The smart bullet concept was successfully tested in June of 1984.

For an advanced defense, four or more layers are needed. "In the first layer our defense attacks the Soviet missiles as they rise above their silos. The second layer attacks the warheads that have gotten through the first layer, as they arc through space on their way to the U.S. The third layer attacks the warheads that have gotten through the second layer, as they descend to the earth again. And so on," says Jastrow. The total effectiveness of the 4 layers is 99.8% which essentially reduces the Soviet nuclear threat to nil. This advanced defense would probably utilize such exotic and promising technologies as the X-ray laser, the neutral particle beam, the excimer laser, the electromagnetic railgun, and more. It will take years of research before these Buck Rogers devices are available, and it won't be until the end of the century that they will be deployable, provided continued congressional support.

Troubled by the inhumanity of Mutual Assured Destruction (MAD), President Reagan saw SDI as a departure from the need to threaten innocent people. "The human spirit must be capable of rising above dealing with other nations by threatening their existence," he said. At a time when many people claim that there was no alternative to a world of nuclear weapons, Jonathan Schell in *The Abolition* came to a conclusion similar to President Reagan's and Professor Jastrow's.



If deterrence can be maintained by each side having 10,000 nuclear weapons, it can also be kept by each side building down to 5,000, 10 or zero weapons, so long as both sides have equal numbers of nuclear weapons at each stage. With a defense against missiles on both sides, the need for a large nuclear arsenal or any nuclear arsenal is eliminated. In a nuclear free world, if one side cheats it would be to no avail because a system designed to defend against thousands of warheads can destroy one or even a hundred warheads with 100% accuracy. In the eyes of President Reagan, Schell, Jastrow, and others this the way towards a nuclear free world.

For those interested in the SDI debate, and its role on placing national security on a more rational plane, but find it difficult to discriminate among the various voices emanating

from the scientific community, *How to Make Nuclear Weapons Obosolete* serves as a good guide for the perplexed. It's written for the layman with minimal scientific knowledge. At times, one wishes Jastrow might give his audience, layman or not, a little more credit than he does, though one supposes that this SDI apostle intends to make his arguments comprehensible to the widest audience possible. The book can be read in one or two sittings, yet nevertheless it is authoritative and places the argumentative burden on the shoulders of those seeking to refute SDI. By writing and dedicating this book "to the men and women who want to see nuclear weapons disappear from the face of the earth," Jastrow has done an invaluable service to them.

—Sarvar Patel

J.K.

Continued from page 7

MR: In regards to the contras, do we actually expect that they will be able to bring the Sandinistas to negotiate, or are we simply trying to tie the Sandinistas down in a guerilla war to keep them from expanding and consolidating power?

JK: In my own view, either of those is a worthy goal. It is important to note that the contras are three times as strong today as the FSLN was in January 1979.

MR: How do you answer charges that the contras have been involved in terrorism, as the American lawyers reported?

JK: I would say a couple of things. One, that most dramatic report was the product of people hired by the Sandinista government, who were guests of the Sandinista government while they were in Nicaragua, and are clearly partisan. I think that in itself creates a presumption of taint. Second, I know the contra leadership personally. Their policies are powerfully opposed to human rights abuses, terrorism against civilian population, and violations of civilized conduct of warfare. I also know that in war tumultuous violence sometimes occurs. It is possible in the case of the contras, as with any army. I also know that the contra leadership takes real pains, one, to make clear their policy, two, to control abusive practices, and three, to investigate and punish any violations if they should occur.

MR: Do you think that Congress may have assumed too broad a role in the conduct of US foreign policy?

JK: I don't think it has assumed too broad of a role, I think it has assumed a mistaken role.

MR: Are you pessimistic about the ultimate ability of a democracy to fight external threats?

JK: I think that our government and society has been really suffering from our own interpretation of the Vietnam War, and the whole counterculture. Two devastating tendencies developed with the dominant liberal sector of American opinion. One is the tendency to "blame-American-first" and two, a tendency to feel that we cannot really justly use power, a rejection of using power as an instrument of American foreign policy. (I don't mean force, I mean power, its important to retain a clear distinction between the two). That's very self-defeating, and I think that the congress and the opponents of the Administration are creating a situation where the only alternatives left to us will be isolation or war.

MR: Are you a feminist?

JK: I would say I have been a feminist all my life.

MR: How do you define feminism?

JK: Well, somebody who believes that women as well as men ought to have freedom to develop their own capacities to the limit, to have broad choices of professions, limited only by their own abilities. I would define feminism in terms of support for those kinds of freedoms, and opportunities for self-development.

MR: Do you think there is an institutional oppression of women in this culture?

JK: I wouldn't put it that way. I think that today American women have extraordinary opportunities. I think there has been a kind of revolution in sex roles which has dramatically enhanced the opportunities for women, beginning with opportunities to higher education. You think of Virginia Woolfe; her brothers went to university and she stayed home. It doesn't mean I see the world in terms of women as proletariat, with institutionalized oppression.

MR: Do you see the current feminist movement as being counter-productive to the aspirations of women?

JK: I think the current feminist movement is much too broad to be simply classified. It has a radical edge. I don't think that radical edge is in any sense coterminous with the feminist movement.

MR: Do you occasionally see yourself as being discriminated against? Do you encounter strange attitudes by men towards you as a woman in power?

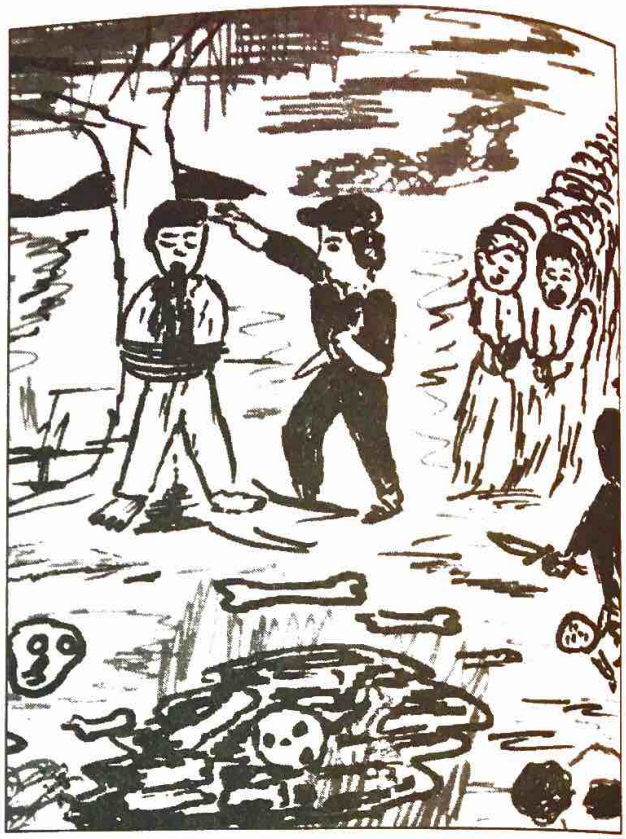
JK: Among some, but not most.

MR: How can you tell?

JK: Well, that's the problem. I can't prove it. Only by observing the way people would treat a male colleague and me . . . You can't be sure about that, because there just may be something about you that is personally objectionable to them, too. Frankly, I think that opportunities are really wide open for women. I think the number of opportunities today for women exceed the number of women who are ready to pay the price. More women drop out of public office than men. I find that interesting.

MR: Don't you ever wish that *you* were still involved in making concrete suggestions on policy?

JK: I still make concrete suggestions on policy. But it's not a question of suggestions but of decisions.



Ask your child to draw a picture of his life.

Now, compare it to this one.

Your child doesn't draw pictures of severed heads or neighbors being stabbed. They aren't part of his life experience. But to the Cambodian child who drew the picture above, these horrors of the Khmer Rouge were a common occurrence, like your kid's touch football game.

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IRC

People with the courage to start over should have the means to start over.

Send your tax-deductible contribution to:
the International Rescue Committee at
386 Park Avenue South, New York, NY 10016.

Afghanistan

Continued from page 9

One has to wonder if the U.S. by her inaction, is not lending unnecessary credence to the Kabul regime's claim of being a "democratic republic."

Fourth, for the first time in the war's history the Mojahedin rebels held a pitched battle lasting for several months this summer. The battle was key to the Soviets: it meant cutting off Mojahedin supply lines from Pakistan. Yet the rebels, relying on battlefield, not just hit-and-run, tactics actually staved off the attack. All objective sources agree on the rebels success and the safety of their arms flow until next summer. Why do so few people know about what can only be described as a miraculous success against the world's most powerful army? Perhaps the answer is that State once again failed to take advantage of an excellent opportunity to spread the truth about Afghanistan and its people; perhaps because they were unwilling to use the facts of the battle to the end that so many Congressmen would have like: to urge recognition of the Mojahedin as a "military force" and thus attempt to protect them under the provisions of the Geneva Convention. Perhaps it would be unrealistic to expect the Soviets to follow the Geneva Convention, but it surely would have been a noble effort.

But what *has* the State Department done? The Administration has made several moves involving mostly the punitive actions taken against the Soviets immediately after the invasion:

I. They have lifted the embargo on fertilizers to the Soviet Union;

II. Seven out of eleven agricultural agreements are back in force (while Afghans are starved we send Soviets grain);

III. Soviets are again fishing in American waters and are allowed to remove 50,000 metric tons a year (though we in fact do not measure their actual take, it is estimated as approximately 400,000 metric tons);

IV. Consulates are to be opened in New York and Kiev;

V. President Reagan is reinstating the cultural exchanges that were halted in 1979 as part of his "tough negotiations" at Geneva.

Not any of these agreements are necessarily bad or ill-advised when considered individually; to condemn Reagan for merely wanting cultural exchanges seems somehow wrong. One does not have to see the Soviet public as an "evil empire," but one does have to question the logic that allows for the reinstitution of programs with little benefit for ourselves or for the cause of human liberty while undermining the fight for freedom in Afghanistan.

In sum then, one might be able to believe that Ronald Reagan speaks honestly against totalitarianism, but the course his State Department has taken betrays a serious flaw in Administration policy. The Department seems most able to compile data and document atrocities, but most unwilling to take action against them. What action it does take at least appears counterproductive. Bearing all this in mind, one might more easily envision Twain's opening words not in his masterful, complex, and ordered novel but, rather on every press release and memo from the U.S. Department of State.

Rights

Continued from page 11

key example to the contrary. Although she favors the Equal Rights Amendment, and is generally considered pro-women's rights, she opposes abortion strongly enough to have lost the support of women's groups in a congressional election against liberal Democrat Barney Frank. The feminist's inability to link abortion with women's rights has indeed cost them greatly in their efforts to gain a wider base of support.

The major issue concerning feminists today is most likely comparable worth. This insidiously un-Constitutional concept has done more to undermine the feminist's cause than any other issue. Comparable worth does not translate to "equal pay for equal work;" rather, as Brigitte Berger, Professor of Sociology at Wellesley College, noted in her 1984 report to the US Commission on Civil Rights, it calls for "equal pay for equal value.' The Commission on Civil Rights, on June 6-7, 1984 held a series of hearings on the issue of comparable worth, and in these hearings many of the underlying faults of the issue were brought to the surface. Professor Herbert R. Northrup of the Wharton School at the University of Pennsylvania stated in his report to the Commission that he considered the issue of comparable worth as extremely important because, in his view, "it threatens, if ever put into effect, to completely upset the labor relations system in this country." June O'Neill of the Urban Institute said in her statement:

> The recent policy of comparable worth would dispense with the rules of the game. In place of the goal of equality of opportunity, it would substitute a demand for equality of results, and it would do this essentially through regulation and legislation.

She goes on to wonder:

> . . . why one would bother to go through all these elaborate schemes and why not simply say all women should be paid the same as all men — and why even stop there? Because, in a sense, when you start thinking along these lines, you have to question why some women earn a great deal more than other women and why some men earn a great deal more than other men if they're each putting forth their maximum amount of effort in working according to their highest ability.

This last is obviously an "extreme case" scenario, but it serves a useful purpose in that it makes clear the problem inherent in any government regulation of the free market, namely, where does it stop? This is but one of the faults of comparable worth; yet another lies in the determination of comparability — *who* determines it? To make such a judgment

requires someone to decide exactly what compromises inherent value: this is always the case when one seeks to override the natural market value, and replace it with an unnatural, artificial one. Professor Northrup stated to the Commission:

> . . There is not such a thing as a fair wage. It's only a matter of opinion. Most people think they are underpaid. Most employers think they [employees] are being paid too much.

Since it appears to be next to impossible to define a fair wage, it is only logical that it is next to impossible to determine an inherent value. As Northrup said:

> We run in to the fact, of course, right away as to whether worth can ever be defined. Many of the older economists . . . wrestled with this question. The Jesuits wrestled with it in terms of what they called a just wage, and they got into deep metaphysical arguments. They never could even agree among themselves what a just wage is.

We cannot, and do not, use any standard of inherent value to determine the market value of products, and there are few people, if any, who would argue that we should. As June O'Neill points out, we do not use nutrition, which could be considered by some as an inherent value, as a standard of prices in regard to food products: often unhealthy foods cost the consumer far more than healthy foods. Instead, the value is determined by "taste, the needs of millions of consumers, and various conditions that determine the cost of production and the price of these products" — in short, *the free market.* In the same manner, only the labor market should control the value of a particular job; there is no other rational way to decide just pay in a particular occupation.

Comparable worth is clearly the major issue in the decline of feminism, mainly because it is the most obvious example of the major basis of the movement: "reverse" discrimination. Perhaps Ayn Rand stated it best in her book *The New Left: The Anti-Industrial Revolution*, in the chapter entitled "The Age of Envy."

> Women's Lib proclaims that success should not have to be achieved, but should be guaranteed as a right. Women, it claims, should be pushed by law into any job, club, saloon or executive position they choose — and let the employer prove in court that he failed to promote a woman because she is a slob, and *not* because she is a woman.

What Rand is saying is that granting promotions based solely on sex is wrong and, when government enforced, un-Constitutional. This is one of the ultimate goals of modern feminism, and perhaps its most pernicous one: legislation which forces businessmen and businesses to overlook ability and productivity, and grant jobs and promotions based solely on gender (with women, obviously, as having the correct gender qualification), as if women somehow had a "right" to these positions and advancements. This is where hypocrisy begins to rear its ugly head within the feminist movement: the feminists want the passage of the Equal Rights Amendment, which states that "equality of rights shall not be denied or abridged by the United States, or by any state, on account of sex," but they then expect, and even demand, that those same United States pass laws to ensure that women be given special privileges "on account of sex." The feminists call for legalized abortion on the basis of being pro-individual rights, but seek to eliminate liberty and individual rights for businessmen, replacing these rights with regulations which force the businessmen to hire whomever the government says deserves hiring.

The doctrine of feminism operates under an erroneous collectivist principle: namely, that businesses are not completely in the private domain, but can, and should, be regulated and controlled to whatever extent demanded by the particular pressure group in question. This socialistic aspect is deeply ingrained in the women's movement, and is only now being perceived by the public. The current popular trend towards greater individual liberties and away from government legislation and regulation is what is causing the decline, and what may bring about the fall, of modern feminism. The majority of Americans now realize that, as Ayn Rand said:

> Women's Lib rides on the historical prestige of women who fought for individual rights against government power, and struggles to get special priviliges by means of government power.

If the so-called women's liberation movement seeks to regain its strength, it must do so through a radical alteration of its current methods and goals. The best way of securing rights for certain segments of society is by securing the rights of the smallest minority in society: the individual. Until the feminists reverse their present course, and become champions of women's rights *within the context of individual rights*, they will continue their decline, and will have only themselves to blame for their inevitable downfall.

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CONTENTS

Departments

Cover drawing
by Nicholas Egon Jainschigg

In lumine tuo . . .

Friends of the Earth, an international environmental group, recently announced the winner of their "Environmental Hero of the Year Award":

> All the news out of South Africa isn't grim. According to the *Natal Mercury*, a game ranger being charged by a black rhinoceros refused to use his gun and allowed himself to be gored because he realized the rhino belonged to an endangered species. "I watched her rush forward. She dropped her head, and I knew she was going to hit my legs," said Dave Reynolds. The rhino slammed Reynolds to the ground, smashing his legs and tearing open his right thigh. Reynolds is still recuperating from his wounds.

Such is the nature of the bizarre, nonsensical modern-day don Quixotes who romp around our world. Ah, you say, but there are no black rhinos on Manhattan, and surely we, the nation's intellectual elite, are free from such behavior here at Columbia University. Oh, dear reader, how I wish I could agree! But everyday on our Ivy League campus we see those who undauntingly face their own imagined black rhinos.

I speak of our student government. Steve "Quixote" Cancian, Stu "Sancho" Gallant and their merry band roam our Morningside campus in a romantic trance in search of . . . the *new cause* to announce and defend. This semester they have turned our attention to issues of military recruitment, S.D.I. research, and humor publications. Each cause more glorious than the last, each battle fiercer, each enemy more evil.

The Marine Corps., enforcer of America's imperialistic and hegemonist policies, must be banned from our pristine academic environment; professors with the audacity to believe

that a space-based defense system might have some merit (and I say "might" for, after all, they are still *researching* it), will be shot; magazine writers poking fun at a segment of the University's population should be analyzed at length by a professional and then hanged . . .

What our brave and noble leaders have forgotten in their monumental struggle is that eventually the rhino catches up, that Quixote loses all, that they will be gored. And here at Columbia the rhino has already hit.

Unfortunately, however, it has not been Steve or Stu or any of their crew who has felt the terrible blow. They plan to spend their upcoming summer travelling the country in a van to continue their quest; their trance has not yet worn off; they escape before the blow is fully felt.

But the blow is to be felt, and felt hard. It is each and every member of the student body that takes the miserable shock in reparation for the leaders' behavior. You see, in this last year student government leaders, with a few notable exceptions, pursued their romantic visions at *our* expense. They refused to spend a few hundred dollars on a party for the students as there are "starving people in Africa"; they put issues like improved athletic facilities on the back burner as "student awareness issues" took precedence in their minds.

The crucial problem here is not even the ends they choose to pursue: there are starving people in Africa who do need our help, and there is a need for "student awareness" on a number of concerns. The problem lies in what *means* are employed to their goals. The means our Quixotes have employed, sadly enough, is the student government.

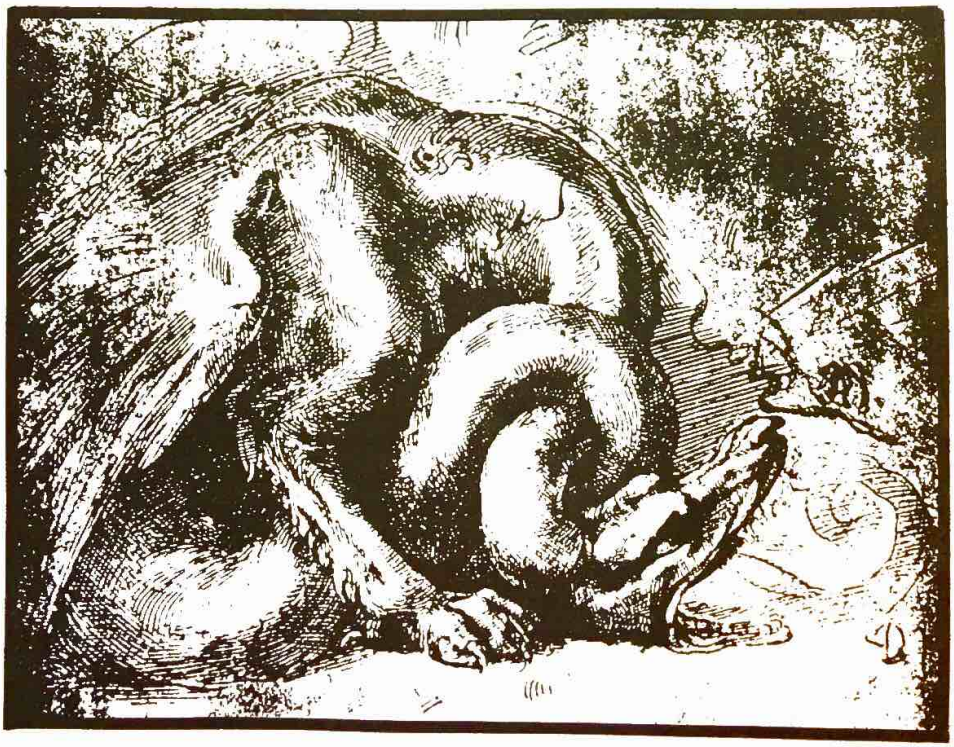
One has to wonder if they have ever ventured from their cubicles in Jay or River to the northwest side of campus to the Earl Hall Center. There, literally dozens of service organizations exist—ranging from religious and cultural groups to community outreach and world-wide hunger relief programs. Earl Hall qualifies Columbia as a unique institution in providing students so many excellent *means* to "raise student awareness" and feed the hungry. And students recognize this: Earl activities (e.g. the Big Brothers/Big Sisters) are the most attended on campus. *Here* is the proper vehicle for our societal concerns.

Our student government, though, has persisted in its own quest—one that is a *futile act of duplicity*. At best it has accomplished as much as Earl Hall programs; at worst, and as I suspect, it has done little but pad a few very sorry resumes.

This, however, is not a doomsday call for the abolition of the Student Council. Indeed, Columbians acutely need a strong Student Council. But the key word in that title must become "student." A student government exists to promote student life and foster a sense of community. In the heart of Manhattan, amidst the craziness of city life, we should be able to find in our school a positive campus atmosphere. We have all heard from our friends elsewhere of the "collegiate life" and, though we have freely chosen not to attend State U., we need not necessarily be denied at least a taste of "college."

There is a need for Earl Hall. And there is a need for student government—one focused on student life, social activities, book co-ops, better security, a more involved Columbiafest, and improved relations with Barnard. Let us make emphatically clear this distinction for the incoming officers of our Council so that we may not once again be the unaware victims, gored by the fancies and delights of irresponsible leaders.

—N.M.T.G.



Bloated rhetoric

ties you in knots and renders

you worse than bestial.

The Morningside Review

can cure all that,

thank God.

Letters

To the Editor:

And you wonder why Women's Center representatives are reluctant to expound their views on "important women's issues" in your magazine? Any journal that would run the headline "Barnard Girl Makes Good" with an article on Jeane Kirkpatrick hardly deserves serious consideration by anyone concerned with important women's issues. The headline is insulting to all Barnard women, belittles Jeane Kirkpatrick's accomplishments, and illustrates your editors' attitudes towards successful women in our society. Combine this with a piece mocking both sexual harassment and gays ("A Columbia Fairytale") on page 13, and a bigoted, stereotypical illustration on page 11, and think again about why women concerned with women's issues are reluctant to take you seriously.

—Jacqueline Shea Murphy
BC '87

Jacqueline Shea Murphy is the Editor-in-Chief of the Columbia Daily Spectator.

The editors reply:

The *Review* staff does not "wonder" why the Women's Center representatives would not put forth their views on important women's issues. The reason seems rather obvious: the Women's Center would prefer not to engage an MR editor in intellectual debate, but would rather have its views go unassailed, etched solitarily in stone. Ms. Murphy's letter, in the opinion of the *Review*, exemplifies such an attitude; it attempts to focus on MR's treatment of women and women's issues, but not a word of the letter concerns itself with the analysis in the article on the women's movement ["Individual Rights and Today's Feminist Movement"]. Instead, Ms. Murphy chose to comment on three other items, one of which has *nothing whatsoever* to do with women's issues, and two of which are interpreted in a manner which seems to lack a great deal of thoughtful reflection.

To say that the piece entitled "A Columbia Fairytale" mocks sexual harassment is completely outlandish. There is nothing funny about *true* sexual harassment, something which the blurb in question *does not* depict. Do people no longer have the right to criticize (and yes, even ridicule) that which they believe to be wrong? Is criticism of a lifestyle, valid or invalid, now considered "harassment?" If so, then all Marxists should be reported to the Administration for harassing the "bourgeoisie."

As for Ms. Murphy's comments on the title of the Kirkpatrick interview, Mrs. Kirkpatrick herself did not think the title "belittled her accomplishments," nor did she find it "insulting." Also, it is interesting that Ms. Murphy implies speaking for "all Barnard women" on this matter. The *Review* would prefer to let people speak for themselves; even if many Barnard students do agree with Ms. Murphy's assessment, certainly there are some who realize that the title was tongue-in-cheek.

Mr. Pride's illustration on page eleven *is* stereotypical: it is stereotypical of a woman who believes that her "success should not have to be achieved, but should be guaranteed as a right," as Ayn Rand said. This does not mean that the cartoon stereotypes *all* women—*certainly* not. Most women do *not* believe that their success should be guaranteed, and the drawing is not relevant to them.

Ms. Murphy's comments resemble those often characteristic of the far left at Columbia: no substance, no actual analysis; merely rhetoric, and empty rhetoric at that.

—A.L.L. & G.R.M.

The Libertarian Alternative

Andrew L. Levy

In contrast to all other thinkers, left, right, or in-between, the libertarian refuses to give the State the moral sanction to commit actions that almost everyone agrees would be immoral, illegal, and criminal if committed by any person or group in society.

—Murray Rothbard, *For a New Liberty*

[A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified . . . any more extensive state will violate persons' rights not be forced to do certain things, and is not justified . . . [T]he state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their own *good or protection.*

—Robert Nozick, *Anarchy, State, and Utopia*

Those who advocate laissez-faire capitalism are the only advocates of man's rights.

—Ayn Rand, *Capitalism: the Unknown Ideal*

As is evidenced by the response to my last article [Individual Rights and Today's Feminist Movement], the political philosophy of libertarianism is one which is greatly misunderstood. I have been called everything from sexist (although I support ERA), to misogynist, to fascist (which would be amusing were the accusation not so pathetically unintelligent and immature). Therefore, in a sorely needed effort to educate those people at this esteemed university who believe that the only legitimate debate is that which is between the left and far-left, I offer an alternative, a manifesto, if you will, for modern libertarianism. Libertarianism is *not* synonymous with what is currently considered conservatism, although many people believe this to be true; in fact, it is *diametrically opposed* to many tenets of Conservative thought. Libertarianism is, however, exactly what its name suggests: a philosophy concerned with individual liberty and personal freedom. Indeed, it stands alone in its absolute adherence to these concerns, despite the lip-service paid to these same concepts by other political philosophies, including modern-day liberalism, perhaps the most offensive pretender to the throne. What libertarianism offers is a coherent and logical alternative to conservatism, the modern bastardization of liberalism, and every form of collectivism.

The most basic principle of libertarianism is the belief in the natural right of every human being to life, liberty, and property, or as John Hospers states in his book *Libertarianism: A Political Philosophy for Tomorrow*, the view that "every man has the right to be free." Freedom is here defined in its fundamental sense as the *absence of coercion;* no person has the right to force his views on another, no matter how valid he considers the reason. This axiomatc principle is unique to libertarianism in that while other philosophies agree with it to some extent, none make the necessary moral leap to the absolute. A libertarian firmly believes that there is no justification whatsoever for violating any person's rights, i.e., using force or the threat of force against them (the only exception being retaliation—this is not a "turn the other cheek" philosophy).

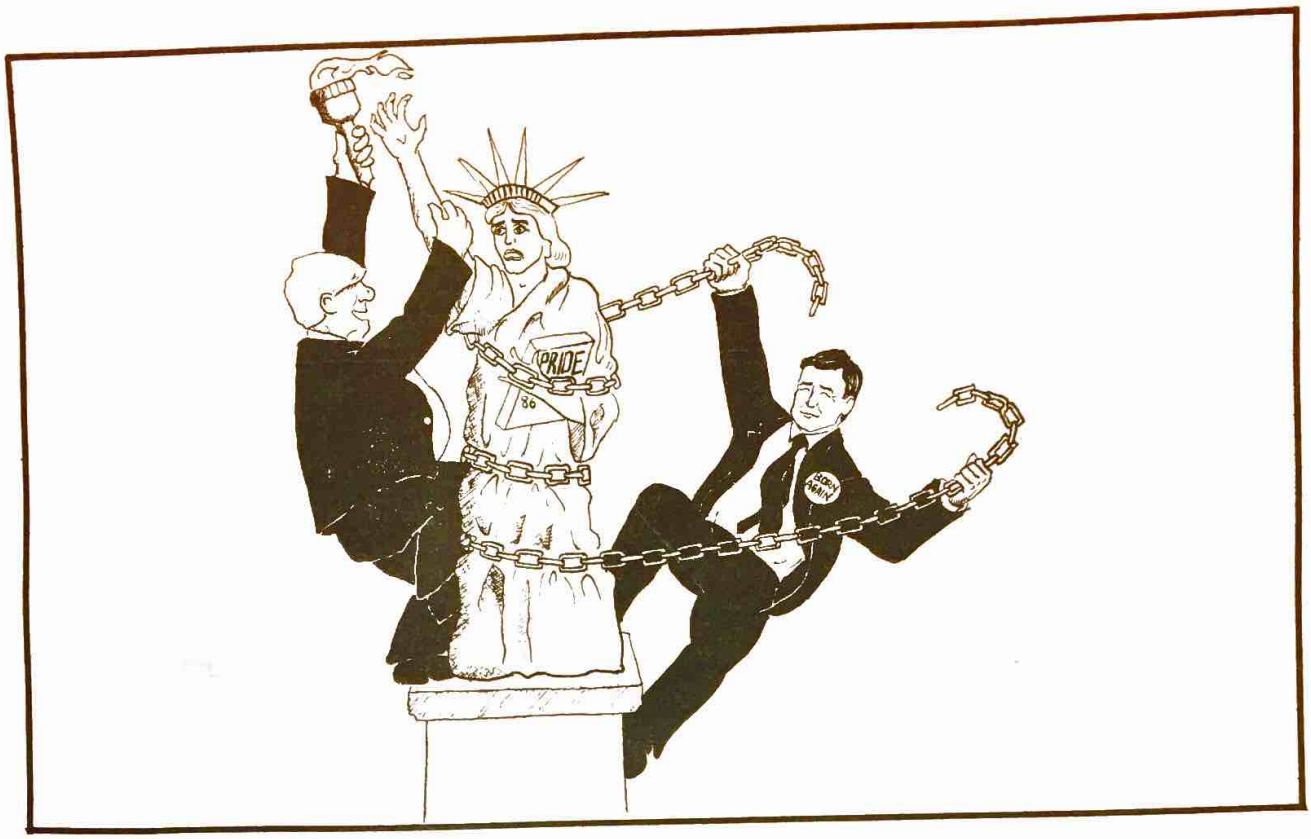
The question now arises as to where these rights come from. For a libertarian, the answer is probably not God; libertarianism is generally an atheistic philosophy which does not accept what it views as the irrationality of religion as justification for its moral stances. Instead, it is the libertarian's position that man possesses these rights *because he is a man.* Man possesses the right to life because the life in question is his, not someone else's. As Ayn Rand states in her thesis on *Man's Rights*, the right to life can be translated into

> the right to engage in self-sustaining and self-generated action—which means: the freedom to take all the actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life.

Man is, for the most part, unique among all creatures: he is dependent primarily on his intellect for survival. Therefore, he must act on his own judgment if he is to survive and flourish. As John Hospers states:

> [M]an . . . has a distinctive method of survival, and that is the use of his mind. . . . [a]lone among the animals, what happens in man's life is the result of *choices*, choices which he consciously makes. Man alone can promote his life through thought, and man alone can act as to destroy himself. But whichever he does, he does it by virtue of his distinctive nature as a rational animal, that is, an animal capable of reason.

From this basic axiom flows the rest of libertarian philosophy. The right to liberty (frequently denied by conservatives, always denied by socialists, communists and fascists) is merely the right to decide for oneself the best means of one's own survival, free of unauthorized coercion from others. The right to property (denied by present day liberals and all collectivists, usually but not always respected by conservatives) is merely an extension of the right to liberty (itself an extension of the right to life): it simply means that the product of a person's labor belongs to that person, and that person alone, unless he freely decides to share it. The right to property is the right to determine how one is to lead one' life, and the denial of this right is the deprivation of one's means of survial. Nathaniel Branden, ex"disciple" of Ayn Rand (probably the single most important modern libertarian philosopher),



summed up the necessity for the recognition of the right to property in his book *Who is Ayn Rand:*

> Without property rights, no other rights are possible. If one is not free to use that which one has produced, one does not possess the right of liberty. If one is not free to make the product of one's work serve one's chosen goals, one does not possess the right to the pursuit of happiness. And—since man is not a ghost who exists in some non-material manner—if one is not free to keep and consume the products of one's work, one does not possess the right of life.

Observe that this philosophy places the libertarian on different "sides" of the political specrum, depending on the issue in question. For example, the libertarian is against gun control, the regulation of businesses by the government, taxation, public education, and the welfare state. All of these positions, if taken alone, would mark the libertarian as a staunch conservative. However, the libertarian is also against all anti-drug and prostitution laws, as well as any laws which seek to regulate the private sexual practices of consenting adults; in addition, he views the draft as slavery, and is generally isolationist in foreign policy. While this may seem inconsistent to many, it is in fact, as Murray Rothbard writes

> . . . virtually the *only* consistent [position], consistent on behalf of the liberty of every individual. For how can the leftist be opposed to the violence of war and conscription while at the same time supporting the violence to taxation and government control? And how can the rightist trumpet his devotion to private property and free enterprise while at the same time favoring war, conscription, and the outlawing of non-invasive activities and practices that he deems immoral?

What this boils down to is the reality that throughout history, it is the State which has been the largest aggressor against individual rights. Perhaps nowhere is this currently more evident in America than in the role the State plays in regulating and corrupting the free market. Businesses are told what they can and cannot produce, who they can and cannot hire, and what they can and cannot charge for their products or services. This is usually done in the name of the "people," the term always used to connote the faceless masses who apparently have the right to control the lives of the productive people of the world. Consider the following:

> If a small group of men were always regarded as guilty, in any clash with any other group, regardless of the issues or circumstances involved, would you call it persecution? If this group were made to pay for the sins, errors, or failures of any other group, would you call that persecution? If this group had to live under a silent reign of terror, under special laws, from which all other people were immune, laws which the accused could not grasp or define in advance and which the accuser could interpret in any way he please—would you call *that* persecution?

If the group being written about was the majority rather than the minority, this would sound uncannily like the current situation in South Africa, with the blacks characterized as the people in question. However, add this next sentence and the group about which is being spoken becomes clear:

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How the West Was Lost

W. Dean Pride

The real questions are: How do we get the federal government off our backs? We feel about the federal bureaucrats as the peasants used to feel about the baron in his palace. Now the palaces are along the Potomac, and the barons are the bureaucrats who inhabit them. The serfs are rebellious . . . We want to be free. We don't think we have to bargain for freedom. We thought we were guaranteed that freedom. What we seek is the opportunity to live our lives and make our own decisions.

—U.S. Senator James McClure, Idaho

Imagine, if you will, this scenario. Imagine a vast, beautiful expanse of land, with a sparse population. Imagine that this massive, rolling, thundering territory is rich not only in natural beauty, but in natural resources as well.

Imagine that most of the inhabitants of this land lead tremendously difficult lives, that these people long ago forsook the rudiments of what we call "civilization." Imagine that they saw the opportunity to claim better lives for themselves and pursued it. Imagine that the members of this rugged folk staked everything on their survival.

Do these people seem at all familiar to you? They should. They are Americans.

Let our minds wander further. Let us assume that these people, these "Americans," are deeply concerned with liberty. They have formed local legislatures with elected representatives, in order to address the people's concerns, and to enact laws for the protection of the people and their land.

Let us probe even deeper. Suppose that the central government, the sovereign to which these people are subject, is thousands of miles away. Suppose this government is virtually deaf to their needs, their concerns, their protests.

Let us further suppose that this government, seeking to advance the "wealth of the nation," forms an unspoken alliance with leading industrialists, in order to extract the natural wealth from this vast territory. And during the extraction of that wealth, the people are exploited; government sponsored monopoly runs rampant and free enterprise is shelved. None of the extracted wealth goes back into the land or back to the people; it all goes to distant landlords. The edicts passed by local legislatures are evaded, even blatantly ignored. the sovereign, in effect, sanctions the destruction of this beautiful land and its sparse population.

The scenario should be all to familiar by now. It fits perfectly the situation of the New World colonies in the 1770's. Who would say the actions of the British government were not imperialist? Who would say that the colonists were not justified in seeking economic and political self-determination?

The truth is, no one would say that.

However, the scenario described above is also the situation currently facing the states of the American West. And whenever Westerners cry out for greater self-determination, their pleas are either dispassionately ignored or cruelly rejected.

Westerners are growing increasingly impatient with this callous treatment. The "Eastern Establishment" may soon be surprised to find the West utterly unwilling to accept such blatant disregard for local traditions and values. Who today would deny that the actions of Potomac politicians are colonialist? Who would deny that the West's growing exasperation is justified?

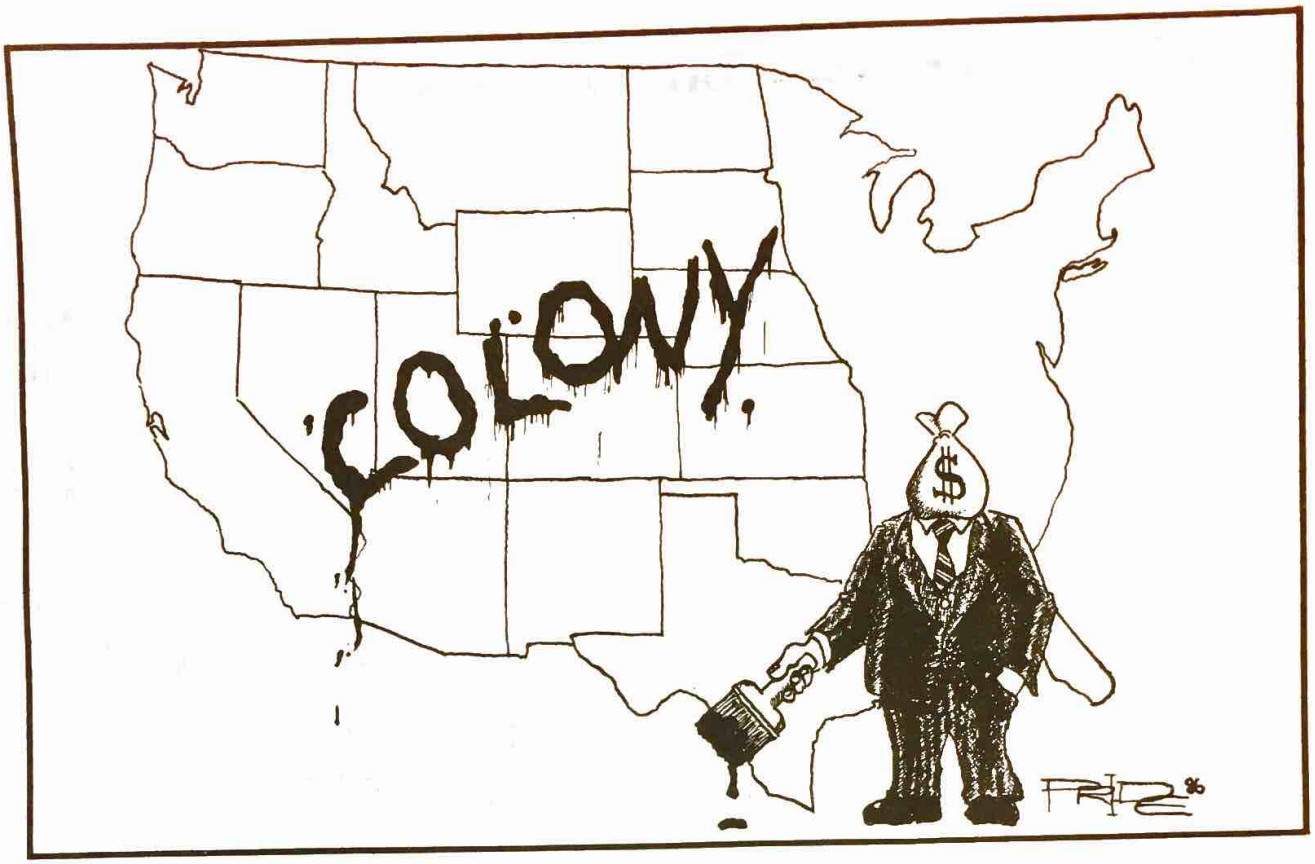
Unfortunately, many easterners would do just that, and would even go so far as to dismiss the West's concern as "paranoia." Westerners are far from paranoia, far from outright rebellion; what they are demanding is not secession, but simply a greater voice in their own destiny. Many easterners, though, believe that the affairs of those living on the other side of the Mississippi are trivial.

For example, in a recent argument with one of my friends I said that the concerns of my home state, Colorado, were not being adequately addressed by the federal government. My friend, a liberal from the East, was horrified. He told me I was "paranoid" and proceeded to give me a long lecture about how New York's poor were the only people being truly neglected. If I wanted to see a real example of people's concerns not being adequately addressed by the government, he said, I should drive through Harlem.

Harlem's poor shouldn't take priority over Colorado's needy just because the former live on this side of the Appalachians, I replied. My friend dismissed that, saying "you guys have the oil/space boom." I was then denounced for being "divisive," for trying to make this and "East versus West thing."

His argument, which typifies the easterner's attitude toward the West, is both misinformed and down right arrogant. The oil and space boom has been declining for almost four years. Ask the 500 people who were laid off last year by StorageTek in Longmont, Colorado, if they are prospering. Ask the thousands of people whose jobs were eliminated in Parachute, Colorado in 1982 if their needs aren't as important as anyone else's.

As for being "divisive," I'm a little tired of being called a "hick," and being told that we Westerners are too dumb to take care of ourselves. If showing a little regional pride makes me "divisive," then I am guilty. If suggesting that we Westerners understand better than the Eastern Establishment how to solve our own problems makes me "paranoid," then



I should be locked away.

History shows that the West's fears are justified. For over a century the dreams and destinies of Westerners have been controlled or stifled by men in New York board rooms. In the 1800's, the federal government cleared the way for eastern corporations to shoulder aside the small entrepreneurs of the West. Those enterprising pioneers, who embodied the American spirit, who had the raw courage to tame wild land, found the land and their dreams snatched out from under them.

This plight is best exemplified by the exploitation of Western farmers by the railroad companies, with the sanction of the U.S. government. In the mid-to-late 19th century, Congress granted large amounts of Western land to eastern-based railroads, who in turn sold these plots to farmers at exhorbitant prices. A virtual monopoly on shipping and storage facilities further enabled the companies to grind huge profits out of confused, frightened settlers.

Farmers were not the only Westerners to feel the heavy hand of eastern colonialism. Western miners saw the doors of opportunity closed to them by Congress, who in 1866 and 1872 passed mining laws favorable only to big eastern corporations. The ranchers and cowboys of the Old West, far from fitting the stereotype of the "independent individual," found themselves bound to myriad companies in the East and even abroad. Colorado Governor Richard Lamm and Dr. Michael McCarthy eloquently state the problem in their book, *The Angry West:*

> The history of the West, in many respects, is a history of exploitation. From its very beginning, the life of the West never has been its own. Westerners settled the land, lived on it, died on it. But they seldom owned it. Small prospectors found its gold and silver, but it was eastern corporations . . . that seized the field — and fortune — from them. Sodbusters nested on the prairies and built a civilization out of dust. But it was cattle kings and eastern syndicates that dominated their land, that bled them of their profits.

Lamm and McCarthy continue:

> Throughout its history, the West was filled with little men with big dreams. They blazed the trails, dammed the rivers, built the cities. But it was eastern power—mining combines, cattle cartels, railroads, banks, smelters, and politcal coalitions—that ruled.

This same eastern arrogance towards the West continues in this century. It was seen in 1979, when President Carter proposed broad new energy initiatives, designed to alleviate U.S. dependence on foreign oil. Among other things, his plan called for the creation of a federal agency, the Energy Mobilization Board, whose purpose galled Westerners.

The EMB, as envisioned by Congressman John Dingell of Michigan, would be able to *avoid* local environmental laws in its search for potential energy sources. As Lamm and McCarthy put it, Dingell "seemed to savor his role as Western antagonist, ignoring complaints that the basic tenets of federalism were being uprooted." Angry Westerners saw the attitude of Dingell and other easterners as the "arrogant nullification of two hundred years of constitutional history."

Whether or not Carter himself was arrogant, the sheer

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The mr Interview: Rafael Salas

—Jose Perez and Piero Tozzi

Mr. Salas has been Executive Director of the United Nations Fund for Population Activities since 1969 and is also the Under-Secretary General of the United Nations. From 1966-1969 he was the Executive Secretary of the Philippine Republic, the senior cabinet post.

MR: You were the Executive Secretary of the Philippines from 1966-69, a position of high authority. You left, however, to become head of the United Nations Fund for Population Activities (UNFPA). At that time, how did you find the transition?

RS: Well, I had worked with the government for a long time. The main difference is that the Philippines is a culturally specific country. You are dealing with Philippine culture. The first thing you realize when you work in an international organization is that it is a system where 159 countries particiapte. They are culturally diverse. But my work is concerned with population and in giving assistance to countries. The Philippines is a developing country, any experiences are started with developing countries. And so there is both similarities in the work I do and differences. The difference being that this is a multinational system.

MR: What are your duties as Executive Director?

RS: I am head of this Fund, which is the largest multilateral organization funding developing countries in population in the world. I have to manage this fund as well as to see to it that the directives given by our governing bodies, one of which is composed of forty-eight countries called the Governing Council, are carrried out, that this organization is managed efficiently, economically and at the same time responsive to directions of this multinational governing body. The UNFA is an organization which assists developing countries in terms of population. We have transferred in the course of fifteen to sixteen years 1.4 billion dollars of assistance. We are currently involved in thirty-four countries. This is basically a transfer from developed countries, who give voluntary contributions to UNFPA, at about 140 million dollars per annum, to developing countries who formulate their own views. This organization is neutral. It doesn't prescribe any type of population policy to any country. It leaves it to the country to decide after knowing the facts about their population situation. Therefore, one of the main activities is census taking. You have to take a census to know the structure and composition of the population. One of the accomplishments here is that we gave assistance to twenty-two African nations to conduct their first census. Many countries in Africa have never had censuses. So there is some validity in global population data today, much of which is due to the assistance of this fund. Now the question of how population is to be taken into account is left to the policies of individual nations. Not all countries want to lower fertility. It's a common mistake for the the layman to think that we assist only countries that want to limit fertility. In the developing world, three percent of all governments want to increase population, some twelve countries, which we also assist. Eighty percent want to decrease the fertility rate, and some seventeen percent are indifferent to the question of growth. They are concerned more with migration, urbanization, health care programs, low infant mortality rates. These are subjects that they are working on and to them population growth is satisfactory. Therefore you have the developing countries divided. The fund assists, if it is within our mandate and we have the resources, these countries. Our largest program is India, which we give five million dollars a year. We have a program of ten million dollars per annum in China and we have projects of varying sizes and amounts in all the rest of the 134 developing countries.

MR: At the 1984 conference on population at Mexico City, the United States found itself in opposition with a number of countries. In an interview with *The Morningside Review*, Jeane Kirkpatrick spoke of the UN as dominated by bloc politics, a multiparty system where the United States lacked a party. Was the United States isolated at Mexico City?

RS: Well, that question must be separated into two parts. The question of bloc politics occurs mostly in political debates. The conference in Mexico was on the specific issue of population and there was hardly anything political there. So the bloc politics as such really didn't occur. It was a question of issues. The U.S. was alone in the view that population was not important, that is why it got into all sorts of problems with other countries. It wasn't because of bloc politics, but because it took a view that was against the views prevailing in that conference of more than 140 countries. And the U.S. view was that population is not really important, that there is no need for governmental intervention. What perplexed the delegates was that this was a complete turn in the policy of the United States for sixteen years, which kept telling countries that population was important for development . . . you must look at it as a stabilizing factor, you must do something about it, you must have policies and programs. In fact, the U.S. is one of the leading donors to the Fund, precisely to encourage countries to look at population as an important factor. When the U.S. went to Mexico it contravened and completely reversed its position. That is why it got isolated, not because of politics or power blocs, but because it took issue against what it has

been saying for sixteen years, which supposed all of the developing as well as the developed countries. There was one vote on an issue, where they were the only country to be for it, along with Israel.

MR: The U.S. was arguing that developing countries with low birth rates tended to be those that stressed the private sector over public, private ownership land over common . . .

RS: Well, countries are free to decide on their own which economic theory to pursue. So we have diverse economic structures throughout the world. There are countries that are bound to free enterprise, there are countries which are centrally directed, like socialist countries are, there are a terrible number of mixtures. So I think when you think of population vis-a-vis the economic policies that they pursue, it depends on the country. While population is always linked to development, it does not mean that family planning needs a specific view. For example, Singapore has been very successful. It has a free enterprise system, it has succeeded in industrializing, with one of the highest growth rates of that region of Asia. And it's also very successful in a population program that reduced fertility from a high of almost three percent some decades ago to a very low 1.1 percent. It is because they merged population programs with very dynamic economic planning and free enterprise. On the other hand we also have the example of Cuba, a socialist country with a centrally directed economy that has an equally good record of reducing its population growth rate, from a high of three percent to one percent, which is a remarkable record. What this points out is that regardless of the economic view, if population is well integrated into the developmental plans, examples of success are available.

MR: Efforts to induce population control by outside agencies have sometimes been viewed with suspicion in certain traditional societies . . .

RS: That is a very obsolete view. We have had two international conferences a decade apart, and we have worked out a world population plan of action as a conclusion of this. There is consensus. There is resistence by countries only if it is prescribed by one country to the other. It is not correct to say it's resisted, unless one country tries to force its view on another.

MR: The Agency for International Development (AID) has been criticized . . .

RS: Yes, well they choose countries which to assist. We are assisting 134, they are assisting fifty-four to fifty-eight. Some countries reject aid if it comes from one country to another because it gets tied up with your political policies. That's the difficulty. You have political objectives which may not be tied to population assistance. And national leaders confuse this as a means to other political ends, which does not occur with the U.N. because we are neutral.

MR: I suppose among the political leaders of these countries there is consensus, but how about among different sectors in their societies, like the clergy . . .

RS: Well that is why we go again to the principle of sovereignty, which saves us. We go to the countries and we tell the leaders to decide. So there is hardly any conflict with religious leaders, because the assistance is tied up with the views of the countries itself. Thus we assist Catholic countries as well as socialist. We collaborate with them, although there are some elements in those societies which might object. But we leave it to the governments, so we do not come into conflict. The leaders solve it themselves, we don't direct them what to do. This is both a religiously and ideologically neutral position.

MR: It's often cited that 2.1 children per woman is the number needed to replenish the population. Is this correct?

RS: Yes, this is the replacement level that we ought to have, because many women don't get married, or they die, so a little more than two is necessary for replacement. That is the objective of some countries but not all. There is a very large difference. In Kenya women bear 7.8 children on the average, so you have the highest growth rate in the world, and you have a very low number children in the case of Germany, which already has negative growth. If you stretch it out for at least seventy years, you will stabilize your population at 2.1.

MR: It seems however that most Western, or Northern nations are failing to meet that number. I think in the U.S. the rate is 1.8, Japan 1.4 . . .

RS: Well there has been no definite population policy in developed countries. Why? Because you approach this historically. You went through a long period of transition and you had countries that had high growth rates. Actually the history is something like this: biologically, there has always been an increase in population, but because of disease and death, people have had to have large numbers of children. Many of the offsprings died, until science intervened. Sometime, maybe in the 18th or 19th century, we began to improve

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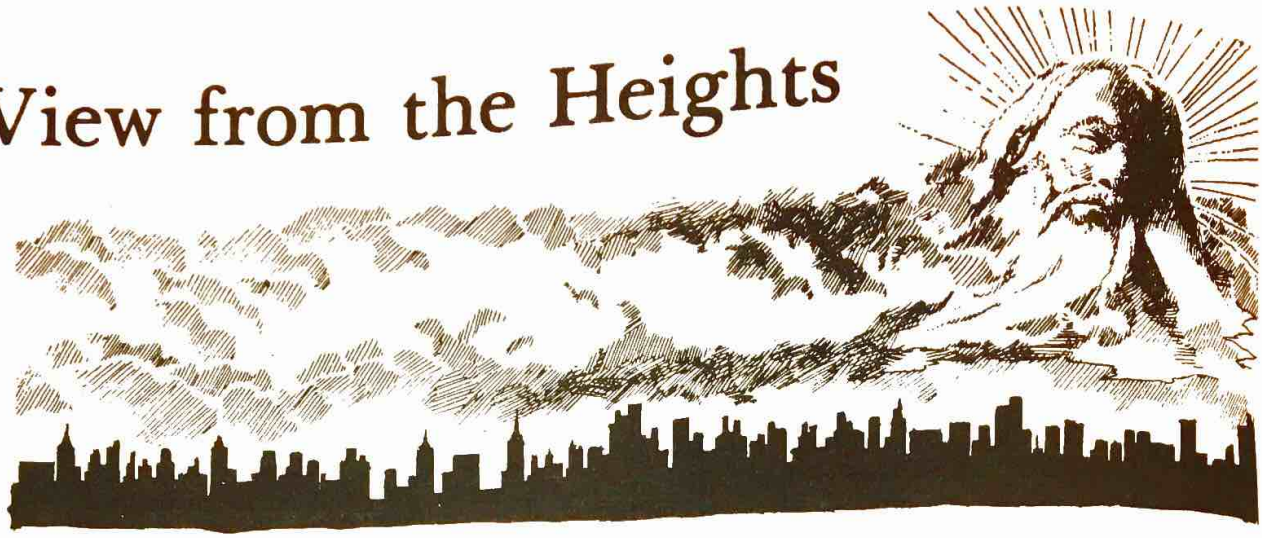
View from the Heights



Making the Grade

Choose the answer which most closely represents reality:

A) "Students and faculty angry and dismayed over Libya bombing."
—Headline; *Columbia Daily Spectator*, April 15, 1986.

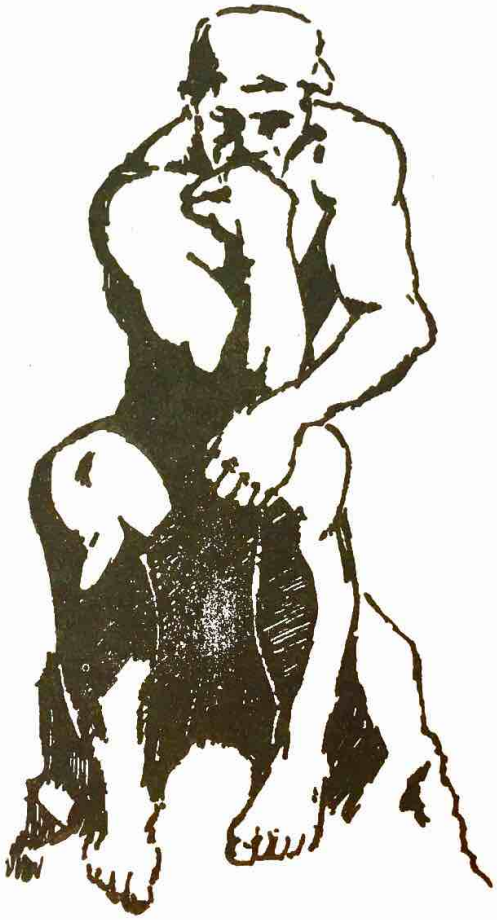
B) "Students responded (to the recent U.S. military mission in Libya) primarily with approval."
—Astute observation of a *Spectator* reporter attending a speech by Mayor Koch at Columbia; *Columbia Daily Spectator*, April 16, 1986.

C) "Wrong Answer"
—Headline of a *Spectator* editorial condemning the bombing of Libya; *Columbia Daily Spectator*, Apirl 18, 1986.

If you chose (B), welcome to reality. If you chose (A) or (C), there's an editorial position waiting for you over at *Spec.*

Workers of the World . . .

A group of non-union, non-calloused, non-workers engaged in a semi-spontaneous "workers" protest, expressing their solidarity with Libya's dapper charmer, Colonel Qadhafi. Meanwhile, a group of construction workers, obviously not sporting the consciousness of the proletariat, unfurled a banner proclaiming: "USA All the Way!" Insensitive brutes!!



Poet

Sad ambitious sick girl
gone these twenty fat years—
years fat with the bodies of peoples
not needed by other peoples.
I can just see and hear you
bitterly offended poems
of a nasty now. Bright girl
who always passed exams well
at school—as in everything but living.
I counted up your dead compeers
among poets. They came out at
six large talents, most of them
dead from their own hand since you
died.
Not one of them much over fifty.
But your letters to your mother
are so dutifully daughterish.
I don't know where the poet hid
and came out from—the oven maybe,
with a batch of arval bread.

Bruce Beaver
Quadrant

Anacreon in Heaven

Beer, my God, the happy hour's news
When I with thee commune, and thee
with me.
It's at the threshold of this blessed
time
I most appreciate the magic's twine,
And Vine! yes vine, the thou, thum,
tho
Thickering thrillness thake
Thrice blessed, blessed blotto . . .

Tarquin

A Thrilla In Manila

"People power" in the Philippines has spread to encompass the bar girls who soothe U.S. servicemen's leisure hours, as discovered by *New York Times* reporter Francis X. Clines, whose in-depth March 31 article may cause editor Abe Rosenthal and publisher Sulzberger to take a closer look at their scribe's expense-account statements:

> The bar girls who thrive on the business of American servicemen took up the cry of "People power!" today as they stormed a civilian picket line and reopened the gates of Clark Air Base.
>
> Shouting and throwing rocks, hundreds of women succeeded in freeing the servicemen from a weeklong restriction to base that has deprived them of the honky-tonk comforts just beyond the gates.
>
> "I win! All the girls win!" said Wanda, an obviously exhilarated dancer from a bar called the Flying Machine, after a crowd of prostitutes, taxi drivers, hotel attendants, bartenders and hostesses put a few hundred pickets to flight in an exchange of insults, shoves, kicks, bottles and rocks.
>
> "Give us G.I.'s!" women shouted among cries of "People power!"
>
> "Where is our honey-ko?" others demanded, using a Filipino term of endearment. "Open the gates!"

Fascists?!

A fascist is anybody who, seeing someone else succeed where he failed, says, "Send the dirty Jew to a concentration camp!"

A fascist is a sailor who, seeing long hair of which he doesn't approve, says, "What that guy needs is thirteen weeks in bootcamp."

A fascist is a citizen who, seeing someone else read a book of which he doesn't approve, says, "Ban it! Send the publisher to jail!"

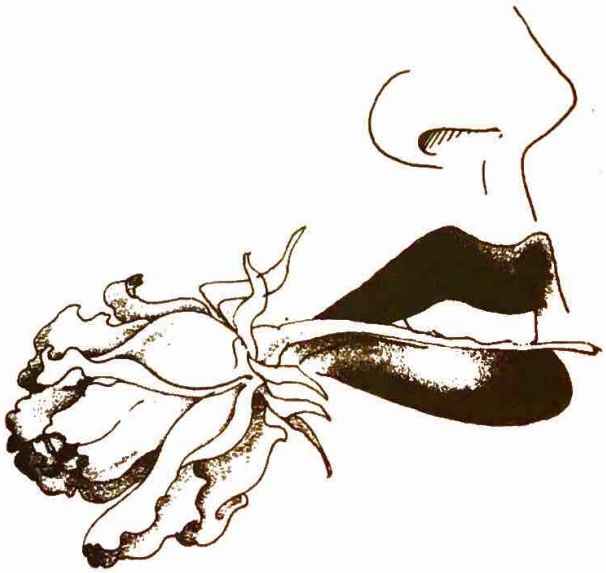
A fascist is anyone who, seeing a man working hard and earning money says, "He's getting more than we are — let's pass a law to take it away from him!"

A fascist is a student who, seeing the representatives of a chemical industry recruiting on campus, cries, "Let's chase the bastard off! We have the right to free speech but he doesn't!"

Hospers

The Best They Could Do

In a comment appearing in the *Columbia Daily Spectator* about Barnard College commencement speaker Governor Thomas Kean of New Jersey, commencement committee member Ellen Leavitt described Kean as "the only Republican I would condescend listening to." Where did Kean go wrong?



Coordinating Domestic and Development Economics

Brian Domitrovic

American prosperity depends on that of the Third World; domestic jobs rely on foreign markets and financial stability, which only are assured with an economically and politically sound Third World. Protectionism, Third World debt and oil are three issues that command domestic and international concern. The domestic economy would be enhanced most if the U.S. restrains from protecting home industry, and deals with these issues through stabilizing the Third World.

Economists have been lambasting protectionism since Adam Simth's days, yet trade barriers are still a predominant economic issue in America. Trade barries imposed on large exporters — perhaps Japan and Brazil — would, in the short run, produce more American jobs in the protected industries. However, the long term domestic impacts are adverse and well known: trade barriers would limit the incentive for the affected American industries to modernize; resulting inflation would hurt the vast majority of Americans whose jobs do not depend on protectionism; and, that inflation — not accompanied by an increase in overall output — coupled with the sloth of the protected industry, may lead to less spending and fewer jobs. Hence domestically, protectionism in the long term cancels the short run benefits while accruing disadvantages. Far-sightedness, then, dictates that America should not adopt protectionism.

But the harms to American industries extend far beyond these domestic impacts. Consider why industries lobby for protection: they cannot produce products at prices comparable to those produced abroad, shipping costs included. Sluggish, high cost industries demand trade restriction. Cheap foreign labor is not a primary cause for protectionism, but expensive American labor is. The United Auto Workers (whose product is constantly in need of protection) command a wage twenty-four percent above the national manufacturing average. Instead of propping up dead-end industries, as protectionism does, the United States needs to advance its industrial trailblazers — American industries expanding abroad.

These are the industries that protectionism undermines most. Third World exports (steel, shoes and raw materials are three primary ones) would bear the brunt of American protectionist chaff. Stifling these exports would devastate American multinational corporations (MNCs). The Third World accounts for nearly one-third or U.S. exports; restricting Third World exports would reduce its foreign exchange, which is so desperately needed to purchase American products.

And a host of U.S. MNCs are currently making profits in the Third World. Take away a primary source of income for the developing countries — the industrial democracies buy eighty percent of Third World exports — and the MNCs' profits will plummet. Progessive American industries realize that the U.S. economic growth outlook is somewhat constant and slow, a given for the most developed country in the world. Fantastic growth prospects are in the Lesser Developed Countries (LDCs), whose resources are large and untapped, whose investment potential is substantial and whose people are clamoring for better standards of living. The Business International Corporation identifies this danger: "The fast growth economies of the LDCs will provide major markets for MNCs in the next decade. But if protectionist action hinder these nations' exports, their development could suffer."

The challenge confronting America — from MNCs, unprotected industries, consumers, and the Third World — is to thwart protectionism. But already there is reason for alarm since U.S. tariffs and quotas already inhibit some fifty Third World exports, and bills are on the Congress floor to restrict key LDC exports such as shoes and steel. Eliminating protectionism assures domestic and Third World economic vitality. Likewise does solving the Third World debt problem.

In the 1970s, American banks lent uprecedented amounts of money to the Third World, hoping to facilitate quick growth. Today, however, the LDCs are burdened by their largest debts in history, and cannot boast the spectacular growth that the loans promised. The reasons are clear. Latin America, the region of problem debtors, owes $368 billion. Western banks did not lend these nations close to that sum. Rather, exhoribitant interest rates proliferated Latin debt at a high geometric rate.

Latin America ranks as the most powerful money vacuum. These nations borrowed in order to make capital investments, whose products would, in the long run, pay off the debt, and represent a great economic growth sucess story. The tragedy is that these investment projects occurred only on a very small scale. Christine A. Bogdanowicz-Bindert notes that "only about half the credits extended to developing nations were used in productive investments." Also, the interest rate compound coupled this effect. Citicorp, America's largest bank, made more money in Brazil (the world's largest debtor) than it did at home.

To be consistent, America must resolve the debt crisis. Clearly the most important step is restraining protectionism. Some Latin American nations earmark a percentage of their export earnings to debt payment, and all debtors finance their debt through export revenue. Therefore, restraining from tariffs and quotas directly translates into less LDC debt.

In the long run, America must restructure its plan and attitude toward the debt. Some of the debt may have to be written off. Millions of Latin Americans were promised prosperi-

ty with the loans of the 1970s, and many tasted artificially high standards of living made possible by the injection of the loans. But with the debt at its present sum — $800 billion for the entire Third World full payment cannot be expected for decades. Can we assume that a generation of Third World citizens, who have already sampled prosperity, will dedicate their lives to paying the debt?

No, the best we can ask is the plan that best recitifies the debt burden. Aside from shunning trade barriers, the most important step is more careful lending; lending that produces what the original loans offered — wise investment projects that get the Third World moving. Though lending to solve a debt problem may seem contradictory, careful lending can most effectively lead to payment of the original principal. The new lending would be injected into profitable long term investment projects, whose products would pay the new loan and some of the original debt. James Baker, the U.S. Secretary of the Treasury, has introduced a plan of new lending to the largest debtors that would lend to structural investment improvements. Mr. Baker has assigned the World Bank, along with American and European banks, to provide an additional $20 billion in new loans, in order to facilitate productive investments. His plan also realigns foreign exchange procedures to enhance debt payment.

Some may question the absolute urgency of resolving the debt situation. Economically, Third World improvement is consistent with American economic viability; politically, Third World stability is imperative to U.S. national security. The largest political issue in Latin America is the debt. A host of dictators have been ousted from Latin American nations after failing to ease the debt burden. In the most cases, they have been replaced by democratic regimes. The political urgency for the U.S. involves preserving the upswing toward democracy in Latin America. Brazil, now the world's third largest democracy led by first year president Jose Sarney, is precariously attempting to keep growing and exports high, and austerity at a minimum. It would be pernicious, perhaps shameful, if protectionism and debt apathy hasten a return to autocratic rule. Clearly, the success of American economic and political objectives depends on the resolution of the Third World debt problem. If the LDCs pay the debt, U.S. MNCs would gain profits (leading to more American jobs), and American banks would be more secure, leading to increased domestic investiment. Sound LDC economics would also foster democracy.

On paper, arguments noting the need for consistency are quite convincing; but applications can be tricky. Conveniently, we are currently presented with a test case for determining how global our economic and political visions are. The situation of oil in world markets provides the U.S. with a great opportunity to coordinate its economic and political policies.

In recent history, oil has been the key economic parameter. The OPEC price shock of 1973 chilled the haughty visions of the industrialized West and directly caused most of the bank deposits which later served as a capital base for LDC loans. Also important is the fact that the price of oil varies directly with American inflation. Hence oil's plummet — from $30 per barrel to just over $10 per barrel — calls for some analysis and management.

First the good news. Oil's slide is a windfall profit for American consumers. Americans are spending money previously relegated to oil purchases on other goods and services, an overall boost to American industry. Restrained inflation should nudge interest rates downward, encouraging more consumption and industrial expansion. Perhaps this individual boon could even ward off the forces of protectionism.

But the bad news is reckoning. American oil industries and their dependant banks are already flagging. But internationally, the problems are more acute. The nations most severly affected are smaller OPEC producers and non-OPEC producers who must accordingly cut prices. An alarming number of these oil exporters are debt-ridden nations, including Ecuador, Mexico, and Colombia.

Mexico is of greatest concern since Mexican-American relations are of utmost importance. Our objectives are universally linked — we trade not only products, but labor; and the U.S.'s much publicized Central American policy is justified by the threat of communism to Mexico. The drop of oil could exacerbate these linked relations.

Mexico foreign debt is second only to Brazil's, standing at $97 billion. Mexico inaugurated the debt scare when, in 1982, it became the first debtor to announce it could not meet its debt payments. Since then, Mexico has been a problem debtor, with political corruption and painful austerity measures limiting its growth potential. To add to the difficulties, oil accounts for 70 percent of Mexico's exports. With oil slashed by two-thirds, Mexico's foreign exchange account is devastated. Mexico may have to default again. But the U.S. can take certain steps consistent with its own economic health which will concurrently aid Mexico.

Vice President George Bush recently returned from a visit to Saudi Arabia in which he tried to tame, with the Saudis, oil's rapid decline. Citing harm to American banks and oil producers, Bush suggested that the Saudis cut production and raise prices. America should adopt a solution more sensible to its consumers and ailing friends, including Mexico. A tax on Saudia Arabian oil, say of three dollars, would subsidize American industry, and still would not restrict American demand. Meanwhile, the U.S. could devote this tax and other revenues to filling its strategic oil reserve, which it has been trying to do for years. The U.S. could buy this oil from Mexico at the inflated price. Coupled with an infusion of Mr. Baker's development loans, the U.S. could prop Mexico's foreign exchange while it provides capital inflow without hurting the American consumer.

Treating protectionism, LDC debt and oil in the best interests of the Third World confers and abundance of benefits to the U.S. Stifling protectionism leads to more American jobs through greater MNC profits and greater domestic consumption. Alleviating the LDC debt burden would help American multinationals, while it would enhance U.S. banks and investment. And controlling the volatility of oil would lead to similar benefits. Coordinating domestic and development economics guarantees the best course toward mutual prosperity for America and the world. mr

Books

Noah Scheinfeld, Piero Tozzi

The Siege—The Sage of Israel and Zionism
Conor Cruise O'Brien
New York: Simon and Schuster ($24.95)

The Siege: The Saga of Israel and Zionism by Conor Cruise O'Brien could easily be titled *Belfast and Jerusalem: Israel's Unending War as Seen Through Irish Eyes.* Although *The Siege* is a compilation of monographs rather than a work of creative history, its usefulness and interest value has been enhanced by this approach. O'Brien explains that as an Irish Catholic, a group which has suffered greatly and until 1921 did not have its own state, he can deeply empathize with Israel and the Jews. He combines this innate sympathy with his experiences as a journalist and member of the Irish Foreign Service. O'Brien's material is familiar but his vantage point is noticably fresh. Ocassionally, O'Brien's novel attempt to blend a comprehensive treatment of the whole Zionist enterprise together with his Irish experience causes him to draw syllogistic parallels between Israel and Ireland and overemphasize the role of personality to smooth the flow of his history. In spite of these problems, which are endemic to most wide ranging histories, O'Brien's work is a useful addition to the crowded field of Zionist literature.

The central thesis of *The Siege* is contained in its title: European Jewry from the 1860's until the end of World War II and the Jews in what is now Israel from the 1890's until the present have been under a sustained and relentless siege by their enemies. European Jewry was wiped out in the Holocaust ending one part of the conflict. In the Middle East, the war between Jews and Arabs goes on with no end in sight. The Arabs will not accept an independent Jewish state for a variety of religious, national and social reasons. Such being the case, Israel must never forget that it exists because of military might and can never trade land for peace.

This portrayal of the attack on Jewry in Europe and the Middle East as un unyielding monolithic force is really only partly true. O'Brien is correct that Palestinian anti-Zionism began in the 1890's and grew as Jewish immigration increased. Even before the Balfour Declaration, Palestinians demanded that the Ottomans end Jewish immigration to Palestine and stop land sales to the Zionists. In Europe such opposition did not exist. Between the wars the Prime Minister of France and the Foreign Minister of Wiemer Germany were Jews. *They* were fully accepted into European society. O'Brien for the most part ignores this. He peppers his account of European Jewry from the 1860's until 1933 with references to Hitler, tells us that Moses Hess in *Rome and Jerusalem* "fortells the destruction of European Jewry," and explains that the anti-Semitism of Nietzsche and Marr almost linearly fed into the Final Solution. Such statements make the "siege" of European Jewry complete and its destruction inevitable. In reality, no one saw Hitler coming; there were an infinite number of possible scenarios for pre-World War II European Jewry. O'Brien seems to foist England's unwavering, multicentury oppression of the Irish onto the history of European Jewry whose experiences were far more varied. O'Brien also appears to have accepted the accusation of early Zionist settlers that European Jews possessed a "habit of resignation," and hence did not accept Zionism and are to blame for their suffering. O'Brien rightly notes that the rise of Arab anti-Zionism was ineluctable, the invasion of their land by aliens made it so, but wrongly blames European Jewry for not seeing their own extinction.

O'Brien's views of Irish history effects other aspects of his work. He dislikes terrorism and finds the Stern Gang's, "extermism very close to insanity." From this evaluation, one can surmise that O'Brien is not a supporter of the IRA. Similarly, he finds the Jews of the Second Aliylah, who came to Palestine between 1904-1913 and provided most of Israeli leadership until the sixties as "harder, more puritanical, more ruthless" and less sensitive to the Arabs than the Jews who had previously immigrated to Israel. In such statements, one detects a tinge of the enduring enemity of Irish Catholics toward the stern, idealistic Cromwell and Protestants that he settled in Ireland. These kind of touches are nevertheless refreshing, for few authors combine a sympathy for Zionism with a recognition of the harsher side of the movement that founded the Jewish state. O'Brien's Irish perspective allows him to fruitfully combine these two elements.

O'Brien's popular approach to the Israeli history also has its problems. He frequently uses vignettes of important personalities to give his work color but which almost render them caricatures. They all seem to possess the kind of spontaneity which shows that *The Siege* is more a saga than a scholarly history. To O'Brien, Herzl is a second Parnell, who suddenly became a Zionist at the trial of Dreyfus. The Christian beliefs of Lord Balfour largely shaped his declaration. Moshe Sharett, Israel's first Foreign Minister, is a prig who in secret meetings with Abdullah of Jordan foolishly corrected the King on minor points of fact thus ruining the negotiations. Abba Eban is a stately diplomat who oft times plays the Cassandra role. Yigal Yadin, whose Democratic Movement for Change party helped the Likud and Menachem Begin com to power in 1977, is curiously absent from O'Brien's epic. Equally strange is O'Brien's assertion that a calculating Henry Kissinger encouraged Sadat to go to war against Israel in 1973. These vivid

thumbnail assessments of the key players in Israel's history make for interesting reading but have little validity for scholars.

Personalities and Irish parallels aside, O'Brien's assessment that Israel exists under constant and continuous siege unifies his work and provides its raison d'etre. In fact, the nature of these pressures is different. Many within Israel lack the "siege mentality" of which O'Brien speaks. O'Brien says that almost all Israelis supported the invasion of Lebanon as a just attack on a looming Palestinian threat. This is not true. Initially the leaders of Israel's Labor party supported the war half-heartedly as a geture toward national unity, but quickly demanded its termination. They did not want to attack since the interests of Israel were not threatened directly and immediately. For many Israelis, merely being surrounded by a threat was no reason to lash out against it.

O'Brien tells us that Israel cannot exchange land for peace. the chaotic nature of Arab body politic makes peace impossible and territorial concessions, especially on the West Bank useless. Today, modernization and fundamentalism are sweeping across the Middle East and bringing in their wake economic dislocation and political instability. Countries like Syria and Jordan cannot make a peace treaty with Israel because it would be the ideal rallying point for their religious opposition to use to overthrow them. Fanatics killed Sadat, Gemyal and Abdullah—Arab leaders who tried to make peace with Israel. The same could happen to Assad and Hussein and they know it. In the short term the constant state of war with Israel is a splendid distraction from domestic problems and hence Arab states are loath to abondon it. The Arab states are in no condition to make peace or receive or profit from territorial concessions.

What of the Palestinians who suffer terribly in their state of dispossession? They are racked by dissension. Their strange, stateless existence has made them prize unity over peace. The Palestinians reason, perhaps correctly, that to deal with the Israeli juggernaut they must stand together. Since no consensus exists on the West Bank, Gaza and their diaspora on how to deal with Israel they do nothing but lash out against the world through terrorism and kill the odd Palestinian leader who deals with the Jewish state. They too can not make peace in the near term and to thrust an independent state upon them might do more harm than good.

Ireland provides an accurate case in point of the difficulty of two "peoples" to share one land. The difference of religion obliterates the vast sameness of two peoples who are white and Western and have been living side by side for hundreds of years. There is no threat from the Irish Republic to invade the North but Protestants live in continuous dread. Middle Eastern conditions are far more ominous and less conducive to peace. Most of the Jews who live in Israel are newcomers having migrated there in the past forty years to escape persecution. They have displaced the Palestinians whose wounds have not had time to heal. The Palestinians refuse to accept the situation and with their Arab brothers strike out with terrorism against the world. Yet the Jewish state is a fact of life kept in place by military power.

One hopes that the pressing need for peace would prevail over the current bleak outlook of war, terrorism and nuclear bombs. Yet O'Brien is right, need cannot dictate peace. The intransigence of the Arabs continues leaving the Jews sadly to negotiate with each other as to how to achieve peace. There is no one to talk to.

—Noah Scheinfeld

The Ratzinger Report
Joseph Cardinal Ratzinger with Vito Messori
Ignatius, 197 pp.

The Holy Office of yesteryear was often shrouded in mystery, but Joseph Cardinal Ratzinger, Prefect of the re-christened Sacred Congregation for the Doctrine of the Faith, is quite forthcoming in his interview with Italian journalist Vittorio Messori, published in this country by Ignatius Press as a 197 page book. Belying the image of a stern *Panzer Kardinal*, as some journalists have labeled the former Munich professor of theology because of his defense of Catholic orthodoxy, Ratzinger is quite thoughtful and open. Through the interview he willingly expounds his views on some of the more divisive controversies regarding the interpretation of the Church in the modern world which have emerged since the Second Vatican Council. The only place where Ratzinger appears terse and close-lipped is when Messori presses him about the "third secret of Fatima," which some speculate concerns eschatological revelation which the Church has not made public for nearly seventy years.

Ratzinger begins by rejecting the political terms of "left" and "right," which is the context many outsiders see debate within the Church as being. Rather, in the words of Pascal, the church is "of another order which surpasses all rest in depth and height." Thus Ratzinger, who reemphasizes the utter incompatibility of Marxist and Christian ideas, which characterizes certain aspects of liberation theology in the developing world, is also able to criticize those voices invariably emanating from either Europe or America, which seek to change traditional Church teaching viz. Sexual mores as "stamped by the typical mentality of the opulent bourgeoisie of the West."

Ratzinger warns against turning the Gospel into a "Jesus-project," which deemphasizes the Divinity of the Second Person and thinking that right-practice (orthopraxis) can exist separately from right-thinking (orthodoxy). Those who wish the Church to conform its teaching with the spirit of the age while retaining the right to dictate morals to the faithful have forgotten that the Church can only do so because she is "not only a human organization; she also has a deposit to defend that does not belong to her." "Dogmas," which to some is a

bad word, "are not walls that prevent us from seeing . . . they are windows that open upon that infinite." But if one begins to look upon the Church as a human construction, changing in accordance with the historical context, instead of an institution "willed by Christ," it would divest itself of all authority to speak on faith and morals.

While the Cardinal throughout is guarded in his appraisal of affairs, remarking that the past decade had been "decidedly unfavorable for the Catholic Church," he retains the Believer's confidence that not even the gates of Hell can ultimately prevail over God's Church. He sees the need today more than ever for reform, especially in regard to women's religious orders and among teachers of theology on the university level, but also notes that *"ecclesiae semper reformanda."* Much of the dissent which is in vogue today is actually a reappearance of past heresies. Ratzinger also points to evidence of renewal, mentioning movements like the charismatics and the Focolore. The past decade has also seen the emergence of a more catholic, universal Church, with tremendous growth in places like Africa and Korea. Ironically, this has also corresponded with a decline in the number of missionaries from traditionally Christian countries of the West. Ratzinger closes his interview exhorting believers to proclaim Christ again, "in response to the challenging example of the generations who have gone before us in faith."

The Cardinal Prefect, entrusted with the powerful position to preserve and promote orthodoxy, appears to be much like the simple parish priest, conscious of the foibles which have and forever will characterize man since the Fall, who concerns himself with spiritual welfare of his flock. Ratzinger's flock spans the globe, threatened as always by what Christian call sin, perhaps more so in a morally lukewarm age when not all who have been given the authority to proclaim the undiluted truth do not always do so. Ratzinger explicitly calls on the bishops to join him, mindful of the words St. Paul once wrote, in order to

> Proclaim the message and, welcome or unwelcome, insist on it . . . Refute falsehood, correct errors, call to obedience. The time is sure to come when . . . people will be avid for the latest novelty, and collect for themselves a whole series of teachers, according to their tastes; and then, instead of listening to the truth they will turn to myths."
>
> (2 Timothy 4:1-5)

Whether one chooses truth or myth has always been up to each individual and his conscience. But its important to the Church's defender of orthodoxy that the choice remains clear.

— Piero Tozzi

Libertarian

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> If this group were penalized, not for its faults, but for its virtues, not for its incompetence, but for its ability, not for its failures, but for its achievements, and the greater the achievement, the greater the penalty—would you call *that* persecution?

Obviously, the group in question is American businessmen. Ayn Rand, from whom the above quotes where taken ("America's Persecuted Minority: Big Business"), was perhaps the first modern political philosopher to actually dare to defend the free market on a philosophical basis, rather than on a utilitarian one—certainly she was the loudest. As she and other libertarian thinkers have stated time and time again, economic power is *not* political power, at least not under free market conditions. It is only when the state has the power to intervene in the market that the economic power translates into political power. Political power means the use of force, and since, as Max Weber states, a government holds a monopoly on the legal use of force, economic power cannot, by definition, be political power. Under a free-market system, there is absolutely no economic coercion; no person or organization may tell you what brand of soap to buy, what kind of job you must have, what type of retirement plan you must set up. These choices are made by each individual as *he* sees fit, not as the State sees fit.

But won't the businessman exploit the workers in such a system, the liberal/socialist now asks, by paying him as low a wage as he possibly can? *Of course* he will pay his workers as low a wage as he can—he is in business to make a profit, ot for any altruistic reasons. However, he cannot pay too low a wage for the simple reason that if he does, another businessman can simply hire the workers away from him by paying a higher wage. As Hospers states:

> The higher the wage he must pay, the higher the cost of his product must be, and the more likely he is to be outpriced on the open market. . . . But every firm must compete for good workers; if it pays too little, the workers will desert the firm and go and work elsewhere. And as virtually every employer knows, it doesn't pay to hire underpriced workers—they will stay only until they can get a better job elsewhere, and while on the job they will not work well—the employer gets his money's worth much better by paying his workers well than by paying them little (if indeed he can keep employees at all by doing the latter).

Also, as Percy Greaves states in a 1970 article entitled "How Wages are Determined,"

> Given the conditions which an employer faces, he must pay workers pretty much the values that consumers place on their contributions. If the employer pays a higher wage, he suffers a loss. If he does not then reduce his wage rate, his number of employees, and his production to what he can sell at a price that covers his costs, he will eventually be forced out of business. No businessman can long pay costs which he cannot get back from consumers. . . . In the long run, it is the consumer who pays the wages. The businessman is merely a middleman.

Thus the businessman is ina sense regulated even without government intervention—by the *free-market*. The market acts as a natural series of checks and balances on businesses, and any regulation by the government is both immoral (as a violation of property rights), stifling to productivity, and, in the long run, injurious to the "people," the same group whom the regulations supposedly "protect." The libertarian firmly believes that if merely left alone, businessmen will do what is best for themselves, and therefore, since they must serve the public to be successful, what is best for society. For more

information on this topic, information more of an economic nature than a philosophic one, I would recommend the writings of the libertarian economists, including Ludwig von Mises, Henry Hazlitt, F.A. Hayek, and Milton Friedman (to some extent) among others.

Philosophically, libertarianism is individualistic, *not* egalitarian. It takes for granted that equal rights do not guarantee equal results. The libertarian usually has no problem with this; it is a fundamental truth of humanity that there are always those who are more productive, more intelligent, and/or more able than others. These are the people (the "Atlases," as Rand would say) who, through their ability and achievements, support the rest of the world. It is only natural that these people have the majority of the world's wealth—it is their sweat which has forged modern society, and without them the masses would be wandering in darkness (literally, if one thinks of an Edison or Einstein). While this may sound elitist, note that all people are still equal *under the law.* The libertarian grants no special legal favors for these people; however, he also does not treat them as mass property, as most of the modern world does.

Nowhere is this treatment of the able as property more evident today then in the field of medicine. In order to become a doctor, one must be naturally intelligent, work hard in school, pay enormous sums of money for this schooling, become an intern at fairly low pay (while still paying off loans, etc., from schooling), and then finally enter either private practice or work in a hospital or clinic. The doctor is then made to feel guilty for actually charging people to cure their illnesses or even save their lives. "Medical care is everyone's right!" scream the politicians and "do-gooders." "Why should doctors treat only those who can pay them? What are they, mercenaries?!" shout the clergy and rabble-rousers. Consider these statements. Consider them carefully, because chances are you have said similar things at one time or another. Now answer this: what right do you have to the product of another man's work? By what "right" do you claim his sweat and effort as your own? Should teachers teach for free? Certainly not (although public school teachers basically do). Should construction workers build for free? Of course they shouldn't. Why then, should doctors, who have devoted many, many years of their lives just to *enter* their chosen profession, work under conditions which make them de facto slaves to the masses who claim the "right" to their long years of education and work? The answer is obvious: they shouldn't. Doctors have the same right as people in any other profession to charge whatever the market will bear for their services. If enough people feel that their doctor is charging too much for their services, they should stop going to him for treatment, and switch to another one whose prices are lower. If all doctors charge exorbitant sums, then take out insurance. If you still cannot afford proper medical care, then you must seek help from your relatives, friends, etc. It is not the government's job (or shouldn't be, at any rate) to make sure you can get low-cost medical care by either forcing doctors to charge less than market value for their services, or by forcing other members of society to foot your bills (Medicare, etc.). The right to life does not mean the right to life at other people's expense.

The recent passage of the Gay Rights Bill here in New York is considered a great victory for progressivists, reformists and "civil" libertarians (just another name for liberals). Those who opposed the bill were called everything from reactionaries to outright homophobes. No doubt the latter is true in some instances, but in many cases this is just a smear tactic used shamelessly by homosexuals and liberals. From the libertarian perspective, the passage of the bill is a blow to freedom, and merely another example of how pressure group lobbyists can force their will on the general population. In regard to the bill, the issue in question for the libertarian is not whether homosexuality is proper or moral, but whether the state has the right to force businessmen, landlords, etc., to hire or rent space to people whom *they* might consider immoral. The libertarian's opposition to this bill *in no way* implies a condemnation of the homosexual's lifestyle. What they do in the privacy of their own homes is nobody's business but their own; however, when they force others to condone their lifestyles, they have encroached on other people's rights. If a landlord with small children does not wish to rent a room to a homosexual because he is concerned that the children will see the tenant coming home arm-in-arm with another person of the same gender and think that this is "normal," he, the landlord and father, should have the right not to rent the room to a homosexual. Whether or not he is correct in his fears *cannot* be the question; the issue is his right to private property, and his right to determine how he wishes to use or allot that property.

What I have outlined is a general overview of the philosophy of libertarianism, as I see it. There is by no means universal agreement among libertarians on many issues. Murray Rothbard, among others, advocates "anarcho-capitalism," which differs from what I have espoused in that he doesn't believe that even a minimal State is necessary or moral, even for purposes of protection. He feels that competing protection agencies would better serve the populace, and that this is more consistent with libertarian thought. However, many libertarians (Rand, Nozick, Hospers, etc.) feel that a limited State is both necessary and moral, and it is to this school of thought which I adhere. In addition to general principles, I have tried to illustrate with examples how this philosophy translates into reality. I hope I have shown why libertarianism is synonymous with neither modern-day liberalism nor conservatism; that it is instead a coherent body of philosophy which stands on its own, and which follows the principles of eighteenth and nineteenth century liberalism. The basic axiom of that *true* liberalism is the same as modern-day libertarianism: the use of force or coercion is *always* wrong, unless it is retaliatory. It is this principle which guides the libertarian, and which gives libertarianism the most rigorous and logical structure of any political philosophy. **mr**

West

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enormity of his plan frightened the West. As Carter said in 1980, "The scope of this project is greater than the sum total of the interstate highway system, the Marshall plan, and the space program all combined." Such a plan presented the gravest threat the West had ever seen. As Lamm and McCarthy put it:

> The stunning massiveness of the plan, its hugeness, the implementation of the biggest economic enterprise in American history on one of the most socially and ecologically fragile landscapes in the nation—this was what worried the West. Outsiders, perhaps, could not understand it, but those who loved the beauty of the land the grace of its life feared the ruin of both. They had seen it before. Now, with an uneasy sense of deja vu, they saw in happening again.

While the EMB never got beyond the planning stage, much of Carter's plan took fruition. Eastern companies once again paid little or no heed to state regulations, and once again raped the landscape. The West was dealt another blow when the energy boom subsided. Acres of land lay scarred, open wounds in testament to the decline of the oil shale projects. As laid off workers moved out of the once-booming oil towns, they left behind empty houses—new ghost towns after another cycle of boom and bust.

Another issue which has been a source of controversy in the West is the issue of land. The federal government has always owned most of it. In 1982, according to *The Angry West*, the U.S. government owned practically all of Nevada, 64 percent of Utah, 63 percent of Idaho, 47 percent of Wyoming, 42 percent of Arizona, and 32 percent of Colorado. In all, the total amount of Western land in government hands would be larger than Western Europe. (In stark contrast, *The Angry West* notes, the federal government owns less than one percent of the state of New York.)

Such disparities prompted the formation of a group in Nevada called the "Sagebrush Rebellion." Among the items on its agenda was the demand for greater local control of land. Most of the group's anger focused on Jimmy Carter, whose land policies devastated the West. Aside from foisting this huge energy program on the West, Carter also wanted to install the MX missile system there. As Lamm and McCarthy say, "at no time" did Carter "understand the needs and interests of the West."

As testimony to his, Lamm and McCarthy point out that Carter only came to the Rocky Mountain region four times during his term, "out of uninterest, or contempt, or both." People like those in the Sagebrush Rebellion felt that Carter had "sold the West down the river to win votes in the East." As Lamm and McCarthy state:

> In the fall of 1980 *Denver Post* columnist Red Fenwick wrote, ". . .When he [Carter] ran for office, he wrote off the West. He flies over the heartland and around it," but never to it. The West did not forget. Its shattering repudiation of Carter in 1980 spoke more eloquently than Sagebrush rebels ever could.

It was because Ronald Reagan was able to portray himself as pro-West and anti-Eastern Establishment that he was able to score so heavily in the West in the 1980 election. As long as conservatives continue to portray themselves as federalists, they will continue to hold popular support in the West. And many eastern liberals seem unwilling to accept this.

During the aforementioned argument with my friend, he expressed fear about letting federalism run its course. "By decentralizing government power, you just give power to all those 'neo-conservatives' out West," he said. I, for one, would rather vote for a "neo-conservative" who had Western interests at heart than a knee-jerk, establishment liberal. And I am still a loyal Democrat.

Far better to give "neo-conservatives" more power than to deny Westerners a stake in governing themselves. Denied that, some frustrated Westerners might flock to the maniacal ravings of such right-wing extremist groups as The Order or Aryan Nations. Such Groups are steeped in bigotry, and advocate the overthrow of the federal government through violent means. Some frustrated Westerners have already adopted this dangerous attitude. This attitude particularly frightens easterners, because they cannot hope to understand the frustration Westerners go through.

Most Westerners, however, do not desire division. All they want is more say in local affairs, and they are getting tired of being denied that. They are getting tired of the arrogant, colonialist attitude imbedded in the eastern psyche. They are getting tired of having their visions tossed aside by men in smoke-filled rooms hundreds of miles away. They are getting tired of being called "hicks" and "rubes." Perhaps Governor Lamm and Dr. McCarthy put it best in the introduction to *The Angry West:*

> A new Manifest Destiny has overtaken America. The economic imperative has forever changed the spiritual refuge that was the West. Some of us have made a truce with change. Others have refused. They—we—are the new Indians. And they—we—will not be herded to the new reservations.

All we want is freedom. Don't deny us our share of The Dream. **mr**

Interview

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the conditions of life, and therefore, the death rate dropped. And when the death rate dropped, and the birth rate rose, there was an exponential growth of the population. Now what is being attempted by this agency . . . is because if we go on with this number it might spoil the land and make life . . . not viable. This is the rationale behind that. Now, in the Western countries you did this historically. There was no overt policy in any government to reduce population. There was a time when the thought of reducing population, with Malthus *et. al.* There was never an overt policy by the governments. This occurs only today, a phenomenon of the last two decades in the developing countries. The reason is that they want population at a level to allow growth. You have India and

China, two giants, where between both, forty percent of the world's population is, which have policies of government intervention in population. Then you have these cases in the industrialized countries, who since we get money from them, we don't intervene at all. Some countries just do that on their own, and you can see after a certain economic threshold, people voluntarily limit their number of children. One of the reasons is the difficulty getting people educated, it costs so much. So parents rationally calculate how many children they can raise. Similarly with improved health services in the industrial nations, there is really no need of a large number of children. They were necessary when deaths were high. So parents limit the number of children because they are assured of continuity. These are some of the social factors that affect decisions on the number of children. The policy here, the U.N., is to let couples decide. We cannot intervene, because of the universal declaration of human rights. But you should give them information so they can know their capacity to raise children.

MR: Is it true that the People's Republic of China, in order to meet its one child per family quota has been forcing women to have abortions against their will?

RS: This is as silly as the newspaper reports, which caused all this controversy, portraying China as having a coercive policy. True, there is abortion in China, with the same in the U.S., where abortion is legal, but the question of coercion in order to meet that target is false, because the P.R.C. has one of the most extensive and effective family planning programs. Their hope is that there will be one child because they want to stabilize their population in the first two decades of the next century at 1.3 billion. There are now one billion plus. But they are not coercing, in the Chinese sense, to have one child. There are many two or more children families. No government can really coerce family to have one child. That is just a target. They are using all persuasive means to convince people to have smaller families, but to coerce as one newspaper article has portrayed it is completely inaccurate. You must realize the word coercion is understood differently in many cultures. To the Chinese, this is not coercive at all because they have a different social structure from the U.S. So what may appear to an American as coercive may not be so to the Chinese. Any kind of infanticide in China is punishable as a crime.

MR: The Finance Minister of the Philippines, Mr. Jaime Ongpin, recently was in Washington to request aid, part of which would go for agricultural programs, emphasizing management. In the sixties, you were the action officer of the Philippine Rice and Corn Sufficiency Program, and widely credited for your role in that decade's "green revolution." How similar is the situation today as it was twenty years ago?

RS: It's serious today, because the population has grown from thirty-two to fifty million and so you have that many more to feed. Minister Ongpin is correct, it needs substainable agricultural growth to feed the population. The question of managing this is a difficult one, because you have many small units in rice production. It's not like managing an enterprise or a factory. In agriculture you are susceptible to the weather, exposed to the elements, and you cannot really control that. There are periods of low production because of natural calamities. Also the organizational structure is so diverse because of the number of people engaged in this particular activity. Now you have to manage them as such; so these farmers get motivated, incentives are provided for them to produce a high yield. Philippines' economic difficulties were in part caused by the Marcos administration, which practically deprived the country of capital to invest by exporting it abroad. These are the reasons Mr. Ongpin needs to reinvest in agricultural production and maintain sufficiency level for the growing population. That's the situation. The situation remains similar as when I was working in this area.

MR: What do you think the Philippines could do besides reinvesting capital in agriculture?

RS: I think first of all that you have to have sustained economic policies, firm economic policies. The mistake of the past administration was that it was erratic. Decisions were made on a personal basis, policies changed in accordance with the direction that the head of state was taking. Therefore, entrepreneurs could not plan because policies were arbitrary. The first thing in addition to capital is stable economic policy, so that managers in the free enterprises, owners of the industries, can program and plan production.

MR: What effect will the high debt of the Philippines have?

RS: Maybe in three or four years, if the export of capital is stopped and if the economic policies begin to work, the Philippines can pay part of this debt, which is not as bad as other developing countries that borrowed and have no means for increased production. The Philippines is richly privileged with resources. It has a talented people, considerably literate with an enterprising attitude. The defect was that its political structure was designed on a purely individual basis for the benefit of the ruling party, which caused distortion.

MR: What do you think of the future of the Philippines?

RS: It will take a little while to stablize the government because this is a revolution that is quite unique. The change was unique in that part of the military disagreed with President Marcos, and unlike what happens in many Latin American countries, the military did not take over as a consequence. What President Aquino has now is many factions, so before she can improve the economy and stabilize the country, she has to stabilize her own group of ministers and people in the government. Because they belong to many factions, the prospect is that there will be a long, extended period of stabilizing before you can say progress has been restored.

MR: Can you sum up what has happened in the Philippines over the past several months and what the future looks like?

RS: There is one value you have to give to President Aquino. That she restored freedom. The press is free. You can express yourself in the Philippines, and to me, that is the highest value any government can give to its people. I hope she persists in that. Though she has taken some powers back, she has not deprived the people of that. The people are free to express themselves not only in speech but also in demonstration, which is allowed without harm. That is to me her greatest gift so far, and I hope it is maintained. **mr**

...the last word

The following is an amended version of an editorial which Columbia Professor of Philosophy David Sidorsky wrote for the Los Angeles Times.

The foreign policy message that President Reagan sent to Congress on March 14 has been hailed by critics as a departure. They find in its support of a "democratic revolution" directed against dictatorships of both the right and the left a move away from the Administration's focus on anti-communism. In the process they see the crumbling of Jean Kirkpatrick's distinction between totalitarian dictatorships (particularly of the communist world) and authoritarian dictatorships.

The foreign policy message in its discussion of the values which can be realized by American strategy opens another round in the debate over the way to balance morality and realism in foreign policy.

It is true that two authoritarian governments of the right have fallen in recent weeks (Haiti and the Philippines), with limited U.S. participation. That certainly does not mean, however, that the Administration has abandoned the distinctions between policy toward communist states and those of the authoritarian right—nor should it. Indeed, it clearly is mindful of the special threat posed by states which provide strategic bases or forward positions for Soviet expansion and of the necessity of standing up against them, as the President is doing in Nicaragua.

Until the Carter Administration, the assumption that governed postwar foreign policy had been that the defense of the national interest, including support for America's strategic allies, would in the main enhance freedom and democracy. In putting a universal human-rights agenda in the forefront of U.S. foreign policy, President Jimmy Carter placed new weight on the value judgements in international relations as against considerations of strategic and moral realism.

Critics of the Carter approach argued that this tilt was inherently self-defeating. If the United States were to pursue the human-rights agenda openly and without inhibition, it would exacerbate tensions with major adversaries (the Soviet Union, the People's Republic of China) and unsettle relationships with a host of traditional allies or friends (Brazil, Ethiopia and Iran were most often mentioned). The consequences of such a policy would in fact prove deleterious to human rights.

This has turned out to be the case. The activist Carter human rights policies contributed to the destabilization of the governments of Iran and Nicaragua. The successor regimes of the Ayatollah Ruhollah Khomeini and the Sandinistas have been not only fiercely anti-American but also regressive in domestic human rights.

The main criticism of the Carter approach is that while its rhetoric envisioned a uniform standard of human rights, its application inevitably led to a double standard, directed paradoxically and sometimes tragically against American allies.

Thus, the Administration's indulgence in public expressions of support for Soviet dissidents virtually guaranteed that the Soviet Union would move forcibly to show that it would not permit U.S. pressure or intervention in Soviet domestic affairs. The Soviets responded in the Carter years by arresting every single Helsinki monitor and sentencing them to long terms. The Administration had no countering human rights strategy.

To speak loudly while holding no stick could not be productive in human-rights results with a major power like the Soviet Union. Subsequently, the Soviet response to a symbolic boycott of the Olympics and a self-defeating end of wheat sales, was to virtually cut off all emigration from the Soviet Union.

The smaller nations recognized the double standard in the Carter human rights policy. For some of them, like Brazil or Ethiopia, it raised questions of the United States as a reliable ally in a dangerous world.

The most obvious illustration of this criticism lies in the symmetrical cases of North Korea and South Korea. Both Korean governments have been charged with violations of human rights. But because North Korea receives its arms from the Soviet Union and little trade with the United States, it is immune to any American sanction beyond verbal indictment. In contrast, to press South Korea on human rights, the Carter Administration proposed an arms cutoff, troop withdrawals and economic sanctions. As a result, an American adversary, North Korea, has continued to threaten to invade South Korea. Quiet diplomacy on behalf of democracy in South Korea has been since 1950 and should continue to be a goal of American foreign policy in Korea.

One celebrated approach for rectification of the double standard was advanced in the form of Kirkpatrick's distinction between totalitarian (usually communist) and authoritarian dictatorships. For many, her emphasis on heightened opposition to totalitarians helps correct the distortions of the Carter policy. It also expresses the fundamental moral difference between the recognized evils of traditional regimes and the new horrors that have been generated by the ideological visions of the 20th century.

For Kirkpatrick's critics, the argument was reductively interpreted as providing an apologia for one class of dictators. But the operational force of her distinction for recent history can be presented in simple terms: There is a crucial difference between dictatorships that have been imposed or maintained by the Soviet Union and those that have not been.

The Brezhnev Doctrine, which affirms the irreversibility of Soviet-backed dictatorships, has been extended beyond East-

ern Europe into Africa, Asia and Latin America since the mid-1970s. The result has been a series of popular armed struggles against the consolidation of Soviet-backed regimes in Afghanistan, Angola, Cambodia, Nicaragua and South Yemen.

During the past decade many dictatorships have been transformed for a variety of reasons ranging from the morality of rulers to popular protest to the desire to achieve national economic growth. The Reagan message to Congress impressively documents this shift to democracy, from Argentina, Bolivia, Brazil and Guatemala to Turkey and Uruguay. None moved from the totalitarian column; all the changes were from the authoritarian column.

Accordingly, this is a opportune time for the Administration to use this distinction for a single standard in support of democracy. The Philippines and Haiti have just been added to the roster of the devolution of dictatorships. Nicaragua, on the other hand, has arrived at the critical point where further consolidation and arming of the Sandinista regime will probably make the dictatorship irreversible.

For those with some historical memory, the situation resembles the last stages of the postwar process in Eastern Europe where anti-Fascist "National Front" coalitions were replaced by "Popular Front" governments of the left, which were then coerced into communist dictatorships. Subsequently, plural religious institutions, and free press were terminated.

Critics of the Administration's position, who have urged active intervention on the side of freedom and democracy, are then put to the test: Does their standard apply to totalitarians on the left as well as the right? If so, that test becomes a vote of support for the opposition to the Sandinistra regime. This is the pragmatic and politically realistic moral encoded in the Reagan foreign policy message.

—David Sidorsky

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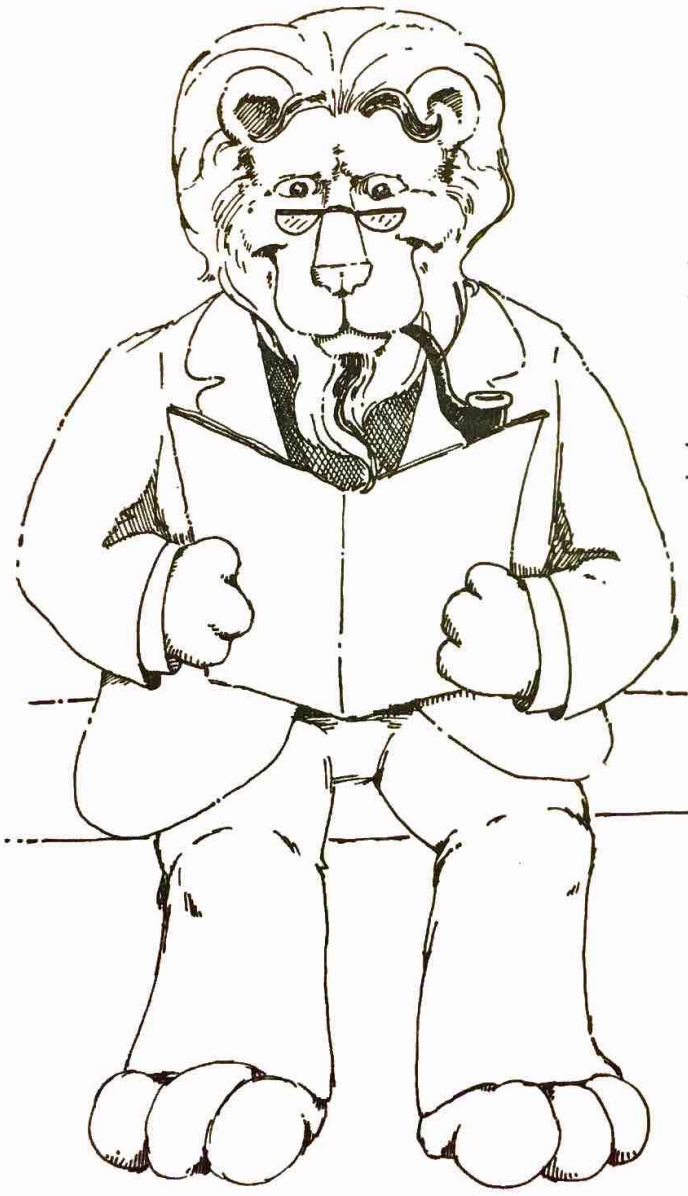

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Nicaragua

Fidel

and the usual fun stuff

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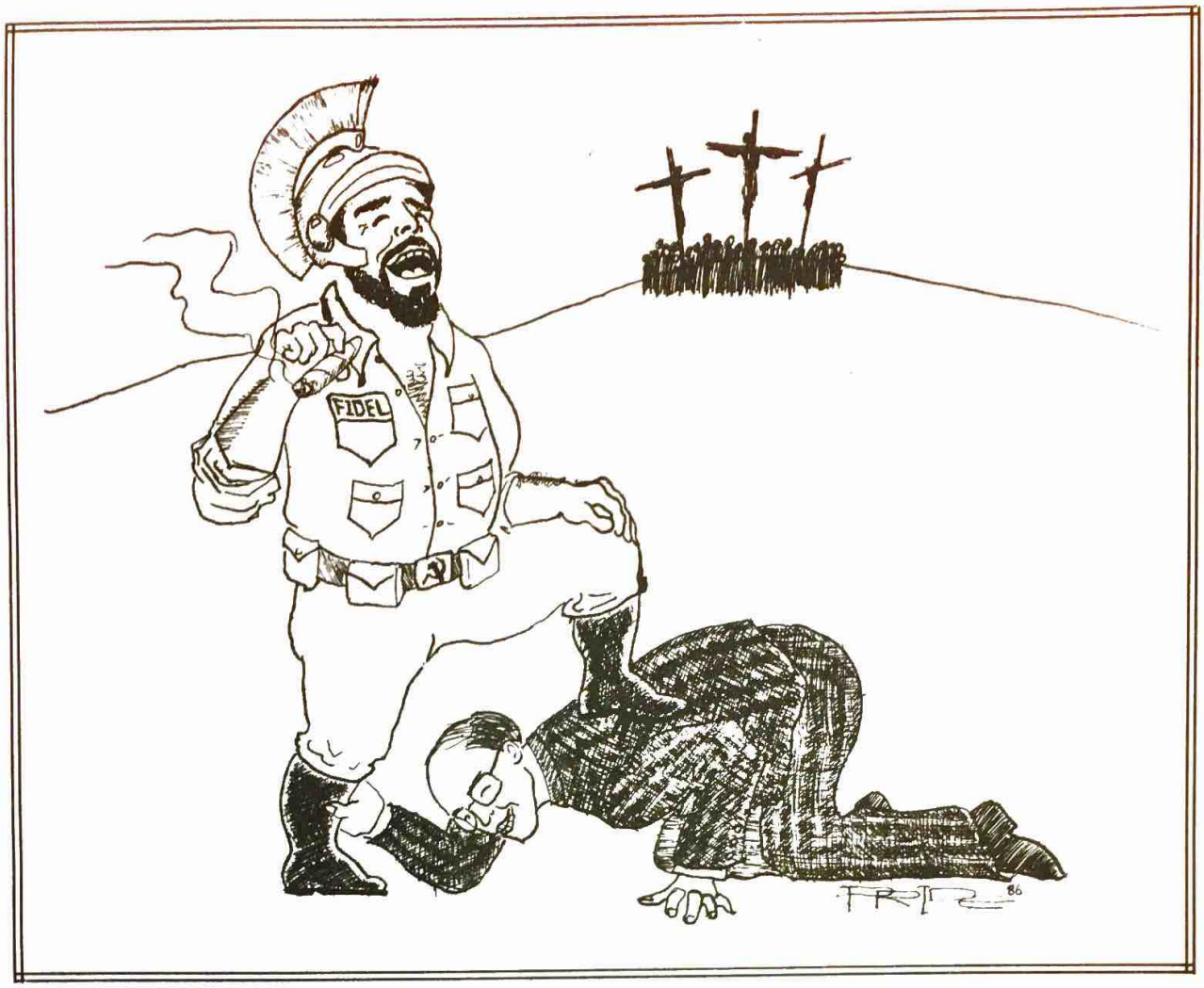


In lumine tuo . . .

Armando Valladares addressed a somewhat mixed crowd at the School of International Affairs on September 25. Sitting alongside graduate students and faculty from the Institute for Latin American and Iberian Studies and the Center for the Study of Human Rights were curious undergrads, Cuban exiles and a smattering of people who seemed downright hostile. Yes, hostile. Or rather resentful, resentful of this now middle-aged man who stood before them with an interpreter at his side.

Valladares was twenty-three years old when he was arrested in December of 1960 for raising doubts about where Fidel Castro was taking Cuba. He was a young official in Castro's Ministry of Communications who had also shown he was a blossoming poet. During the Revolution he had sympathized with Castro's broad united front, and had spoken out against Batista. But Castro did not turn out to be a pluralist, proclaiming instead that "any criticism is opposition. All opposition is counter-revolution." Thus young Valladares found himself in a Cuban jail, mercilessly beaten for his refusal to enter the Political Rehabilitation Program. His account of Cuba's penal system is contained in *Against All Hope*, published by Alfred A. Knopf. In Castro's Cuba, there was no room for a loyal opposition.

Meanwhile in the International Affairs Building, the loyal opposition, though somewhat hostile, was readying itself for the question and answer period. A youngish fellow, sporting a rather stylish haircut not dissimilar to Mike Doonesbury's recent coiffure, got up and began a long, detailed litany of atrocities committed by Nicaragua's anti-Sandinista contras, ending in a somewhat garbled *j'accuse*, placing Mr. Valladares in the company of nefarious Nicaraguan babykillers. Mr. Valladares countered with a steely stare, and through his interpreter patiently reexplained that he was not here today to condemn oppression when one side commits it and to look the other way when the other does it. Rather he was there to "condemn crime and barbarism whereever they occur." In his case barbarism took the form of Fidel Castro and his new Cuba, where any expression of thought not in accordance with

his vision of a socialist society is banned.

This Cuban who composed prison poetry noted that "very often college students have a very different idea of Cuba from what it really is." Unfortunately many who have an idyllic vision of a Carribbean utopia do not like to have their reality disturbed (our young Doonesbury et al.), which accounts for their resentment when someone returns from the land of the dead to confront them with the facts. Babes in a world of ugly innocence, they are quite sensitive to defects in this country and her allies, yet completely indifferent to worse crimes when they are committed by someone masquerading under a progressive's guise.

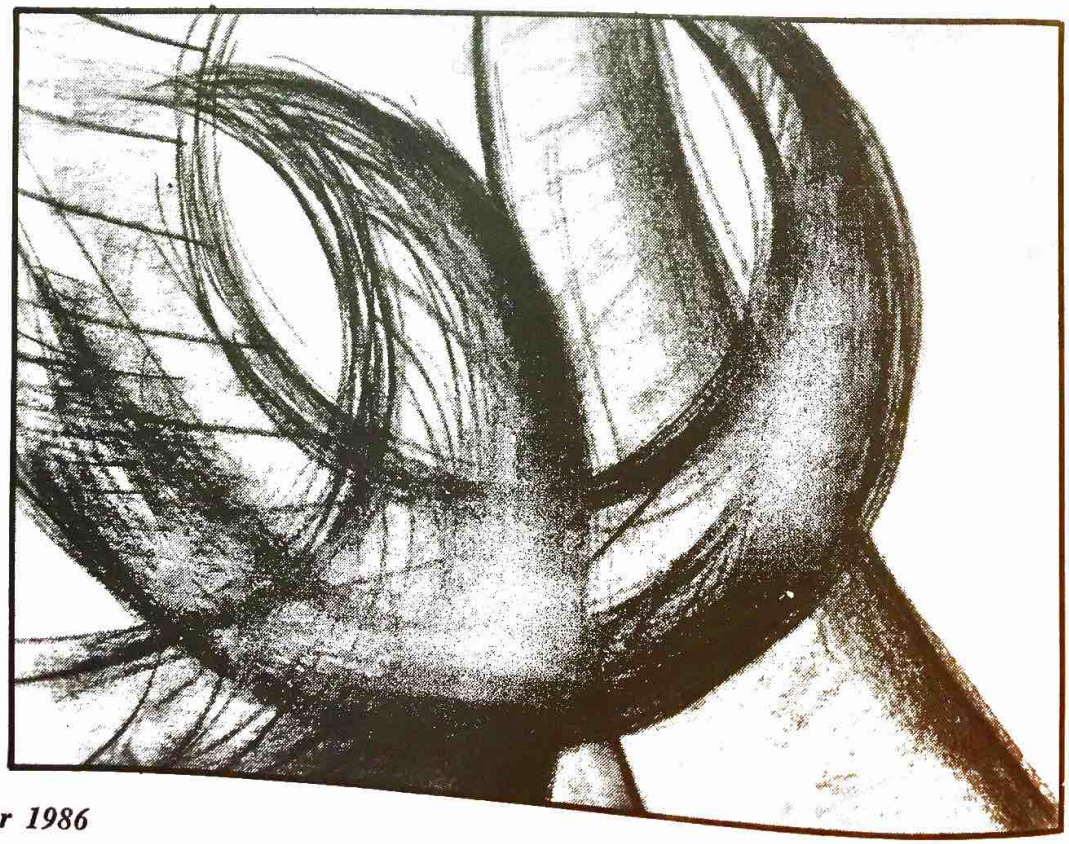
"Witness the sanctimonious unction accompanying an award to Jeane Kirkpatrick and the whimpering, sycophantish assent given to the protestors by University President Michael I. Sovern"

Amnesty International, an organization critical of human rights abuses by both the Left and the Right, adopted Armando Valladares as a Prisoner of Conscience while he was incarcerated. Their constant pestering of Castro and the image it created of the grossly blemished face of Cuban Communism among aware Westerners are major reasons why Valladares is free today. Yet at Columbia and in academia as a whole, indignation is selective. Instead of an objectively applied single standard, this century's greatest atrocities are completely ignored. There is no outrage at the atrocities perpetrated by Communist regimes against the people of the Ukraine, Kampuchea, Ethiopia or Afghanistan. Energies which could be channelled towards making the Columbia community aware of them are instead wasted chasing phantoms; witness the sanctimonious unction accompanying the granting of an award to Jeane Kirkpatrick by the Graduate Faculties Alumni Association and the whimpering, sycophantish assent given to the protestors by University President Michael I. Sovern and the University Senate.

What is also discouraging is that Valladares is a hero of the stature of Aleksander Solzhenitsyn and the event was neither well-attended nor well publicized. Except for posters near the elevators in the Scool of International Affairs and in Earl Hall, over which someone scribbled "Batista cop, Batista pig," the campus was barren. Valladares was ignored in the campus media as well. This contrasts with the wide spread publicity and press coverage which surrounded another former Amnesty International Prisoner of Conscience, South African dissident Sonny Rathnam, who spoke only a few days after Valladares.

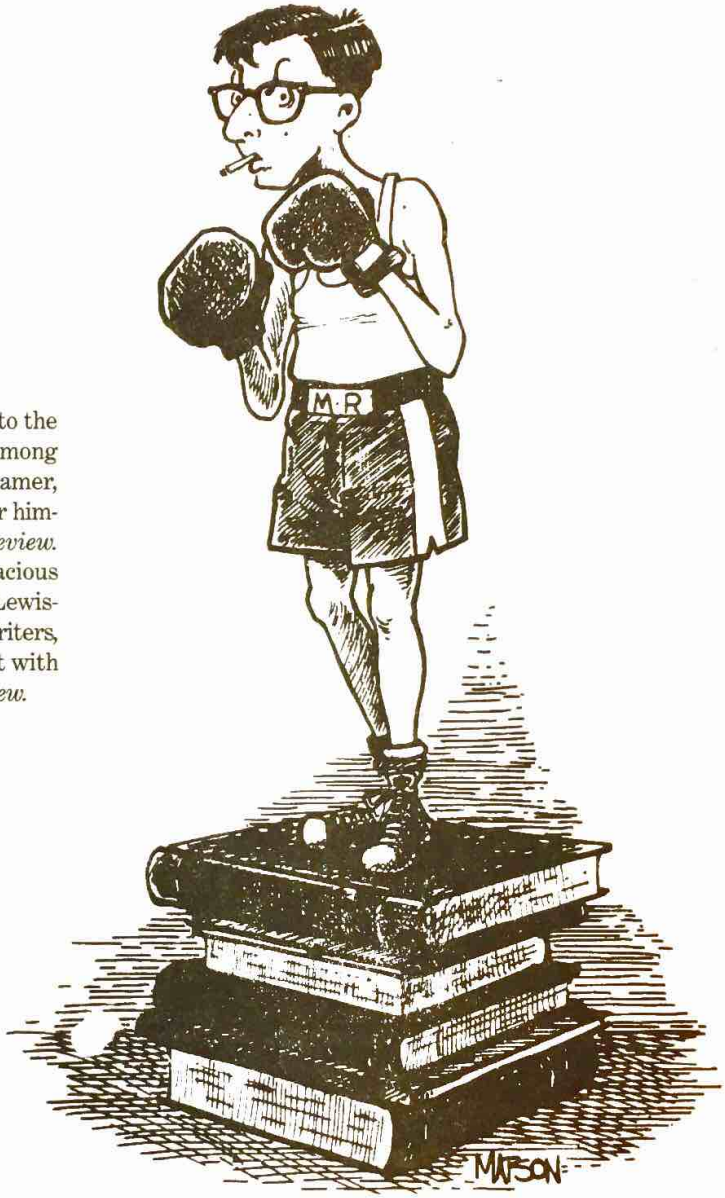
Is this really the apathetic eighties? Apparently not, as there are enough crusades to be vociferously taken up, and just enough indignation on the part of the administration on safe issues - like South Africa - to keep everyone content. Yet this generation, like the ones before it, will probably continue to greet the greatest violations of human rights - those committed by the Soviet Union and its allies - with indifference, with some greeting the Valladareses who attempt to expose them with resentment.

- P.A.T.



We want to pick a fight.

The Morningside Review is looking for people to step into the ring and help us fight the battle of ideas. We count among our readers people like Jeane Kirkpatrick, Hilton Kramer, Norman Podhoretz and Robert Bartley. Even the Gipper himself has nice things to say about *The Morningside Review.* If you'd like to help us continue publishing this pugnacious magazine, come to one of our meetings, or write to 206 Lewisohn Hall, Columbia University, New York, NY 10027. Writers, artists, editors, businesspeople—we need you all. So get with it and come out fighting with *The Morningside Review.*



An *intellectual* fight.

Marxism, Repression, and the FSLN

Gene Marquardt

Visiting New York this past summer, President of Nicaragua Daniel Ortega put a little shine on the tarnished public image of his Sandinista government. Increased repression at home helped President Reagan win the contra aid battle in Congress, so Mr. Ortega felt it necessary to convince the world, (or at least reassure the American Left) that his words speak louder than Sandinista actions. Of course, he succeeded. No longer clad in the military fatigues of the revolution but in designer suits, Mr. Ortega kissed babies and received warm welcomes at Riverside Church and from a Brooklyn Methodist congregation. Since his audiences were composed almost exclusively of Sandinista sympathizers, Mr. Ortega simply referred to the now standard Sandinista line of extrication: *the contra/US war is to blame.*

No doubt the civil war in Nicaragua has been wrought with senseless brutality and hardship; however, the present course of the revolution, along with the necessity of repression, had been determined even before the overthrow of Somoza. As soon as the Sandinistas took power, the ideology and mechanisms for control were put into place. Thus, current Sandinista repression, excessive even in a situation of internal conflict, is the outgrowth of a revolutionary movement which began over two decades ago.

According to Sandinista exile Humberto Belli, the actual roots of the movement can be traced to 1960, when the Cuban revolutionary ambassador to Nicaragua, Quintin Pino Machado, established the Nicaraguan Revolutionary Youth within Nicaragua. This group became the Sandinista National Liberation Front (FSLN) one year later, according to official Sandinista archives. Factional disputes over the proper method of waging a revolution resulted in Sandinista impotence until the mid-1970's, when the *tercerista* faction, led by brothers Daniel and Humberto Ortega, managed to wrest control of the FSLN.

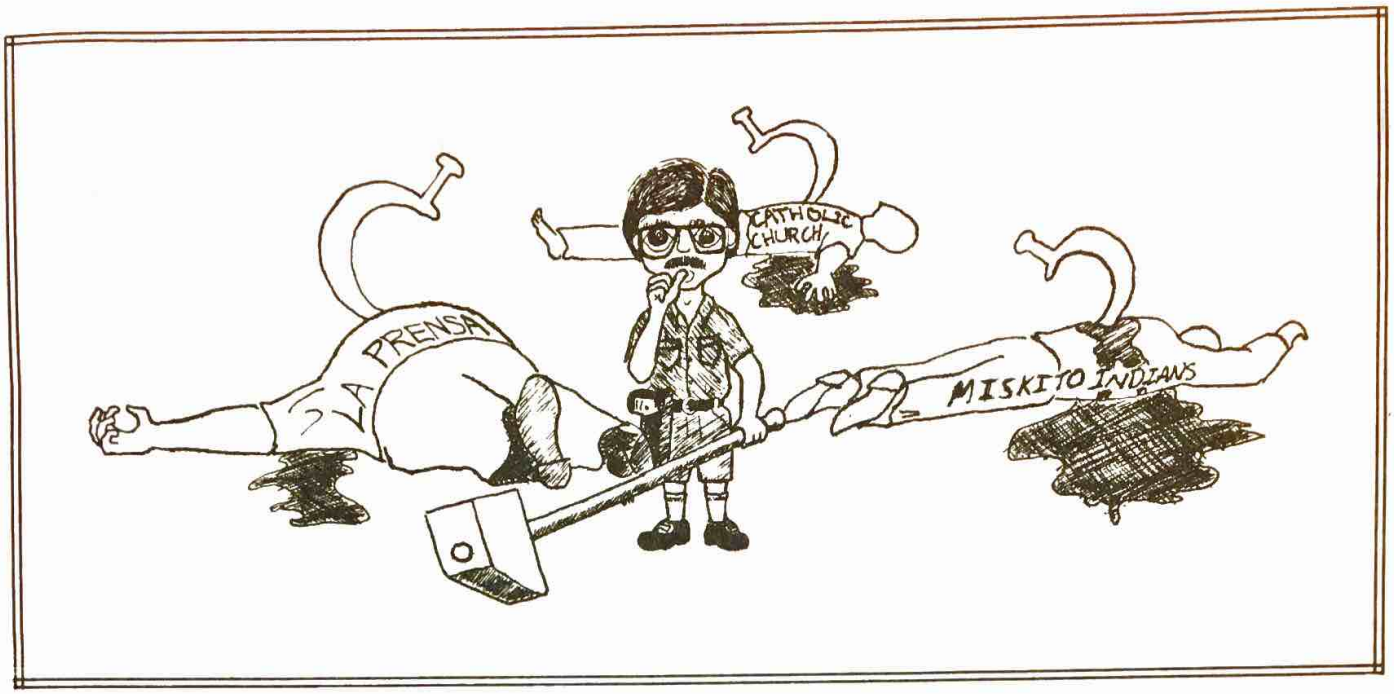
The *terceristas* devised a "popular front" revolutionary scheme that united middle-class business interests and workers groups to form a broad-based coalition against the dictatorship of Anastasio Somoza. Other factions within the FSLN sought to slowly amass Sandinista cadres until the movement became strong enough to achieve an untainted, scientific, socialist revolution. When *tercerista* control was solidified, the FSLN declared itself a vanguard party, and with massive infusions of Cuban aid, called for the immediate overthrow of Somoza.

From its beginnings, the FSLN was a party dominated by Marxist-Leninists. Several party leaders, many of whom now lead the government of Nicaragua, studied in Moscow and Havana. Of course, this fact in itself is not very telling. More concrete is the 1977 Sandinista party platform, titled "On the General Political-Military Platform of Struggle of the Sandinista Front for the National Liberation for the triumph of the Sandinista Popular Revolution." It argues for the creation of "structural and superstructural bases for the revolutionary process towards socialism." The notion of "bases" for "socialism" which the Sandinistas had in mind at that time is clarified in the platform: "our present-day Marxist-Leninist vanguard will be able to fully develop its organic structure and become a strong Leninist party." Couple this with the platform's vociferous derision of "bourgeois" democracy and, more relevant to the current civil war in Nicaragua, its revisionistic apology for Stalin's purges: "(In the 1930's) the glorious Russian revolution was in the process of consolidation and combat against counter-revolutionary terror within its own country." It becomes all to clear what these structural and superstructural bases" would be become and what course the Sandinistas had set for their revolution two years before it succeeded. Of course, since none of this was fit for

"Offers of US Peace Corps volunteers, Costa Rican teachers, and Panamanian military advisors were rebuffed for Cubans, Soviets, and East Germans"

consumption by the US media, a more palatable facade was created. Now Minister of Interior Tomas Borges, one of the more hard-line communists in the Sandinista government stated publicly in 1978 that: "We are neither Marxist nor liberal, we are Sandinistas." Sergio Ramirez echoed this theme: "no right, no left, just Nicaragua." The US media responded by portraying the FSLN as a democratic nationalist movement. When guerilla leader Eden Pastora seized the National Palace in the summer of 1978, he was permitted by the Sandinistas to proclaim the movement's democratic convictions to the Western media. Judging from the fact that he never received a seat on the National Directorate and from his role as a former contra leader, these democratic convictions were his and not those of the Sandinistas.

When the Sandinista's took power on July 19, 1979, they quickly cleared up the contradiction between their private goals and public image. A report compiled by the FSLN Assembly at their first meeting in September, 1979 accounted for the contradictions: "the alliance (with non-Marxist anti-Somoza groups) ... was designed to neutralize Yankee interventionist policies." Jaime Wheelock explained later that the alliance was meant to "prevent sections of the bourgeosie and petty bourgeosie from ... convert(ing) themselves into an alternative



for Somoza for (US) imperialism." These admissions also were not made clear to the Western media.

Sandinista actions at that time further indicated that they would make good on what they had been formulating since the mid-1970's. Large-scale military mobilization began; offers of US Peace Corps volunteers, Costa Rican teachers, and Panamanian military advisors were rebuffed for Cubans, East Germans and Soviets. Seven months after taking power, while still receiving more aid from the US than from the combined offerings of the Eastern bloc, the FSLN issued a joint communique with the Soviet Communist Party which condemned "the campaign by imperialist and reactionary forces... [to] stifle the inalienable rights of the people of ... Afghanistan... to follow the road of progressive change." The "Yankee" was vilified as "the enemy of mankind," words which still remain in the official FSLN hymn.

Internally, the Sandinistas quickly moved to consolidate power. On July 29, 1979, the Public Order Law was adopted, outlining a range of violent and non-violent political crimes. The law, enforced by the Ministry of the Interior, is so vaguely worded as to possibly define any opposition act as criminal. This is not to say that opposition was completely stifled; however, arbitrary detentions were common, even before the civil war began. Amnesty International noted in its 1986 report *Nicaragua: The Human Rights Record*, that political party leaders, trade unionists, and the clergy were particular targets and were believed to be "prisoners of conscience." Actual rule of law never existed in Sandinista Nicaragua; if one was seen as a threat to the party, one could be imprisoned.

The party, the FSLN, has been equated with the state since the beginning of Sandinista rule. Neighborhood based Sandinista Defense Committees (CDS) were established to determine and monitor those who had complaints about the party, those who attended traditional church services, and those who were active in opposition causes. According to these observations, the CDS distributes ration cards for food and essential commodities, recommends (or obstructs) job promotions and pay raises, and approves passports, housing assignments, loans and scholarships, among other things. A party trade union, the Sandinista Workers Confederation, an affiliate of the Eastern bloc World Federation of Trade Unions, was also formed shortly after the FSLN took power. Even a partly controlled revolutionary church was created in opposition to the widely supported Roman Catholic Church. One is conscripted to fight for the FSLN, not for Nicaragua. As in every existing communist nation, the party is involved in nearly every facet of the Nicaraguan citizen's life.

"The party, the FSLN, has been equated with the state since the beginning of Sandinista rule"

An especially interesting example of this FSLN indoctrination and control is the Nicaraguan literacy campaign. Although the Sandinista's claim that illiteracy was reduced from around fifty percent to just under thirteen percent in 1980, the teaching was so ideologically based as to seriously call into question the motive behind the campaign. Lesson One in the official textbook entitled *The Spanish Dawn of the People*, is "The Revolution." Lesson Two is the word "boy," followed by such phrases as "the boy lived through the struggle..., long live the FSLN!" Lesson Three is "July"--"Long live the 19th of July!" Red is the key word in Lesson Four, illustrated with a full-page photo of the FSLN flag. The book is sprinkled with grafitti-like illustrations demanding

Continued on page 16

The mr Interview: Lew Lehrman

Gene Marquardt and Piero Tozzi

Lew Lehrman was the Republican candidate for governor of New York in 1982. Prior to that he was the founder of the Rite-Aid *pharmacy chain and the* Lehrman Institute *for the study of economics and foreign and public policy. He is the current Chairman of* Citizens for America, *a grassroots lobbying group.*

MR: Before you ran for governor in 1982, you were a political unknown, yet you came very close to beating Mario Cuomo. What made you decide to get into politics? Was it a life-long ambition?

LL: No, my first job after college was teaching, I was a Carnegie teaching fellow at Yale after I graduated, and then I was a Woodrow Wilson Fellow at Harvard. In my studies I had always been interested in American history and in intellectual history in particular, but I also had been interested in public policy - which is very different from politics. Today public policy is used as euphemism to disguise the ambitions of women and men who are interested in politics. But as an undergraduate and a graduate student my interests were confined to public policy. During the sixties and seventies while I was building my business I maintained this interest. I continued to study and continued to write, and I established the Lehrman Institute for the study of economic and foreign policy in 1972, ten years before I ran for public office. It was during the seventies, in business and also during the building of the institute, that you cannot, as a citizen, influence the life of your country without getting directly involved. And the more I thought about it the more obvious it became that you have to run for public office yourself or serve as an appointee. I began then to consider those two possibilities and I concluded in 1981 that the best way I could advance the peaceful conservative revolution was to run for public office and present those ideas directly to the people of the state of New York.

MR: Why was it for governor of New York? It seems that now most of your activities are directed to foreign policy and national issues. Why not run for Congress?

LL: Well, first my home is in New York, I have a big family. Our neighborhood is New York. From first hand experience trying to raise five children in New York, I observed it was difficult for every mother and father who was serious about the safety and the education of their children. It was also clear that New York state had declined economically, more radically than any other state in the Union. New York state was also an example in the sixties and seventies of the attempt to create a huge government welfare state. So was New York City, which almost went bankrupt. At that time I was focusing on state and city problems, as well as national and international issues. I decided to run for governor because I believed that if we are going to make the world safe for democracy, the best way to start is to make our homes, our neighborhoods, and our communities safe. The governor sets the agenda in the state of New York, the governor is the chief executive, the governor under our New York state constitution is a very strong executive. Thus he may establish programs and policies and attempt to carry them through the legislature.

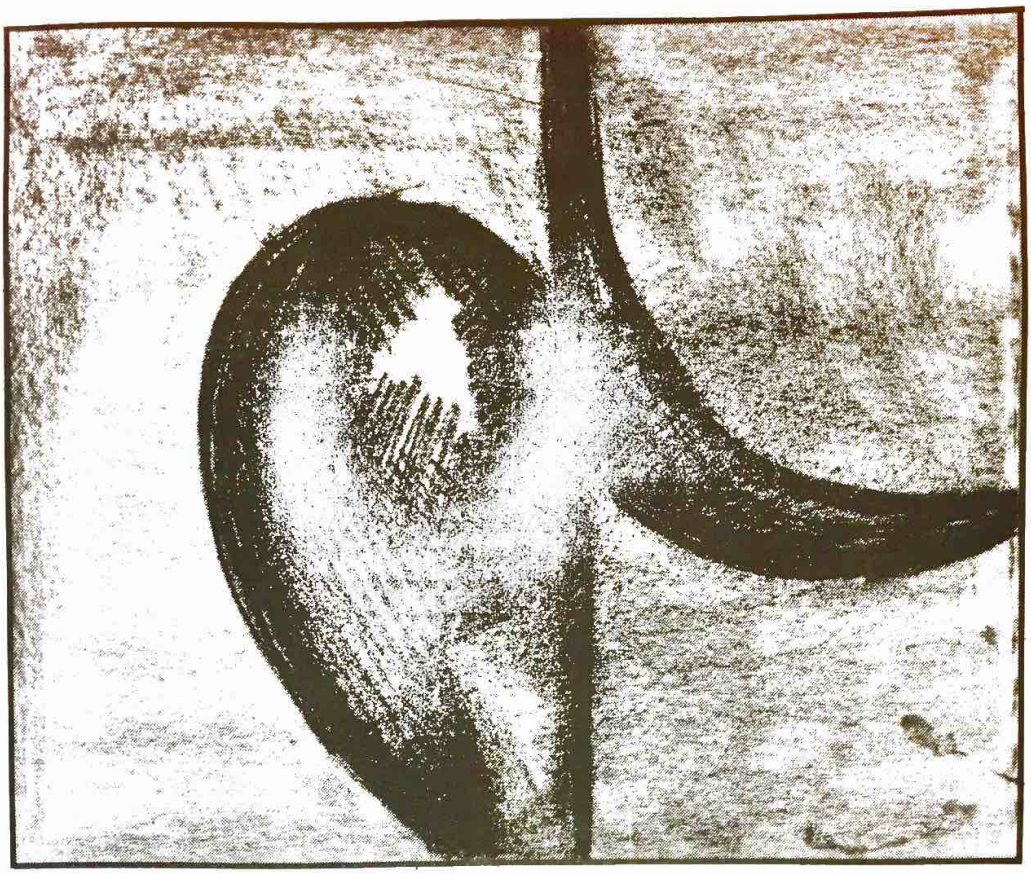
MR: What did the conservative program entail?

LL: In New York state it was a program for growth, for free enterprise, a radical reduction in tax rates for working people and middle income families. As you know, New York is the highest taxed of the continental states. The average of local to state taxes is somewhere from fifty to seventy percent above the national average. New York state in 1963 was the largest state and it had the highest after tax family income. When you adjust the family income in New York today for inflation and taxes, New York is near the bottom. This all happened in twenty years because of big government, big spending, big taxing policies. So I set out a program for reducing tax rates in New York by forty percent.

"The first thing you observe about Mario is his pleasure with talking."

MR: When Antonin Scalia was nominated for Associate Justice of the Supreme Court, one of his former classmates referred to him as a conservative since the age of seventeen. Would you describe yourself as a life-long conservative, or do you think you had a change at some point?

LL: I come from a family where the values of my grandfather are dominant. He was an immigrant and he was a patriot, and he really believed that America was the New Jerusalem. I remember when I first went to Europe, after I graduated from Yale -- he was stunned. He could not believe that I was going



back to Europe when he risked his life to leave there -- which indeed he had. So our house was not self-consciously conservative -- my grandfather did not have a high school education and my father and mother did not go to college -- but the virtues that were transmitted were patriotism, hard work and respect for our country's enterprise system. I went to Sunday school every Sunday. I remember I won the attendance record because my father and mother encouraged me to get there every Sunday. In fact, I think my mother and father voted for Roosevelt in the thirties, though I can't be sure of that; they nevertheless had the values which were associated with conservative Democratic and Republican households. My grandfather was a Republican. I too, like my father and mother, was not a self-conscious conservative. I came from Harrisburg, Pennsylvania, which is as conservative as any area of the country. So it was a very natural and unintellectual approach to matters. It wasn't until after college that I really began to develop my own views much more carefully. During college, while at Yale and Harvard, I was examining everything and all points of view.

MR: What were some of your impressions of Mario Cuomo while you were running against him?

LL: The first thing you observe about Mario is his pleasure with talking. In each of the four or five debates, several people kept an account of who said how much, and apparently for every three minutes I would speak, Mario would speak for ten. It was very difficult to stop him from rambling on. That is not necessarily good or bad, but one of his most obvious characteristics is that he enjoys talking. He seems to be a nice man, he is curteous with me, so our debates were never personal, always having to do with disagreements in principle, disagreements on programs, policies and how to best keep New York safe and prosperous. He was for bigger taxes, bigger spending, and a bigger welfare state. I was for more incentives, more opportunity, more growth, smaller government, while at the same time I was for a stronger government, a government that could protect the average citizen, which means a strong court system and a strong police system.

MR: Does Mario Cuomo have presidential timber?

LL: I think he is planning to run for president. He is certainly among the best candidates the Democrats could run. He is probably the best exponent today of the left wing of the liberal Democratic party. He may very well be the best advocate of left wing liberalism since Jimmy Carter.

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A Tory Defense

Neil M.T. Gorsuch

Edmund Burke, British politician and tory spirit, is famous for the oft-quoted line that "People will never look forward to posterity without looking back to our ancestors." The message to be taken here is as old as Plato and as modern as Columbia campus politics. Here on Morningside, conservatism is an undeniably fashionabe whipping-boy for the world's ills: but are the critics honestly cognizant of the bidy of theories they are so quick to decry, and do those few souls who dare call themselves "conservative" really know the vast tradition they invoke with that word?

True, the term conservative in today's world conjures up sour images of television evangelists and aging politicans. But conservatism properly understood, with its theories rooted in a decidely oragnic world-view, has much to say to us as a generation earnestly trying to face posterity with hope. It has much to say, but needs to be first distinguished from falsely labeled liberal notions. That is, Ronald Reagan and Franklin Delano Roosevelt, though with decidedly different political policies, equally embrace liberal Lockian philosophy; though Manchester or 1890s liberals are often labeled conservative , conservatives they are not. The ideas of Reagan, Huntington, Freedman and others are not those of Plato , Burke, Cardinal Newman, Bismark, or Will; instead, they are a loose collection of dogmas on minimal government, free market, and states' rights. Theirs is the conservatism that George Will remarks carries a "cranky and recriminatory" face. My goal, like Will's, is to remold conservatism, to "recast (it) in a form compatible with the broad popular imperatives of the day." This does not suggest approbation for the governmental minimalism of the Manchesterians; the philosophies of Burke and Locke may occasionally and accidently overlap, but their ends, goals, and archetypal societies remain radically different.

The underlying premise in the aged doctrine of organic conservatism, that which a tory carries into his considerations of government, economy, and society, is a recognition of universal human worth. Modern liberal politics is often based on the pessimistic premise that man can be tamed, but not elevated or improved. Nations devote themselves to individual self-interest and aquisitiveness, to Hobbes' concept of man as a bundle of appetites; liberal political philosophy transforms this concept into a precept of good government. Conservatives, rejecting government as a tamer and umpire of a greedy citizenry, avoiding the "stale, false notion that government is always and only an instrument of coercion, making disagreeable (even when necessary) exisions from freedom," as Will says, search for a government capable of things to realize an elevated man. The free market, Dolbeare and Metcalf state in *Neopolitics* (an objective survey of modern political theories), is useful to organic conservatives only "when it does its job, but it cannot be left in charge when importnat goals are at stake."

Conservatives, then, recognize fundamental human worth as the potential for an improved social being; they further recognize that this value cannot be quantified in the wholly economic terms of the center or left. Man exists not as a self-serving imp, not as "capitalist exploiter" or as "oppressed proletarian," and not even as the "creative laborer" in Marx's schema. Man lives capable and compelled to find a higher meaning to his life--one of social interaction, community development, as Burke says, in a solemn contract with those who have lived before and those yet to populate this world. A fufilled human life cannot be framed as a few sputtering decades of labor; man does not find ultimate gratification from inantimate machinery; he finds it through his interaction with other men. Man is an emphatically social beast.

"Man exists not as a self-serving imp, not as a 'capitalist exploiter' or as 'oppressed proletariat,' and not even as 'creative laborer' in Marx's schema"

How does the conservative apply this notion to daily life? How is man's social nature best addressed? Through the much despised (because sorely misunderstood) notions of social and political inequality. "Social inequality," a nasty cliche on this campus is neither a cliche nor nasty to the true tory for it does not mean to him a liberal functionalist free market. Properly practiced social inequality would allow men to reach their natural positions in society based accurately on their abilities and desires (note; not on their parents' pocketbooks).The leader of this conservative cause ramians Plato himself. In his design, children would be taken from their parents early on, vigorously educated, and placed in society based upon their abilities and proclivities. Perhaps Plato's methodology seems a bit extreme to the modern temperment, but for the highest goal to be attained--that of community spirit instilled within the individual, his eager and productive particiaption in the social fabric of the community--basic fairness, especially with a mandatory and

demanding educational system for all must be assumed and equality of opportunity must remain undoubted. There cannot, in a conservative climate, grow any inequality except for that reflecting the natural order, reflecting true differences in ability and desire.

This may seem, to the skeptical, in conflict with another cherished conservative cause--that of property. The argument goes that one has the unltimate right to determine how he wishes to distribute his property and that the absolute equality of opportunity would violate this "natural right." Well, to the tory, property should be protected as it is needed to give a sense of being rooted, of having a stake, feeling one owns something is of undeniable joy to individuals. But for them to sense community, to sense being rooted, property must also be fairly earned; it must be protected as it is needed for society's continuence, but only as it is needed. This is evident, as Dolbeare and Metcalf make clear because

> wealth and profit are not the end of property [to the organic conservative] --wisdom and stability are--the mere achievement of wealth or corporate position does not entitle anyone to govern.

Property as a "natural right" exists only in aristocratic doctrines of worth.

Likewise, social inequality does not necessitate an impoverished lower class. Organic conservatives, as Dolbeare and Metcalf note, have consistently "spoken out against working conditions, sqaulid tenements and general destructiveness" of industrial England and America; they are open to government as a positive force for social direction--remember that it was Bismark and Disraeli who pioneered welfare programs. True tories believe in social progress--but believe that both words of that phrase are important. Society cannot be left behind in our quest for

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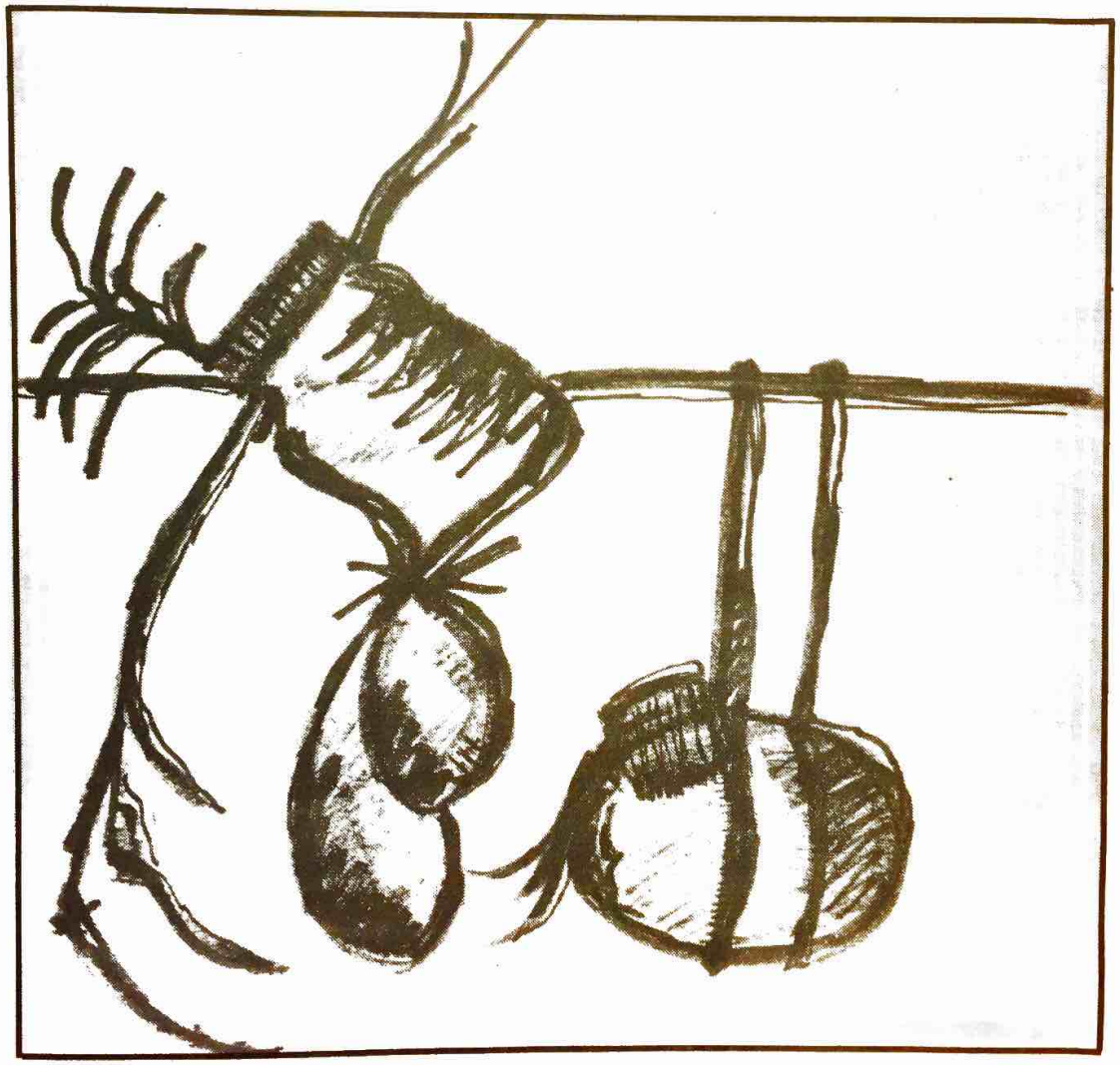
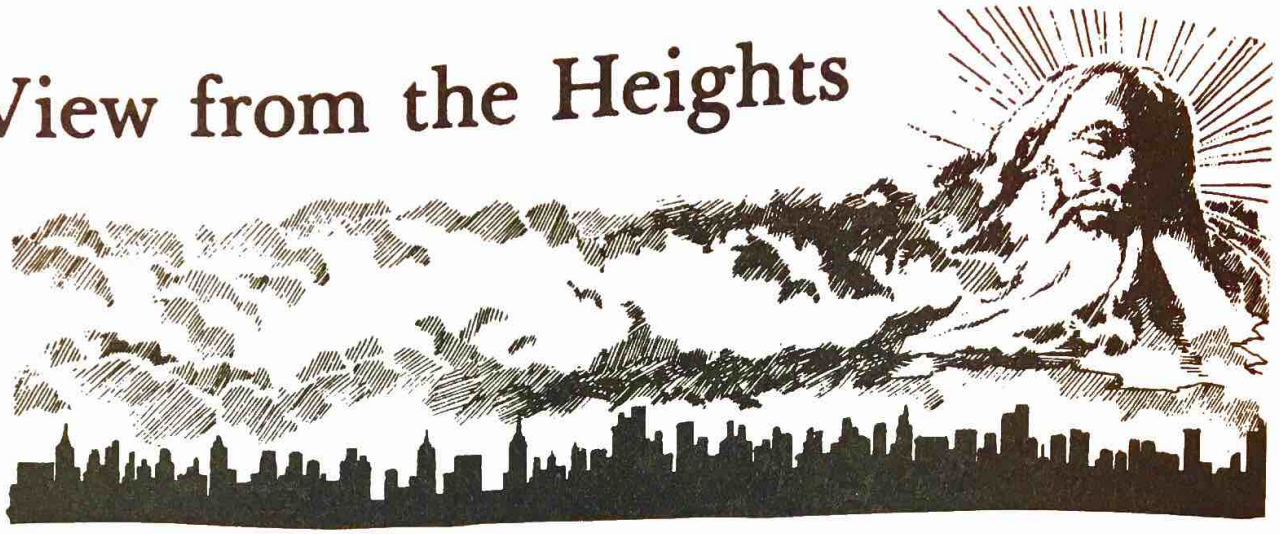


View from the Heights



May I Inquire of Rita?

In her *Broadway* article of September 30, Rita Costable attacks Jeane Kirkpatrick's contention that leftist totalitarian governments are incapable of reform, insisting that, "The history of such governments would seem far too short - less than fifty years in most cases - to support such categorial judgements."

How long *do* you need, Rita?

In the same article, she labeled the communist Sandinista government in Nicaragua "left-of-center," which leads one to question where the "center" is.

Come on, Guys!

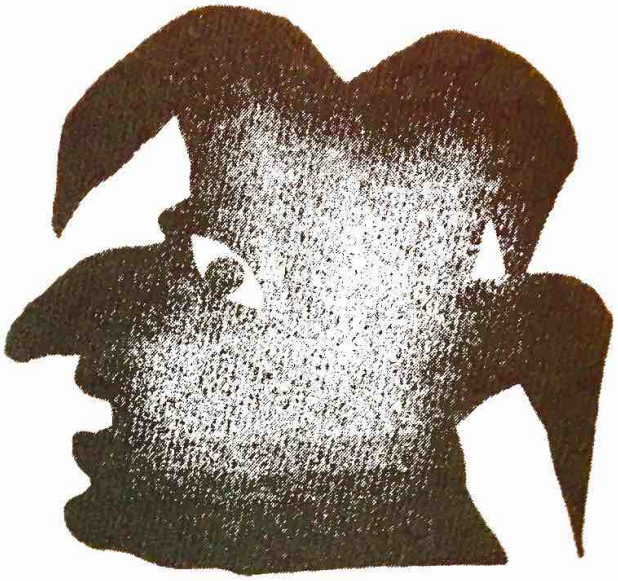
While gay rights advocates at Columbia grapple with such mundane issues as military recruitment on campus, activists at Cornell are really moving. Under Pressure from gay student groups, Administration officials forced an organization sponsoring a dance to take down its advertising bills because they pictured a male and a female dancing, thus being insensitive to homosexuals. There's also talk at Cornell about a gay studies major. Take note, fellas, and let's go!

The Man Who Would Be King

Never given enough recognition for her virtuosity in filing her tax returns, nor for her political saavy, nor for her offsprings adept dealings in the pharmaceutical trade, the Queens housewife who would be king has decided against trying her hand at Big League Academia. Students in Geraldine Ferraro's public policy class were to have been treated to a reading list which would have told her side of the story. Elevated alongside Zbigniew Brzezinski's *Power and Principle* would have been Gerry's *My Story*, as told to Linda Bird Francke. Alas, it were all for naught! Though her threat to don an academic's robe has shaken the very foundation of our proud Ivory Tower, our prognosis is that Alma Mater will survive. After all, our Republic did.

Clevinger was already on the way, half out of his chair with emotion, his eyes moist and his lips quivering and pale. As always occurred when he quarreled over principles in which he believed passionately, he would end up gasping furiously for air and blinking back bitter tears of conviction. There were many principles in which Clevinger believed passionately. He was crazy.

Joseph Heller,*Catch-22*



Drug-addicted Losers?

In response to recent threats of drug tests for Ivy League athletes, the Columbia Chapter of the National Organization for the Repeal of Marijuana Laws (NORML - sic) has sounded the call to protest this infringement on civil liberties. Meanwhile, our football team continues to play as if they were under the influence. Has someone been feeding our Lions too much catnip?

Lead on, Boy Wonder!

Another timely decision by Columbia's own superhero, President Michael I. Sovern. Our caped capon issued a disclaimer to accompany Jeane Kirkpatrick's "Award of Excellence," to be given by the Graduate Faculties Alumni on October 21. The dynamic uno is afraid that people might be under the impression that the award represents the opinion of the Columbia community.

Holy unfounded assumptions! Has Batman gone mad? @$#!!POW!!!

From the Second Pythian Ode

It is God that accomplishes all terms to hopes, who overtakes the flying eagle, outpasses the dolphin in the sea; who bends under his strength the man with thoughts too high, whileto others he gives honor that ages not.

-Pindar

Books

Brian Domitrovic, David Bresch

The Triumph of Politics: Why the Reagan Revolution Failed
David Stockman
Harper & Row (21.95)

David Stockman entered Ronald Reagan's entourage as the Director of the Office of Management and Budget in January, 1981, as an economic revolutionary. Nurtured by New York Representative Jack Kemp and other lions of "supply side" economics, Stockman planned to navigate the American economy from the government-centered Great Society to the business-oriented "Reagan Revolution." His bold initiative included historic tax and spending cuts, coupled with a financially precarious defense buildup. If followed to the letter, the plan was to have lead to a promised land of growth and balanced budgets by 1984. This initiative fell prey to what Stockman calls "The Triumph of Politics." The fatal flaw of Stockman's agenda was that it had to be followed strictly; when Congressmen and cabinet officials riddled the tax cut with loopholes, and saved pork-barrel spending that they had to eliminate, the Reagan Revolution was dead in its tracks. Tracing the digression of his fiscal program, and offering instructive tales of competing Washington beureaucrats and presidential advisers, Stockman has created the first insider's account of the formulation of the historic Reagan economic agenda.

During the 1980 Presidential campaign, a sect of elite Republicans convinced Reagan to confront Carter's economic policy shambles with a supply-side strategy. Stockman's coterie would overturn the Great Society. They would reward entrepeneurs with a tax cut, streamline entitlement programs, and severely reduce subsidies and regulations for individual industries and businesses, regardless of the parochial constituencies. In theory, the supply-side schedule was sound. Primed by he tax cut, and streamlined with subsidy reductions, capitalism would flourish.

Absorbed in the ardor of his "Grand Doctrine," Stockman, in 1981, began taking his case to cabinet officials and Congressmen. He found stiff resistance from these policymakers. Each was willing to meet the Budget Director's agenda as long as his pet projects were not felled. Each tier of Stockman's program eroded as special interests pervaded the budget. Stockman charges that his effort to eliminate domestic industry subsidy boondogles was tripped up by bureaucrats like Energy Secretary Jim Edwards and Agriculture Secretary Dick Lyng, who had to please their followers by keeping programs like subsidies to tobacco companies and breeder reactor utilities and grants to farmers intact. Subsequently nearly every Congressman had to have his share of the loot, and Stockman's spending cutting scheme became pocked with exemptions. He envisioned paring $118 billion from the 1982 budget, but had to settle for $70 billion.

But the young economic meistro did not lose faith. He figured that he could pursue the spending cuts after the tax cut had passed. Unfortunately, the tax cut proved to be as large a giveaway as the spending program. Given the spending cuts' tepid success, Stockman realized that the tax cut had to be chopped from Reagan's thirty percent mark in order to avoid a deficit. But again Stockman insists, the bureaucrats frolicked in the politics of taking. First, Reagan refused to flinch, believing in the much heralded Laffer Curve which guaranteed more government revenue after a tax cut due to the cut's impetus to business expansion. Reagan ignored Stockman's reports that showed the impossibility of that effect. Second, the same Congressmen who safeguarded their pet projects now needed tax loopholes to please their constituencies. The Stockman balanced budget formula was thus confronted by a double onslaught: A Congressional refusal to reduce spending and a Congressional and Presidential approval to slash taxes. Battered and frustrated, Stockman in late 1981 collected leading Republicans to warn them of the impending doom. He shared faith with White House Chief of Staff James Baker and Senate Finace Committe Chairman Pete Domeneci, both of whom realized that the Reagan Revolution was turning into a fiscal catastrophe. In telling the tale of a budget gone haywire, Stockman offers revealing, but perhaps misleading, insights into the world of Washington politics. Stockman portrays Defense Secretary Caspar Weinberger, for example, as a nemesis to the balanced budget. Built into the fiscal plan was the largest peacetime defense buildup in history--$1.46 trillion over five years. When Stockman failed to secure key domestic spending cuts, he tried to pare a meager two percent off expendable defense outlays. Weinberger, however, defended every defense dollar, although the cuts wouldn't have touched programs dear to US security. Finally, Weinberger relented, saying that he could barely "manage" a $13 billion cut out of a three year budget of $800 billion. Stockman commented: "*Manage?* All I could do was nod. The sum was too ludicrous to denounce. The President smiled."

The other cabinet officials were just as shrewd, but, Stockman argues, usually more egotistical and unintelligent. Alexander Haig used his army regalia to bully Stockman into sparing the Defense Department. Secretary of the Treasury Donald Regan, for whom Stockman relegates the most criticism, ignored the impending economic crisis in order to

impress the President with cheery economic reports. Stockman more subtly criticizes Reagan, describing him as a political dynamo who did not comprehend the complexities of his own economic policies. Perhaps Reagan frustrated Stockman most. Reagan often dismissed his Budget Director's warnings of the bloated defense budget and the massive tax cut with platitudes concerning "the previous administration" and the way he "operated in California," though the warnings in question were exclusive to the Reagan federal fiscal plan. Stockman declares Reagan's greatest failure, owing to his alleged incomprehension of the economic crisis, his refusal to hike taxes once two-hundred billion dollar deficits became budget standards.

As an insider's expose of the Reagan cadres, *The Triumph of Politics* is a work without parallel, but not a paragon. Many of his insights are valuable, but generally Stockman's glimpses of the entire array of the Reagan gallery are much too cynical. The author catergorizes Regan, Weinberger, Haig, plus Deputy Chief of Stafff Michael Deaver, Ed Meese, along with a host of Democrats, as provincial, politicians and even pseudo-intellectuals. Even if such allegations were true, they would still be inappropriate in an internationally-marketed book, against which the accused cannot defend themselves. Because Stockman so vehemently, and often emotionally, castigates those who spoiled his program, the reader is forced to challenge Stockman: For how much of the budget blunder is he responsible?

Had Stockman's plan been followed strictly, today two trillion dollar deficits would not burden the nation. But this agenda was revolutionary, predicated upon dismantling a half-century's construction of an elaborate, though ailing, government subsidy system, upon which many poor, small businesses, and educators, relied. Stockman was not a newcomer to Washington. He had written speeches for John Anderson for several years before he ascended to the House of Representatives in 1976, and later secured a position on the economic council of the 1980 Republican convention. Therefore he must have known that the capitulation that he expected was impossible in the American governmental forum. For example, he placed Social security on the chopping block for a $44 billion dollar whack. But he never details the extent of such reform, much less his plausibility, even in a fully Republican Congress. Among the questions left unanswered are, would Social Security revenues mingle with Treasury funds to reduce the deficit, and would the Social Security tax, along with other taxes, be reduced? Stockman elicits such probing from his treatment of other Washington bureaucrats, whom he portrays as shortsighted beneficiaries of the Reagan spoils system.

Such rhetoric, unfortunately, overshadows Stockman's palpable economic arguments. The ambitious budget director realized in late 1981, after his original budget proposal had been decimated, that he had to make the needed amends. For his remaining three and one-half years as the director of the Office of Management and Budget, he unassumingly attempted to increase taxes to brake the runaway deficit. He failed, and finally resigned, quietly, in August, 1985. Stockman correctly asserts that the most economically patriotic act that Reagan can undertake is to raise taxes, against his campaign pledge. Shouldering aside the Washington rhetoric, the reader can arrive at the book's greatest asset, its economic pith.

- Brian Domitrovic

Gameplan
Zbigniew Brzezinski
Atlantic Monthly Press ($18.95)

"This book is based on a central proposition: the American-Soviet contest is not some temporary aberration but a historical rivalry that will long endure. This rivalry is global in scope, but it has clear geopolitical priorities, and to prevail the United States must wage it on the basis of a consistent and broad strategic perspective. This book therefore is not an argument about the evils of the Soviet system compared with the merits of American democracy, but a practical guide to action."

This is the startling first paragraph of Dr. Zbigniew Brzezinski's new book *Gameplan*. It is a bit forward, a fair view of the author's clear and authoritative style. The reader never wonders what is the author's thesis nor where his discussion is leading.

From the first chapter, which summerizes the conflict between the super-powers, to the last, which offers some long-term goals for policy makers to strive for, the book reads like a cup of black coffee after a hangover of indecision.

Critics will greet the book as an inevitable product of the Reagan era and dismiss it. Brzezinski does sometimes sound alarmist, and he toys with statistics as adroitly as a politician. Before these people become too glib in their view, they should recall Dr. Brzezinski's credentials: he served as National Security Advisor in the Carter Administration, one constantly praised for its attention to liberal virtues in foreign affairs, like human rights and arms control. Furthermore, the author in this book and elsewhere calls attention to the need to extend freedom to all nations, a critical element of a responsible foreign policy. This aspect of the doctor's thought may shock those who habitually divide people into hawks and doves. Like the best of modern thinkers, Brzezinski defies simplistic labeling. He writes too logically and responsibly to warrent this, and does not compromise his argument with machiavellian musings.

The world is divided into three to four strategic fronts by Brzezinski. Our victory over the Soviet Union requires a responsible policy towards every one of them. The author tires of event-oriented politics, and warns that in spite of many shortcomings in Soviet strategy, the Russians remain patient and largely ignore the journalistic whirlwinds that distract us from what is enduring and important.

Dr. Brzezinski astutely considers the strategic balance in terms of ethnic conflict and their devisive potential. He spends a whole chapter examining the Warsaw Pact's different cultures and their unfriendly feelings toward one another, as well as viewing Pakistan and Iran from this window. The ethnic diversity of the Soviet Union is seen as one of its most vulnerable flaws. The West is urged to no longer consider the Brezhnev doctrine sacrosanct. Russia has never had to face agitation of the extent they have fostered in the West, from efforts to destabilize Italy with arms sent to the Red Brigade to a massive investment of capital into terrorism in Turkey in the late seventies. The explosives used by the Abdullah clan in Paris to slaughter innocents, the clay-like Semtex-H, is manufactured in Czechoslovakia. The list of other Soviet projects in this area defy enumeration.

The author also takes a sober look at the Strategic Defense Initiative. He incorporates this into his entire estimation of allied nuclear strategy while dismissing the comic-book notion of a "peace-shield" cutivated by the present administration. The technology will act as a further deterrent to a Soviet first-strike and so it remains useful, but it is not an immediate panacea to the nuclear dilemma.

The theme of imbalance in super-power relations haunts Dr. Brzezinski's discussion of the fourth strategic front, Central America. Russia already has an island proxy in the region powerful enough to extend its military muscle all the way into Africa. With the arrival of Nicaragua into the Soviet camp, the future does not auger well, threatening an already unstable Mexico.

But one cannot ignore *Gameplan's* finest quality: its unfailing optimism. If one were to observe the world through the nightly news, one would see a dismal portrait of our country's position. This state of affairs has improved slightly during the Reagan administration's tenure. But we continue to ignore the bleak economic realities that Russia must face every day. The Russian citizen suffers four times the cost we do just to maintain strategic parity with the United States. Each person in our country produces more than twice as much as his/her Soviet counterpart. Brzezinski's reason for reminding us of these facts is clear: if we understand our strengths, we might pursue a less reactionary foreign policy.

- David Bresch

Nicaragua

Continued from page 7

"Death to Yankee Imperialism," "Long live May 1," and "Every house an FSLN garrison." *Future Dawn,* a reader designed for sixth-graders, contains a story called "The Torturers," which explicitly dpeicts two U.S. Marines, "Hays" and "Phillips," who get their jollies from dismembering Nicaraguan children and civilians. Certainly, if the point of the literacy campaign were to teach reading, basic textbooks would be geared toward teaching grammatical concepts, not FSLN propaganda and U.S. hatred. The party, the Sandinistas, control education in Nicaragua, as they control nearly everything else.

Since the civil war has intensified, the Sandinistas have attempted to exert even more control. In 1982, a state of emergency was declared (technically rescinded from November, 1984 to October, 1985) that still remains in effect today. By decree, rights to free expression, political activity, property, certain due process rights, and the right to strike have been curtailed. Also in 1982, the Public Order Law was strengthened. In 1983, the Sandinistas established the Popular Anti-Somoza Tribunals (TPAs), a separate judiciary system to try political cases. For the past three years, these three components have been the main mechanisms of Sandinista political repression.

The Nicaraguan Permanent Commission on Human Rights (CPDH) estimates that more than three thousand political prisoners exist in Nicaragua today. Many are arrested and held in communicado for weeks or months before charges are formally filed. Many are simply arrested, held for several days, and released. The International League for Human Rights (ILHR) reported in 1986 that between three thousand and six thousand five hundred Nicaraguans "are arbitrarily detained at any given time." Most of these are trade unionists, opposition political party members, clergy, or human rights monitors without any connections to the contras at all.

Those who are suspected of being involved with the contras fare far worse, since they must go before the Popular Anti-Somocista Tribunals. According to the ILHR:

> Judges on TPA panels lack independence and are under direct jurisdiction of the executive branch. The lay members of the tribunals are selected from the Sandinista Defense Committees on the basis of their loyalty to the Sandinista Party and normally lack legal training. Most convictions are based solely on the defendant's own statements, which are commonly exacted under duress or torture.

As may be expected, chances of being acquitted after a TPA trial are rather slim. Americas Watch reported in their study *Human Rights in Nicaragua 1985-1986*, that in a survey of five hundred and fifty nine cases heard by TPAs in 1985, only one resulted in acquittal. A similar study, reported by the ILHR, found that out of one thousand cases, only seven defendants were acquitted, all of them either women or elderly.

"The Sandinistas are also responsible for torture ... methods include beatings, rape, mock executions..."

Upon incarceration, prisoners are held in conditions below almost all United Nations minimum standards. Cells are usually no bigger than closets and lighting, fresh air and sanitary facilities are regularly denied. The Sandinistas are also responsible for torture. According to the ILHR, methods include "beatings, rape, mock executions, death threats, food and sleep deprivation, forced postures, prolonged isolation, prolonged detention in darkness, prolonged denial of medical care, hooding, and submersion in water." This is confirmed by the CPDH, which adds that stringent government restrictions on prison access, the existence of secret detention centers, and the high level of motivation necessary to report incidents of mistreatment result in a "small sample" of these violations ever being revealed. Eyewitnesses have reported that the National Director of State Security, Lenin Cerna, has personally administered beatings, death threats, and mock executions.

Even in times of civil conflict, arbitrary detentions, excessive violations of due process, and torture are violations of international law, according to the International Covenant on Civil and Political Rights, which the Sandinista government ratified. It seems rather ironic that Mr. Ortega spoke to the UN on US violations of international law; if the Somoza regime had instituted as rigid controls as the Sandinistas have, it would still be ruling Nicaragua today. But FSLN style of control was planned more than a decade ago. The Sandinistas' grip has progessively tightened; the standard of living for the average Nicaraguan has yet to reach half of its pre-1979 level; the opposition has grown. Yet there are those in the West who will feint blithesome ignorance to those facts, content in the knowledge that the salacious explanations offered by Mr. Ortega and his cronies will be accepted, even lionized, in the pulpits of New York. **mr**

Lehrman

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MR: What about this years race with Andy O'Rourke? If Governor Cuomo had a more visible opponent, could he afford to run on his record?

LL: It is hard to say. That only comes out in debates, and Mario has refused to debate Andy. In Mario's campaign so far, I have seen no effort to put out the record for New Yorkers to examine. So it is really hard to know what the record is. Can you name me one major or significant accomplishment of the Cuomo administration?

"In Mario's campaign so far, I have seen no effort to put out the record for New Yorkers to examine."

MR: Well, in his commercials he talks about how he saved lives on New York State highways by raising the drinking age and toughening drunk driving laws.

LL: It would be interesting to compare the number of lives that he has saved through the drinking law, which is a very desirable thing, and the number of lives that have been destroyed by his payment of Medicaid funding for abortion.

MR: You have modified your position on abortion somewhat since when you were campaigning for governor, haven't you?

LL: In 1982 I was opposed to Medicaid funding for abortion, I believed that abortion was wrong, but I was not convinced that it could be prohibited by law. In 1983 the *Akron* decision was made, when the Supreme Court made clear that unrestricted abortion on demand was in fact the Court's opinion. It also became clear to me that *Roe v. Wade*, which set up some guidelines were in fact not the real guidelines. The *Akron* decision made clear that the court intended unrestricted abortion on demand to be the prevailing policy, and that almost no reasonable restrictions by states or cities to regulate abortion would be tolerated by the court. I remember

doing an interview after that decision, because that decision had a tremendous impact on my own viewpoint, and it was that decision that caused me to believe that the only hope was to restrict abortion by law. The more I have studied the question, the more certain I have become that we must pursuade the American people that there needs to be a change of heart on this question, and thus there can be an effective change of law.

MR: You have been mentioned as a possible candidate for Senate against Senator Moynihan , also in the past you have been mentioned as a possible Presidential candidate. What are your future political plans?

LL: I have come to consider the Senate race because it may very well be the best forum in which to frame the issues that New Yorkers must solve.

MR: Can you tell us about Citizens for America?

LL: It is the President's grassroots citizen's lobby. Citizens for America has two goals. The first goal is to get the truth out through the broadcast and print media about the President's economic and national security policies: economic growth through free enterprise and a strong national defense designed to keep America number one. The second purpose is to meet with Congressmen and get them to vote for the President's program. The way we do this is to organize congressional district committees in each one of the congressional districts. We have about five thousand volunteers, our offices are in Washington, there are about fifteen on the permanent staff, and I am the chairman. I am going to give up that position so I can be more free whether or not to undertake a Senate campaign.

MR: I guess the most visible thing that Citizens for America has been involved with is the freedom fighter movements around the world, with the Muhajadeen in Afghanistan, the contras in Nicaragua, and UNITA in Angola. Do you believe that building an anti-communist network is possible? Do you think that there can be any real success?

LL: The answer is yes to all three of your questions. I believe that the Soviet empire is overextended -which is not to say that it is weak, only overextended, just as America was overextended in the sixties. I believe that there can be some success in rolling back the communist empire and I believe, more importantly that the constitutional democratic model, which is the American model, can win the battle for the minds of men and women all over the world. So I am very optimistic.

MR: When you were in Angola, you had a chance to meet Jonas Savimbi. Can you tell us about him? Is he a true democrat?

LL: I don't know if he is a true democrat. I don't know if Gorbachev is a true communist, in the sense that we would define it from a distillation of Marx and Lenin. But Gorbachev is likely to be what he says he is, a communist. He looks like a communist, he acts like a communist, therefore he is a communist. So too with Savimbi. While at one time he may have said he was a Maoist, I do not know that to be a fact. Today he acts like a democrat, he talks pro-American, he makes policies that are anti-communist, he argues unmistakeably for his country according to the principals of freedom as we know them in America. And thus I take it as an act of political understanding that that is what he's for and I suupport him.

MR: You spoke of democracy and the principals of freedom, but can ideas like democracy and pluralism take root in places like Angola and Afghanistan, in spite of tribal or ideological divisions? How viable is liberal democracy in places where the tradition is completely alien to it?

LL: I think there are two answers to that question. First, I think that it is better to try constitutional democracy, even in the most divided tribal areas of Africa, or in the most difficult areas of Latin America and Asia, than the communist alternative. For as feeble as a constitutional democratic regime might be for whatever reason, it is neither as pernicious nor as hopeless an experiment as the socialist or communist experiment has been. The socialist experiment has impovrished all of southern Africa, just literally made them poor. The lions of the liberals, like Julius Nyere of Tanzania, have turned their countries into economic deserts. So who will argue that socialism has worked in Tanzania, other than a committed utopian? So I say that as difficult as constitutional democracy might have been had it been tried in Tanzania, it would have been better than socialism. Usually what people mean when they ask your kind of question is can constitutional democracy work as it has in America. We can only know if we try. Our own experiment has taken a full two hundred years to reach its present level. It was a hundred and twenty six years ago that the black man was considered under the constitution of the United States to be three-fifths the political value of the white man, only thirty years ago that blacks and whites were to be held by law to be given the same opportunity in the public school system.

MR: But though democracy and free enterprise may take root in a country like Brazil, can it succeed in a place like Afghanistan, where the muhajadeen are Muslim fundamentalists?

LL: I think so. There are many different factions within the muhajadeen, they are bitterly divided not only on questions of religion but also on organization. They could be the very same divisions which lead to the decision not to establish the Anglican Church in America as the established Church of the country, which led to the first amendment, which prohibits the establishment of any sectarian church while at the same time it

gives the free exercise of religion to all. So the very divisions you speak of among the muhajadeen could lead to the conclusion that our constitutional arrangement is the best practical arrangement instead of the fratricidal warfare which often accompanies those deep divisions.

MR: That sounds very idealistic.

LL: So be it.

MR: It is interesting that you tie in the muhajadeen with our constitution and the free practice of religion. Earlier in the interview you also spoke about abortion. With the possible candidacy of the Reverend Pat Robertson and the recent congressional confirmations of Justice Scalia and Chief Justice Rehnquist, there will probably be a lot of talk about religion and public policy. How do you see the two coexisting in the naked public square?

LL: The issue of religion and politics was resolved for all time, in principle, by the Founders. Not all conduct in America is permissible. Russian novels, and characters like Ivan Karmazov nonwithstanding, in America, unlike many other countries, not all conduct is lawful or permitted. And other kinds of conduct is positively endorsed. The discriminating principle is the Constitution of the United States and the Declaration of Independence. I start that way because some people believe that the relation between religion and American politics can be decided every year and changed every day. Now, Thomas Jefferson and the Continental Congress created the Declaration of Independence as the fundemental act of union -that is what Madison and Jefferson called it. The Founders in the Declaration of Independence declare that this country was created "under the Laws of Nature and of Nature's God." That is a direct quote. They declared that we "hold these truths to be self evident," that they are "endowed by the *Creator* with certain unalienable rights." The *Creator* endowed us with the unalienable Right to Life, Liberty and the pursuit of Happiness. So this is what the Founders said and what they meant. If we are Americans, we were born in a country which was created on July 4, 1776. In as much as the Founders in the Declaration of Independence appealed to the Laws of Nature and of Nature's God as the foundation of our country, and in as much as they appealed to divine Providence throughout the document, it is clear that religion and politics were indissolubly linked at the birth of the Republic. There can be no established Church. I think that has been a very good thing for our country, but Congress shall make no law prohibiting the free exercise of religion.

MR: At his famous address at Notre Dame University, Mario Cuomo said that as a committed Catholic, he felt that abortion was wrong, the taking of an innocent life. Yet he said that as an elected official, he had no choice but to uphold the laws of his state and to continue to provide Medicaid funding for abortion. At another speech at Notre Dame, Congressman Henry Hyde took a very different position in the same question. What are your thoughts on this topic?

LL: Mario's assertion that personally he opposes abortion but that as governor he must provide Medicaid funds for abortions, and that he can do little to change the law I can only answer two ways. First, Mario states that we have to change opinion. In the issue over seatbelts in New York State, polls showed that as many as seventy per cent of New Yorkers did not want mandatory seatbelts. This was just two years ago. But Mario campaigned the entire state, saying that mandatory seatbelts will save many lives. And he brought the full weight of the governor on the legislature and on the people of the state of New York to persuade them to have a law prohibiting them from putting themselves at risk by not having a seatbelt in order to save lives. Now if you apply that reasoning to the abortion case, and reflect that twenty million lives have been destroyed since 1973, Mario, if he is prepared to go against public opinion, and campaign to save lives through mandatory seatbelts, it strikes me as very strange that he is not prepared to campaign the state of New York and America for the same attempt to save the life of the child about to be born. This argument just does not hold up.

"How can a governor who goes around vetoing 'on principle' the death penalty ...not want to make the same campaign to veto Medicaid funding for abortion 'on principle?' Obviously he has a double standard here."

And the second argument I would make is that the Declaration of Independence is the fundamental act of union. Now the Declaration of Independence says that all men are endowed by their creator with the unalienable right to life. And to be endowed by the Creator with an unalienable right to life does not mean that you are endowed in the second trimester or the third trimester. Creation means at the very beginning of life. Now this is not a religious argument, this is the Declaration of Independence of America. This is the secular document which gave freedom, which gave life to our nation. The fifth and fourteenth amendments of the Constitution say that no person shall be deprived of life, liberty, or property without due process of law, whereas we are taking the life of the child in the womb without due process of law. So Mario's argument does not hold up because it is the equivalent of saying that personally I oppose murder but I do not think that it can be prohibited by law. I once thought that. But it is a false, if sincere, opinion.

MR: On the seat belt illustration, perhaps an even more interesting illustration, the death penalty, which eighty per cent of his constituents support, has been vetoed by him every

time it has come before him on the grounds that his personal beliefs...

LL: Oh, good for you! How can a governor who goes around vetoing "on principle" the death penalty which is endorsed by the majority of the legislature and the majority of the people, how can Mario not want to make the same campaign to veto Medicaid funding for abortion "on principle?" Obviously he has a double standard here. **mr**

Conservatism

Continued from page 11

technological advancement. We simply cannot afford it.

Social inequality, correctly executed, assures all of equality of opportunity, of education and training, of a share in progress, while allowing men of different abilities and talents to distinguish themselves as they wish, without devaluating their innate human worth as members of society.

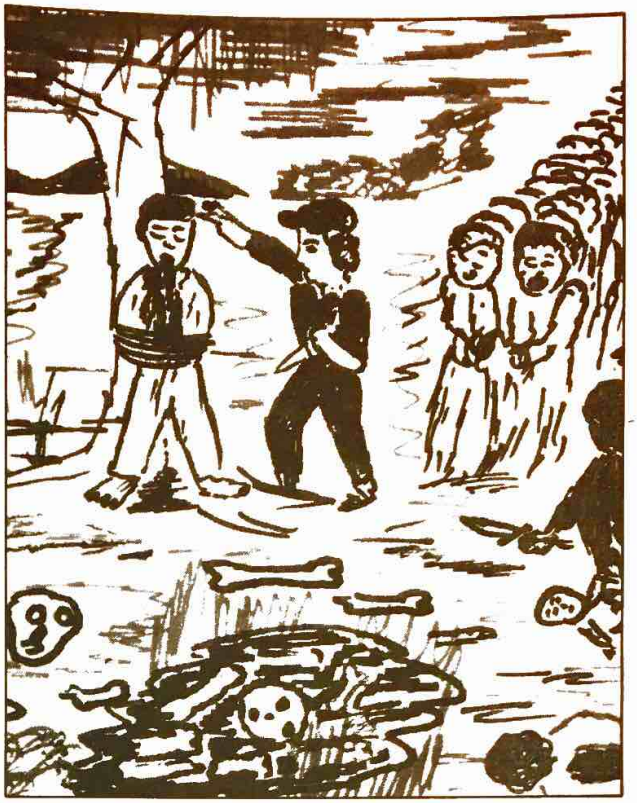
Political life constitutes another distinct realm of conservative concern. It necessarily begins with the question "How should we as a community live?" The import of the answer we give to such a query cannot be reasonably undervalued. To say that anyone in society can adequately formulate a response is dangerous. Andrew Jackson, Jimmy Carter, and Ronald Reagan, populists all, have each proven just this point; they may seem "neighborly" or "nice," but they simply are not equipped to respond to such a question. People have talents--different talents--and there are indeed those talented at governing as there are those good at farming or, say, acting. To suggest a "governing class" in this country or especially on this campus is not far from committing a suicidal stroke. But a responsible system depends on it. Again in the Platonic tradition, we must recognize that through a well-designed educational system, men will emerge talented at, and interested in, in many different pursuits, each for the wisdom and stability of the society and the individual.

This is not to suggest that majoritarian influences be entirely removed from political life. The people can and ought to rule--that is to choose their governors. They can listen to, and decide among, a variety of members of the governing class; they can determine which man among those knowlegeable in the affairs of state suit their ends. The tory, thus, can argue for a *true* republic, a system of government to draw the acceptance and awareness of the population while ensuring that the most apt for political rule.

Further, in answering the first query of politics, one must admit that government is necessarily a social force, a moralizing force. As Will asserts: "all education is moral education; all legislation is moral legislation because it conditions the action and thought of the nation in broad and important spheres of life." Laws are moral agents, tools toward the end of elevating man, or, if improperly employed, tools of despotism; their power is vast and, therfore, to be cherished and carefully crafted as elements of the educational process. Their crafters should be men of excepional political ability, spirit and concern; they should be members of the governing class.

"Laws are moral agents, tools toward the end of elevating man, or, if improperly employed, tools of despotism..."

Throughout these considerations, the value of man is central. His quest for some sort of satisfaction, for some sort of transcendental good during his few decades on this Earth is paramount. We on Morningside need to recognize that man cannot find satisfaction in the moralizing of the New Right, the monadic existence of the Middle, or the intolerance and societal destruction of the Left. Meaning is not measured in adherence to coercive preachers; or by exercising one's "self-protecting rights" that only distance man from man, not bring him closer together to his fellows; or by one's labor. The question of Plato, Burke, Newman, and Bismark remains: If man does not grow and gain a deep and warm public bond with those around him, if he does not learn from those who have preceeded him and add to the knowledge of those who follow him, if he does not participate in the incremental advancement of social traditions, how can he be said to have lived at all? It is clear: the Past is our Heritage; the Presen our Responsibilty; the Future our Challenge. **mr**



Ask your child to draw a picture of his life.

Now, compare it to this one.

Your child doesn't draw pictures of severed heads or neighbors being stabbed. They aren't part of his life experience. But to the Cambodian child who drew the picture above, these horrors of the Khmer Rouge were a common occurrence, like your kid's touch football game.

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IRC

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...the last word

Michael Jones is a member of the Black Student's Organization

Many successful students turn down or never apply to Columbia University because it is in New York City, a city known for its many dangers. These students have a real picture of Columbia, and many of their more foolhardy counterparts, those who opt to attend Columbia University, lack their insights into the realities of coming to Columbia. New York is a dangerous place -- read the papers, listen to the screams. And Columbia stands, despite the Columbia administration's attempts to create subtle and tangible barriers, in the middle of one of New York's most dangerous neighborhoods, Harlem. If you don't believe me, walk five blocks north or south of campus. Clear as the evidence is, many students still approach Columbia expecting a securely policed area completely crime-free, an unreasonable and impossible assumption. Lacking the desired security area, the student gets involved in attempting to create a secure environment, and in the process, often gets tangled up in a double standard.

The most clear manifestations of this paranoia are the calls which Columbia security receives regarding the "strange" or "sneaky," or "weird-looking" or "funny-looking," or "suspicious" man. Working for security's escort service last year, I had the privilege of listening to descriptions over the security radio which would fit a great many New Yorkers. That ambiguity is fine, but it is the complaintant's attempts at clarifying the descriptions which would excite the racially sensitive.

According to a security officer, the security radio once blared, "Report of a strange black man wearing a suit walking around Dodge Hall." The security team dispatched to the scene, hurrying past a Law School professor who was walking out of Dodge. The professor turned and asked the officers what the problem was, and after being told offered to join in the search. When the team arrived at the office of the complaintant, the complaintant voiced her appreciation of a job well done, identifying the professor as the strange black man. *The professor was black.* Understandably, he vehemently expressed his outrage to the woman for her racist aspersions.

But was that enough? Does the professor's confrontation and the many others like it change anything? I have been reported as a "strange black man" prowling around the dormitories and have had similar confrontations. Do they prove anything? And if they do, then do they open the doors for more serious concerns?

The need for security was one of the founding principles of slavery in early Virginia, and was one of the fundamental justifications for that cruel institution throughout its existence. Would it be best to say that insecurity exists in an urban environment, and these "calls" frequently happen "as often as a car needs gas," as a security guard once told me? What is important to understand is that with all the overreactions there is something that is being overlooked, something not being reacted to, which brings us to the double standard. What do "strange black men" look like? I have been one, yet everyone does not look like me. I wonder what "strange white men" look like? I've been told that the complaintant usually describes a suspicious looking white man by what he is wearing. Yet a suspicious looking black man is just identified as being black and when pressed as to what he was wearing, the response is more often than not "I don't remember." This indicates a racist double standard.

"The professor vehemently expressed his outrage to the woman for her arbitrary racist aspersions"

Security in New York is up to the individual. In a similar manner, security here at the University is up to the individual. A man or a woman should not be trusted because of his or her skin color or because large letters spelling COLUMBIA are on a sweatshirt on his or her chest. Nor should he or she be suspect only on account of skin color. How many crimes that could have been stopped were not because the double standard blinders were on? To say that security should be up to the individual is not to suggest that the campus should be an armed camp closed off to the community, with students sleeping with one eye opened. People must take precautions because of Columbia's urban-setting, but there is also the need to wake up and stop seeing the color of a man's skin irrespective of anything else when we feel our safety is in jeopardy. Prejudice spawned by insecurity and ignorance is no more justifiable than prejudice spawned by hatred.

Michael Jones

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Columbia Daily Spectator, Volume CX, Number 11, 16 September 1985 — Spectator Spectrum U.S. Cubans defy Castro
[ARTICLE+ILLUSTRATION]

Spectator
Spectrum

U.S. Cubans defy Castro

By NEIL GORSUCH

Setting: Late night at a run-down office building in a hispanic section of industrial New Jersey not far from Morningside Heights . . .

You knock on the graffiti-covered door and meet ''Gus''—a 250-pound ''friend'' who leads you through dimly-lit hallways and up two narrow flights of stairs to another, smaller door. He opens the door and before you are three dozen men in black suits smoking cigars, chatting quietly among themselves in Spanish. At the end of the meeting ''Gus'' is instructed to drive you to a Cuban ''taxi'' stop down the street. These ''taxis'' are really ancient vans that pick up people at bus depots and deliver them to their destinations for ''a more reasonable price than New York cab.''*

If this scene is not enough to make you wonder if you have somehow accidentally stumbled into a meeting of the Cuban mafia, you soon notice that these gentlemen are not just smoking cigars, but **Cuban** cigars.

Well, the men in this smoke-filled room on a recent Thursday night were indeed Cubans who, expelled from Cuba by Castro, now reside in New Jersey. Some were city councilmembers, others were business people, doctors and laborers. They made up a picture of the typical American melting pot. These ''ex-

the typical American melting pot. These "ordinary" Cuban gentlemen—members of the Cuban Refugee Association of New York—were discussing how to best make their case to the American public for the end to the regimes of Castro in Cuba and the Sandinistas in Nicaragua. Although they represent a variety of professions and backgrounds, they have all dedicated themselves to making America more aware of the harsh realities they see their brethren living with in the Communist nations of Latin America and elsewhere.

Horst Uhlich, president of the Captive Nations Association, spoke of Afghanistan in a way these men understand: "We are determined that Afghanistan shall not join the list of Soviet Socialist Republics whose people were given into misery and slavery according to the program of . . . the criminal Joseph Stalin." He and others asked for a fight against Communism, the "evil spirit of Anti-Christ."

But how is this "truth" to be revealed? I was compelled to ask how they reasonably expected to wage their war and be listened to, when so many Americans take Communist control of Poland, Cuba, East Germany, and Afghanistan for granted.

That question was a tough one for them to answer; I received a variety of responses. Some felt Cuba and other regimes should be toppled by force, others said that Moscow can be stopped by freedom fighters like those in Nicaragua and Afghanistan. But the overriding concern of these men, and the message I received most strongly, was not as simple as the above remarks.

A man named Prof. Ghazantar stated that: "In a curious way there is the idea that if wrongdoing is made public, it is in some way rectified. There is also our feeble hope that when violations of norms of human decency are brought to the attention of concerned individuals, we can . . . put a stop to any further violation of such norms" and gain sympathy for human suffering.

These words were heartfelt words: Ghazantar and others meet in smoke-filled, crowded little rooms in New Jersey because they continue to hope. Most don't realistically expect the expansion of Communism—a force that has

supressed and killed their families and friends—to stop, but they do pray that people will take notice.

On Sept. 20 at noon, across the street from the U.N. Building, these men will be remembering the 1¼ million Afghan lives lost in the last six years and the atrocities of the Ukrainian holocaust, which included the loss of over 9 million people, as well as the maltreatment of political dissidents in Cuba.

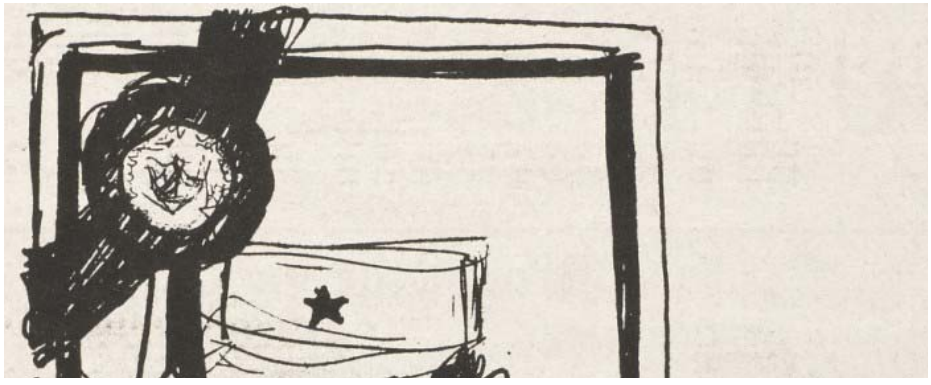
They will rally with bipartisan support, with speakers from a variety of political philosophies (both Sen. Alfonse D'Amato and Rep. Mario Biaggi will attend) and with a collection of A.P. press reports—not propaganda pieces—detailing human rights violations.

Starting Sept. 20 at 12 p.m., these men will put aside their daily jobs and obligations to participate in this remembrance. If perhaps all their notions are not exactly in line with our thinking, we can at least respect Ghazantar's words; when these men heard I would attend their rally they were overjoyed--just by my taking notice they felt they had accomplished something.

Though no dramatic move by the Soviet Union will come of it, perhaps we all should take more notice, think a little more on the subject, and act. Some of the men I met that evening in New Jersey have spent a lifetime hoping for just that.

You knock on the graffiti-covered door and meet "Gus"–a 250-pound "friend" who leads you through dimly-lit hallways.

Neil Gorsuch is a first-year student in Columbia College.




ALEX LEE
NO CASTRO
FREE CUBA
CUBAN REFUGEES INITIATE VIOLENT REVOLT AGAINST CASTRO.
SPECTATOR/ALEX LEE

Columbia Daily Spectator, Volume CX, Number 22, 1 October 1985 — Band is not 'disgraceful', but... [ARTICLE]

Band is not 'disgraceful', but...

By NEIL GORSUCH

Bismark reportedly once remarked that ''if one is to retain one's respect for politics. . . or sausage, one should not know too much about how either is made. The same, oddly enough, might be said for the Columbia Marching Band. Consider: one can certainly appreciate a tasty sausage, a finely tuned political state or even the marching band without knowing, or wishing to know, too much about the often unsavory makings of each.

But sometimes there is a need to look at the recipe for the sausage, the deals made in Congressional cloakrooms, or the interesting but questionable habits of our band members.

Sometimes it is necessary to make a closer inspection of the group of self-proclaimed musicians that marched as a missile during halftime at a West Point football game with former Allied Supreme Commander Omar Bradley looking on, only to ''blow up'' another group of ''musicians'' stationed at the other end of the field. (Can you imagine the look on the aged general's face as Columbia's infamous band acted out a ''nuke war''?).

Well, presented here are bits of my talk with two band members, in a revealing look at a Columbia tradition:

Q: Dan, what exactly do you do as a member of the band?

Dan: I am a member of the miscellaneous sounds and noises department. My particular specialty is the cow bell.

Q: The cow bell?

Dan: That is correct.

Liz: I play the spoons.

Q: The spoons?

Liz: Someone has to do it.

Q: But can anyone even **hear** the spoons from up in the crowd?

Liz: No.

Q: Then why. . .

Liz: Because ''spooning''—interestingly enough, also an Old English word meaning ''to f---''—is an important way to keep the members of the band in ''rhythm''.

Q: Oh. . .

Dan: Can I tell you about something that really makes me mad—can we talk?

Q: I, uh, suppose. . .

Dan: Coach Garrett, you know, the guy who yells at everyone. Well, he called the band a ''disgrace.'' I wanna know why

Well, he called the band a "disgrace." I wanna know why we're a disgrace when we're the ones who have to sit through every agonizing defeat of the season, ruining our Saturday afternoons.

Liz: Ya. Besides, how come when he calls the football team drug addicts that makes the front page but when he calls us names no one hears about it? I want you to do something about that, do you hear me?

Q: Well. . .

Liz: Don't laugh, I want justice.

Q: Okay, Liz, Okay. Just one last question. If you could do anything for the world, what would you do?

Liz: Well, I'd like to work for world peace. Think about it—if everyone spooned, the world would be a happier place.

In considering all that was said, I have a few observations to make. The first is that I can now see a little more clearly why these people were not invited to return to the military academy. Further, Bismark's words ring oh-so-true in my ears: perhaps man should never know too much about his band, his political leaders, or his sausage; perhaps he should just sit back and enjoy.

Finally, I feel obligated to call for a questioning of Mr. Garrett's remarks on the band. I think he had his statement backward: the football team is the disgrace and the band members, playing spoons and cow bells, well, they must be the ---- -------.

Neil Gorsuch is a first year student in Columbia College.

Columbia Daily Spectator, Volume CX, Number 107, 4 April 1986 — Poor Dartmouth clone [ARTICLE]

Poor Dartmouth clone

By NEIL GORSUCH

Wednesday's noon-time architects employed two noticeably different shanty styles on Low Plaza: first, the authentic, aged, weathered kind brought from Dartmouth for the event; second, the pre-fabricated, simple and fashionable Columbia look. In doing so, they demonstrated in a wholly tangible form the great intellectual division that separates this spring's activities from last year's and from the present effort of students in Hanover.

The divestment movement is unquestionably an honorable one. It stands for the liberation of an enslaved people, for the recognition of inalienable human rights, for a decent government. The beaten Dartmouth shanty embodies this struggle. It stands crickety and battered, yet solid to the core in resolution.

In complete contrast, Columbia's own shanties are pre-fabricated and simple, as are their occupants' present demonstrations: they diminish the significance of the shanty as a symbol and South Africa as a concern; they lack focus, and set a poor precedent; and they enjoy little student support because of this.

To use in campus protest the image of a shanty, a place where human beings are born, live and then die in slavery and squalor under the Pretoria regime, is to use a *very powerful* image. But by building shanties here, after the promise of full divestment and after Dartmouth's own shantytown, gives the appearance that the image of the shanty and the sad reality it represents are being exploited solely for media coverage.

The shanty is further abused by the demonstrators' insistence that the problems of numerous "causes" on campus be included in their shantytown protest. The United Auto Workers union and the Morningside Tenants Federation have important things to say to our community, but their

suffering cannot be equated to that of the true shanty resident; not every "cause" merits a shanty of its own.

The organizers have simply overextended the effort, have offered no focus to their protest, and have sapped the shanty of all its potency. Columbia's shantytown truly is simple and fashionable.

But pre-fabricated it is, too. Last spring hundreds participated in the blockade; this week fewer than 50 people attended the organizational meeting, fasted and built the shanties. Yet more than a dozen groups claim sponsorship of this protest, a maximum of four students per organization—a prefabricated protest indeed.

Shantytown Columbia is many things, but it is not, sadly enough, true to the cause of South Africa nor to the end of a meaningful demonstration. It does not carry with it the sincerity of the Dartmouth protest nor the spirit of the Columbia student body.

Neil Gorsuch, CC '89, is associate editor of the Morningside Review.

Columbia Daily Spectator, Volume CX, Number 95, 19 March 1986 — Neil Gorsuch [ARTICLE+ILLUSTRATION]

Neil Gorsuch

1. The question here is not whether ''the Marines should be allowed to recruit on campus'' but whether a University and its community, so devoted to the freedom of individuals to pursue their own chosen lifestyles and to speak freely, has the right or obligation to determine who may speak on campus or what may be said. To fulfill an immediate end, we are likely to forget the underlying principle that every human being, according to our nation's proclamations, and reinforced by our University's standards, has an inalienable right to express himself or herself—whether we agree or not. Free speech works; it works better than any form of censorship or suppression; and in exercising vigorously, the truth is bound to emerge.

2. The Senate absolutely must address the way Low Library operates: students have little idea of what the University Senate ''does'' or, more accurately, ''can do.'' The Senate has a concrete obligation to make its proceedings more accessible and to open the offices of Low more than just on a once-a-year tour.

Concerning more specific issues, Phi Kappa Psi, a distinguished and long-time member of the Columbia fraternity system, is doing battle with the bureaucrats to maintain its charter. Weight lifting facilities are wholly inadequate for the ever-increasing numbers who use them, though room does exist to house new facilities if the ''O.K.'' can be found.

3. This question, I believe, could be better decided by a poll of the student population than by the Senate.

4. Instructors of smaller classes, core curriculum courses, etc. are almost always interested in their students and readily available, but more might be done. More faculty-student dinners and social gatherings are needed.

It is imperative that deans open their doors occasionally to casual student inquiries.

5. If possible, yes.

6. Those who attend Columbia have no voice in the

doings of the University; they have no representation on the Board of Trustees. Columbia sorely needs to change this, to enfranchise fully the members of the society that is Columbia.

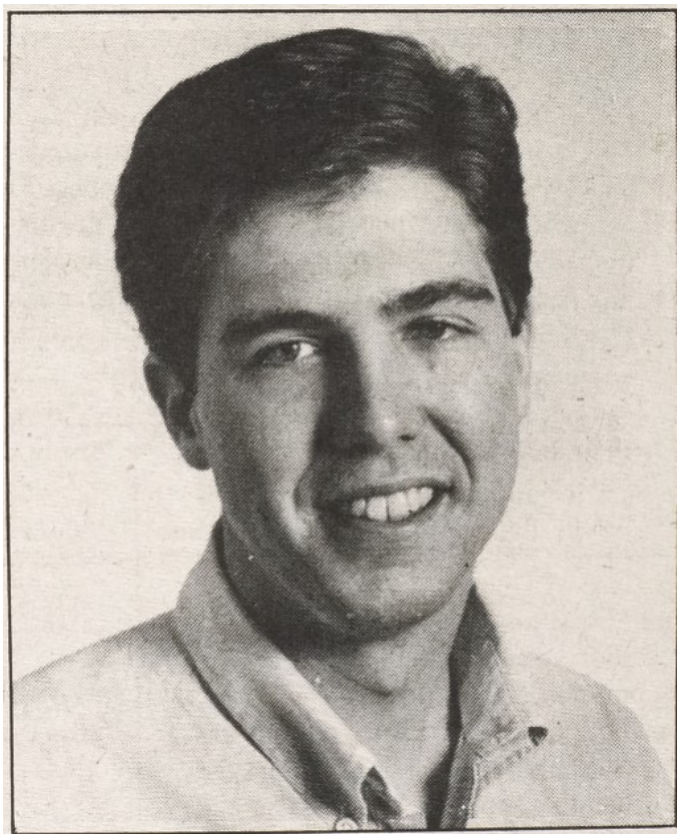
7. While some candidate's may respond, ''students should be involved in everything!,'' I think that is not necessarily the case, although there are many topics of concern to students which thus deserve our attention and active participation.

8. The Rules of Conduct do, unquestionably, need to be clarified. Too many students last Spring complained that the Rules do not explicitly state how alleged violation are to be treated. The University must be able to ensure each student fair and equal treatment; it is difficult to do so now many claim because of great ambiguities. If changes are then a must to ensure that

Neil Gorsuch

changes are made in just a manner.

9. It would be, to my mind, a violation of AIDS patients' rights and privileges of privacy to demand that they report their illness. I would hope, however, that the University will develop a positive and intelligent policy to ensure that all AIDS patients may receive competent medical attention.



Columbia Daily Spectator, Volume CXI, Number 69, 28 January 1987 — Let's let the commander in chief lead
[ARTICLE+ILLUSTRATION]

Let's let the commander in chief lead

By Neil Gorsuch

As the furor fades, the President's oh-so-crucial ''approval rating'' creeps back up, and the '88 presidential potentials move on to newer news, the enduring sour taste of the Iran-Contra affair needs another, more critical, study. With the spring and its enchanting Columbian afternoons of sunning on The Steps and protesting on Low Plaza just a few weeks off, the images of Young Socialists scurrying about with the latest literature on how-the-nice-Sandinistas-are-getting-screwed-by-our-imperialist-war-mongering-Administration must already be dancing in the minds of more than a few campus activists.

The Iran-Contra affair is a real media mess. The ad-hoc committees know it; we all do. But looking beyond the sensationalist speculation and witch-hunting that even **Washington Post** Editor Ben Bradlee calls ''the most fun I've had since Watergate,'' a few facts do indeed emerge. They are the facts of law and the enduring indecisiveness of American foreign policy since the Bay of Pigs.

Many have speculated that the President doesn't legally have the power to transfer funds from the sale of arms to Iran to the Contras, yet few recall—or more correctly, choose to recall—the powers of commander-in-chief. Jefferson, with his word alone, bought the whole of Louisiana and sent Louis and Clark off to explore it. More recently, FDR freely sent dozens of U.S. Navy vessels and arms to England before our entry into World War II. These presidents did not ask, nor did they need to ask, Congress, Sam Donaldson, or those precious presidential pollsters. Simply because members of Congress, news commentators, and folks at Columbia may not *like* Reagan's action does not, believe it or not, make it illegal.

In fact, the only law operative over the

transfer rests in the 1980 Intelligence Oversight Act, which requires the president to fully inform the Intelligence Committee ''in a timely fashion'' about his covert operations. The world can argue on forever over what ''timely'' means, but as William F. Buckley, Jr. (the man with the bladder) points out, no one disputed the ''timeliness'' of Reagan's advising only a few members of Congress about the Grenada invasion mere hours before the Marines landed. ''But suppose,'' Buckley says, ''that instead of dropping paratroopers...we had decided to overthrow the government by infiltration? The case could be argued that to advise Congress earlier would almost certainly jeopardize the operation.'' Until Congress makes its modifiers more precise, it will be difficult to dispute Reagan's claim that the Iranian affair failed because of premature, untimely leaks.

The second fact emerging from the fiasco—the vital fact—revolves around this Administration's policies toward Nicaragua. As in Afghanistan, we promote and pay for the overthrow of a regime while maintaining diplomatic relations, embassies, and a commitment not to use American troops. This contradictory policy-making incurred the wrath of former Secretary of State Alexander Haig in his book, **Caveat**, and continues to plague present Secretary of State George P. Shultz and others who complain that they don't know ''half of what goes on around here.'' This is just not a healthy way to run a country.

This fact is clear: we need to reach an agreement on the issue of Nicaragua (and Afghanistan), an agreement sound in its analysis of the world's events and consistent in its approach. As the Sandinistas continue to consolidate their power by silencing all alternative media, restricting educational institutions, and even deporting religious leaders, it is evident enough that the Contras, as they stand today, cannot alone free Nicaragua. They are an ''army'' without tanks, planes, helicopters, or heavy guns facing the best-equipped, best-trained forces in Central America. It is evident that accomplishing real reforms or ousting the Sandinistas will take more than our half-hearted

negotiations and a tiny hit-and-run squad. We need to clarify our policy-making, act with confidence, and decide: will we truly support the liberation of Nicaragua or will we try the ''hands-off'' approach? To futilely condemn more Contras to death, as we did the Cuban freedom fighters at the Bay of Pigs and our own countrymen in Vietnam, to continue in ambivalent, contradictory policy-making, is no longer an acceptable alternative. It is time to step out of the mire of indecision that has frustrated American foreign policy over the last 20 years and that continues today. It is time for Reagan, the media, and the nation to choose America's role in Nicaragua and similar conflicts.

The mess of the Iran-Contra affair centers not on ''The Men, the Arms, the Money'' as NBC would like us to believe, not on the soap-opera adventures of Ollie North, not on the illegality claim, nor on the question of ''who knew what when.'' It does not center on those superficial issues our campus activists will exploit on College Walk when the weather warms. What it does center on are the real, enduring, and significant questions of America's foreign policy of the last 20 years. It *is* time for a decision.

Neil Gorsuch is a Columbia College sophomore.

It is time to step out of the mire of indecision that has frustrated American foreign policy over the past 20 years.

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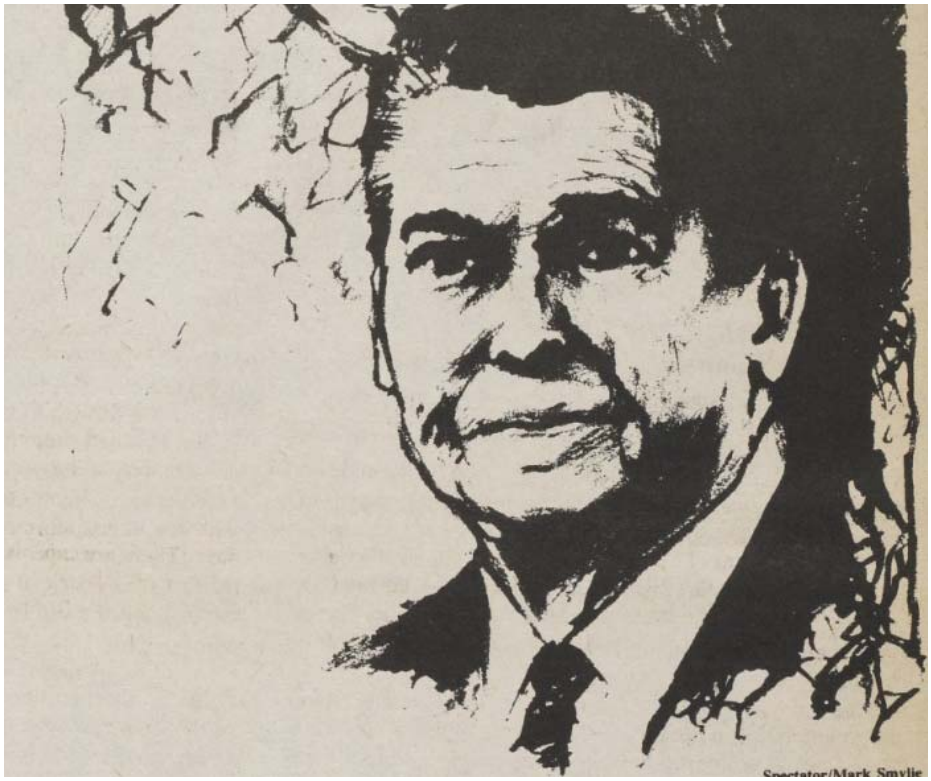


Spectator/Mark Smylie

Columbia Daily Spectator, Volume CXI, Number 81, 13 February 1987 — Counterpoint Just say yes [ARTICLE]

Counterpoint

Just say yes

By Neil Gorsuch

This column kicks off Spectator*'s Counterpoint forum, a place for readers and staff to respond to articles, editorials, and opinion pieces in greater depth than letters to the editor allow.*

The Spectator Publishing Company on Feb. 6 defended its decision to accept military advertisements despite its editorial stance against military recruitment on campus. ''After much debate and consideration,'' the Editor's Note read, the Managing Board reaffirmed its open ad policy, regardless ''of [its] staff's diverse and often changing political opinions.'' The board did so firmly convinced that **Spec**, ''if anything, should uphold the First Amendment's right to freedom of speech.''

Overlooking the absence of a careful proofreader (Amendments don't have rights), **Spectator** actually put together a policy with a bit of panache: lofty language, yes; right reasoning, yes.

But we all knew it was too good to be true. Juxtaposed on page 3 to the advertising policy lay the tritely titled editorial, ''Just Say No'' (**Spec**'s target wasn't drugs, but the U.S. military). While initially admitting that ''by its very definition a university is a forum for ideas of all kinds'' (just as the editor's note stressed their newspaper is), these high-minded defenders of free speech insisted that because the military and its recruiters are involved, there arise special problems needing special attention by our special university community (but not by the newspaper?). They just said no to military recruitment.

Something seems a little fuzzy here, huh?

At best, we can wish away the inconsistencies between **Spec**'s editorial and advertising policies by blaming the vacationing proofreader. At worst, we can accuse **Spec** of playing ideological games with us. You see, the defense and praise of free speech end for the Managing Board when it comes to recruitment: ''[T]here is a distinction between free speech and recruitment. The military recruiters aren't here to debate issues of national defense....[They're] selling a product, not just making a case.''

This ''logic'' can be questioned on at least two points. First, is there a tangible or only a semantic difference between recruitment and free speech? Second, isn't the military ''recruiting'' through the very advertisements the Managing

Board defends so adamantly (and for which the military pays so dearly)?

On the first: isn't the object of free speech to share one's notions with others, engage in debate and discussion in an attempt to win them over (as **Spec** has graciously allowed me to do here)? Wasn't the First Amendment written for the explicit purpose of protecting dissenting voices, allowing them the freedom to ''recruit'' others to their opinions? Don't we call this the *marketplace* of ideas—implying that ideas are *bought* by converts and *sold* by believers, thus using the very language of recruitment? Totalitarian regimes certainly don't see much difference between recruitment and free speech: witness Daniel Ortega's silencing of **La Prensa** in Nicaragua, the prohibition of opposing political parties and private association in the Soviet Union, the very existence of Gorky. Free speech is dangerous to dictators because it promises to *recruit* opposition; effective free speech is the best recruiting policy. Ortega knows it. Seems odd that **Spec** doesn't.

And even beyond their convoluted semantic games, a double standard still remains. While **Spec** demands an end to military recruitment on campus, it continues its unrestricted ad policy—a policy open to ads that, to use **Spec**'s words, don't ''debate issues of national defense...[but are] selling a product....'' According to **Spec**, what's the practical difference between a newspaper and a university with regard to free speech? None—both are, ''by [their] very definition,'' forums ''for ideas of all kinds.'' What is the practical difference between a Marine captain physically occupying space in the basement of East Campus for a few hours and print space devoted to ''Be All That You Can Be, Aim High... send for information on a military career today''? If we are intellectually honest, we know: none.

In the end, **Spec** must reexamine its policies: it cannot expect us to listen appreciatively and thoughtfully to its philosophic defense of the First Amendment while it demands others to censor themselves. Such self-righteous doublespeak has to be reexamined, the proofreader must return, and the Managing Board must decide: free speech for all, or for none.

Neil Gorsuch is a Columbia College sophomore and an editor of the Federalist Paper.

The defense and praise of free speech end for Spec's Managing Board when it comes to recruitment.

What's the difference between occupying physical space in East Campus for a few hours and print space in Spectator? If we are intellectually honest, we know: none.

Columbia Daily Spectator, Volume CXI, Number 99, 23 March 1987 — Comment Going crazy over Coors Fed up with the rites of spring [ARTICLE+ILLUSTRATION]

Comment

Going crazy over Coors

Fed up with the rites of spring

By Neil M. T. Gorsuch and Andrew L. Levy

It's boycott time again at Columbia. Again.

Every year as the weather begins to improve, our campus activists seem to feel the primordial urge to organize rallies and create clever (and not-so-clever) chants to outdo the last year's protests. In their own peculiar way, these protests seem to be the rites of spring at Columbia.

This year, the protesters started early, hoping that tenants' rights would be The Issue—the grand cause that would galvanize student support for an exceptional round of spring demonstrations. The early indications were positive: Jordan Kushner had his smiling face plastered on the pages of **Spectator** and the **New York Times** as he was dragged away to jail; the press coverage and the protests came in increasing daily dosages. Yet, for some mysterious reason, the clamor subsided instead of building into its customary crescendo. Inexplicably, our activists were unable to find the student support they had anticipated. It seemed as if spring just wasn't to be.

So our professional protesters (PPs) resorted to blaming **Spectator** for their failure; they accused **Spec** of being the Grinch who stole their protest, who snatched away their rites of spring. In a March 19 article, **Spectator** reported that HFA members branded the paper for misrepresenting the circumstances of Susana Acosta-Jaafar's eviction, thereby undermining student support. ''Acosta-Jaafar claimed to the audience...that **Spectator** neglected to print that the University had given her the address [of a homeless shelter]. In fact, in the Feb. 26 issue of **Spectator**, it was reported.'' But the PPs could avoid responsibility for their own failures for only so long. Reality caught up, and The Issue shrunk to just another campus cause. But the PPs forged on. So they were wrong on that issue, so students didn't have any sympathy for the tenants; there was still plenty of time to organize a new campaign. But what could the issue be?

Well, Furnald Grocery recently began selling Coors beer—clearly a PI (Politically Incorrect) item. And the **Federalist**

clearly a PP (Politically Incorrect) item. And the Federalist Paper, recently a favorite whipping boy, ran a Coors advertisement. A Movement is Born.

Our PPs have recently been seen scurrying about with signs proclaiming, "Boycott Coors beer and the **Federalist Paper**." Charging that Coors funds "reactionary political causes" and discriminates against women, minorities, and gays at their brewery, they inform us that "Coors beer recently hit many New York bars and will soon be on grocery-store shelves. Coalitions of labor, minorities, women, gays, and civil libertarians are uniting to stop them." They encourage *you* to help.

Now it's no surprise that our campus activists don't like the Coors family's conservatism. In the '60s, Joe Coors, as a regent of the University of Colorado, managed to have the Students for a Democratic Society, one of the luminaries of the Left, removed from campus. And it is true that various family members fund the Heritage Foundation, a conservative think tank in Washington. But it is still surprising how these facts can be manipulated and distorted into the broad and false accusation of discriminatory practices printed on the poster.

All one needs to do to come to any true conclusions about the Coors company is to take a look at the Equal Employment Opportunity Commission's (EEOC) various reports on them. Coors cannot be, by any fantastic stretch of truth, labeled a racist, sexist, or anti-gay employer. The EEOC reports that 26 percent of Coors technicians and 10 percent of its managers are women, compared with the national averages of 17 and 7 percent respectively. It comes as no surprise that the president of the Colorado Women's Political Caucus has written that "Coors is one of the more progressive employers in the state of Colorado." As for minorities, the EEOC shows that minorities constitute 14 percent of the overall Coors work force and 6 percent of its management. The national averages are 13 and 3 percent. In addition, Coors was the *first* American brewer to implement a policy against homosexual discrimination; in 1977, **The Advocate**, a newspaper of the gay community, even investigated Coors and concluded "not to recommend a continuation of the national boycott...."

Yes, the Coors company requires employees to take lie-detector tests; so do at least 20 percent of Fortune-500 companies. Where are the boycotts of these companies? Further, Coors employees are *not* "questioned about religious beliefs, political views, sexual behavior, and sexual preferences." Indeed, before Coors de-unionized, Local 366 of the AFL-CIO agreed to the use of lie detectors in arbitration cases and investigations of theft and sabotage.

So what is left of the accusations? The **Federalist Paper** runs Coors ads and will continue to do so; Furnald Grocery and other establishments in New York are beginning to carry Coors and will continue to do so. However, the Fed is not,

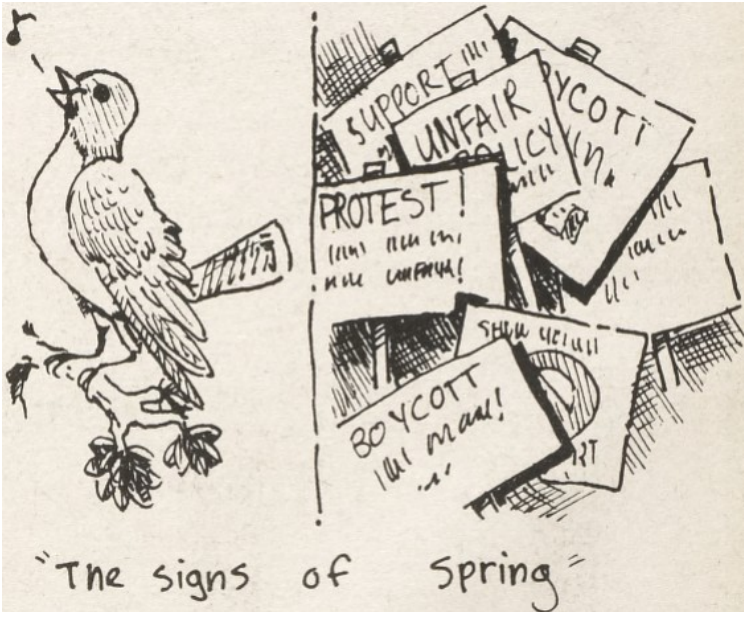
and has never been, *funded* by the Coors Company, the Heritage Foundation, Joseph Coors, William Coors, the late Adolph Coors, any member of the Coors family, or their pets. **Spectator** prints ads from the military: does this mean that the military funds **Spectator**? If so, to paraphrase Walter Mondale, where's the boycott?

The bottom line is this: let the consumer decide whether or not to drink Coors (or read the **Fed**) based on the *facts*, rather than a hodge-podge of malicious and intentional lies. There is nothing wrong with organizing a legitimate boycott—indeed, boycotts are nothing more than free speech in action. However, libel is not protected by the First Amendment; if the people who put up the posters had the guts to put their names on it (not doing so is a violation of campus policy), they might well find themselves with a suit on their hands.

Not to worry, though. There is no doubt that this feeble attempt at brainwashing the Columbia community is, as the tenants' issue was, just another 24-hour protest virus. By April, we'll all be in the muck and mire of a new, bigger, better, more exciting protest, reminiscing about the "good ol' days" of the Coors/**Federalist Paper** boycott.

Neil M. T. Gorsuch, CC '89, and Andrew L. Levy, CC '88, are editors of the Federalist Paper.

Recently, Furnald began selling Coors.
And the Fed ran a Coors ad.
A Movement is born.



Spectator/Vernon Williams

Columbia Daily Spectator, Volume CXI, Number 111, 8 April 1987 — Comment A movement goes astray Fighting racism, not making revolution [ARTICLE+ILLUSTRATION]

Comment

A movement goes astray

Fighting racism, not making revolution

Last Saturday, though the downpour clearly kept many at home, some 300 demonstrators marched from Low Library to fraternity row, past Sigma Chi on 113th Street, uptown to the 26th precinct headquarters, and back to Sigma Chi. The many who were honestly concerned about the incident outside the 'Plex on March 22 didn't let the rain stop them from demonstrating their frustration. Unfortunately, however, the rain also didn't stop those more interested in furthering their own activist agendas from joining the parade.

Among the protesters and speakers were the New York Young Communist League, Marxist-Leninist organizations, and others who constantly claimed that our ''white, male, racist, capitalist society must be overturned....'' Demands that the deans of the college deal with 'Plexamok in a just and intelligent manner were overwhelmed by calls to revolution. There were screams that ''today's pigs are tomorrow's bacon!'' (in reference to officers surrounding police headquarters), and threats that ''if Columbia University doesn't get its shit straight, the walls of this University could come tumbling down.''

The protesters seemed anxious to link the March 22 incident with a variety of other concerns, from tenants' rights to Strategic Defense Initiative research, from cuts in student aid to the ''superprofits'' of multi-national corporations. Their literature and their speeches focused on the interrelationship they envision between these issues. To them, all these problems have an ''underlying ideological foundation''—a foundation that is more dependent on one's ''class perspective'' than anything else. The Marxist-Leninist slogans, straight out of the Tucker Reader that every CC student eventually purchases, were sounded again and again: one must ''not only condemn racist violence and help build the mass mobilization against such attacks, but also [work] to advance a more comprehensive analysis that links the particular incident to the broader dynamics of...the exploitation of the working class.''

What happened to Columbia, to Mike Jones, to Matt Sodl, to the deans' office? Last Saturday's march was more a de-

mand for the overthrow of American society than a forum for the peaceable and rational discussion of these people and events. Those who addressed the march argued not for a change *within* the system, but for a radical change *of* the system. The issues that concern the CBSC and its allies, the demands they now place upon the University and the public, are very different from what we were originally led to believe.

Unfortunately, these methods have not only served to mislead us, but, in the final analysis, will prove to be the downfall of CBSC's efforts. The majority of students and faculty here at Columbia are certainly concerned about racism on campus, in the community, and across the nation. There is little denying that Columbia has played a prominent role in transforming the ''exclusive'' Ivy League education into a broader, more inclusive one; as even C. Vernon Mason pointed out, Michael Sovern sits on the board of the NAACP. But here's the problem: this same student body and faculty is not sympathetic, on the whole, to calls for Marxist-Leninist revolution. They do not accept the slogan so proudly displayed Saturday that change must occur *''by any means necessary!''*

The CBSC and its allies have the opportunity to do much to ''raise consciousness'' about racism on Morningside Heights; they also face the danger of squandering that opportunity for causes less noble. They can choose to participate in the deans' hearings, offering their point of view, or they can leave the deans guessing at their testimony. They can offer a message of change within the parameters of reason, or one outside them. They can offer a righteous message to the Columbia community, or they can choose to follow the self-righteous path of revolutionaries. The choice is theirs.

Neil Gorsuch, a Columbia College sophomore, is an editor of the *Federalist Paper*.

Fed up
Neil Gorsuch

Spectator/Rich Hahn

Columbia Daily Spectator, Volume CXII, Number 67, 5 February 1988 — Comment College and core connote CU
[ARTICLE+ILLUSTRATION]

Comment

College and core connote CU

Columbia College is at a critical juncture in its history. Over the past year, issues ranging from the independence of faculty to the quality of student life have confronted administrators, faculty, and students. How we resolve these concerns will determine what Columbia will be like in the coming decades and the type of students that choose to come here.

One attempt to deal with these issues is the ominous ''Report on the Future of the University.'' It proposes eliminating the separate College faculty and the position of Dean of Columbia College. As an alternative, it would create a unified faculty under the Vice President for Arts and Sciences.

The report displays Columbia's continuing skepticism about the importance of its undergraduate schools. In Dean Van Ambridge's day, administration officials questioned whether Columbia ought to have an undergraduate division at all, since a college education might not be necessary before professional studies.

Today, Low Library has acquiesced to the College's existence, but still does not appreciate its important role in the University. Administrators fail to recognize that an educational institution's reputation stems not so much from the quality of its graduate schools but from the vitality of its undergraduate program.

While most people know about Columbia's Law and Medicine programs, the College remains a secret in many parts of the country. My New York classmates may find it hard to believe—as do I after three years here—but in Denver, people still wonder why I decided to go to school in a Latin American country. If Columbia wants its name known, a rededication to the College and the undergraduate experience is necessary; we do not need an elimination of our faculty and dean in favor of a Vice President. Columbia College, with its core curriculum and New York City location, has the potential to become a place of unparalled excellence, academically and extracurricularly.

Columbia can become a ''first-choice school.'' Inside Hamilton Hall, we can make our Core Curriculum stronger by bringing our tenured faculty back to the classroom. Alum-

ni remember Columbia for the luminaries who sat down with them in their first year to discuss Western Civilization; prospective students are excited by the possibility of the same experience. No one is excited or impressed that graduate students now teach the plurality of Core courses. Many graduate students do a tremendous job, it is true; yet, that is no substutitute for the unusual insights of a Mark Van Doren or a Wallace Gray. Columbia needs to give tenured faculty the incentive to teach Lit Hum and CC and commit itself to bringing the number of preceptors down to more reasonable levels.

Another problem the College faces is that it is just getting too large. The size of the College community continues to grow: doubles in East Campus have become triples; Shapiro Hall promises still more beds. Yet, in its aim to increase enrollment—and tuition dollars—the College has not increased its course offerings or physical capacity to handle added students. History majors now face the possibility of being shut out of their seminars; English students are also finding it difficult to get the classes they want. The overcrowding in John Jay Dining Hall gets substantially worse every year. Library hours and study areas have actually been reduced in number over the last decade. Forced to stretch its finite resources, the College has skimped on essential student services.

Outside the classroom, the University needs to help make the College a more attractive choice for prospectives. Our athletic program includes no formal teams for rugby or hockey, though there are students who want to see our clubs become teams. Other schools in the Ivy League already have such teams, yet Columbia cannot match them. Our student center—Ferris Booth Hall—is outclassed by any other school of Columbia's size and price range. Its rooms are worn and its capacities limited for a growing and diverse student body. We cannot even find permanent space for a student-run book co-op that wouldn't force us to pay Barnes and Noble's outrageous prices.

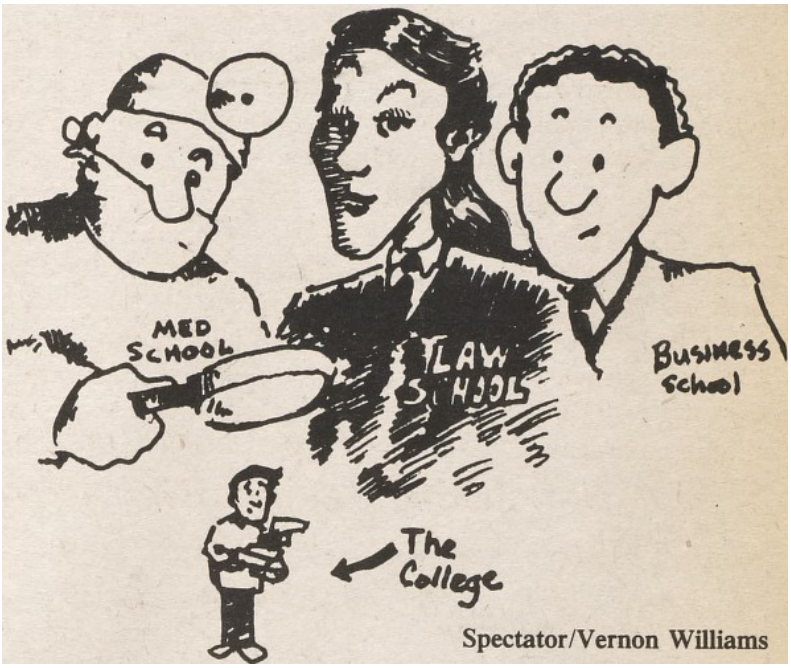
Other student services reflect this same trend. Harvard has a full-time office devoted to identifying and securing scholarships for its undergraduates; Columbia has Dean Thurman who carries this burden in addition to his other duties as an Assistant Dean. This year, Harvard garnered some two-thirds of all Rhodes scholarships available in the country. Columbia came up empty.

We all have our favorite gripes about the College. Yet, most of us are well aware of its enormous potential. In the next few years we

will see if the University is truly devoted to making Columbia a ''first choice'' school, whether it is serious about molding the College into what we think it can be. Or we may continue to watch the College become overcrowded, overburdened, and ever more subservient to the University's graduate programs and Vice Presidents. The course of the College and its place in the University's priorities, then, are the real burning issues of Spring, 1988.

Neil Gorsuch is a Columbia College junior.

Fed Up
Neil Gorsuch



Spectator/Vernon Williams

Columbia Daily Spectator, Volume CXII, Number 92, 23 March 1988 — Comment Student council elections Ignore inanity, investigate issues [ARTICLE+ILLUSTRATION]

Comment

Student council elections

Ignore inanity, investigate issues

With student council elections just a week off, it's time to brace yourself for another round of promises and posters from our budding campus politicians. You can expect great essays on the need to drastically alter our fraternity system to achieve social justice, and carefully practiced orations on the wonders of a new student government constitution. There will be the usual jockeying and backbiting among the candidates, and claims of corruption and accusations of wrongdoing.

Amidst all of this chaos, however, most of us will remain decidedly apathetic toward the individual candidates and the entire election process. Few students actually vote and of those that do, few are convinced that their vote affects their social lives on this campus, or the future of their college. But despite the enormous temptation to let our politicians continue their silly games amongst themselves, the time has come for those of us who usually remain silent to make our voices heard. Too little is being accomplished by our student government, and some of what is being done runs against campus sentiment.

During this year, some of our elected representatives spent much of their time and energy trying to convict one of their own for stuffing the ballot box last spring. Based on rumor, second-guessing, and maybe even malice, they announced their allegations without a shred of evidence. Subsequently, an independent investigating committee chaired by Dean Lehecka concluded, unsurprisingly, that the accusations were unfounded.

Other representatives have devoted a healthy portion of this semester to the salvation of our fraternity system. Arguing that they know what is best for the rest of us, they have decided that we ought to allow only coeducational houses on campus. Of course, before considering such a proposal, none of these folks consulted any of the 700 fraternity members on campus, or even considered whether this change reflects their constituents needs and desires. Instead, their action was based on the concerns expressed by "ten or fifteen students."

Some council members and University senators have sincerely tried to advocate viable proposals to improve our

school. But these ideas have been lost in the debate and infighting over these two ''issues'' and similar items. While concerned students have tried to affect real reforms, others have made their own petty concerns central to the council's agenda. They have made it almost impossible to get anything important accomplished.

Earlier this year, the council considered extending library hours during final exams and providing more late-night study space. College Library, as we all know, is completely inadequate, and its hours are ridiculously constrictive. Some council members sincerely tried to enact these changes, but the majority failed to push the issue. Perhaps libraries are not as glamorous as fraternity-bashing, but to most of us they are more important.

Also lost amidst the politicking has been the fate of the Book Co-op. Anyone who has paid Barnes and Nobles prices will agree that a book co-op is desperately needed and should be given a permanent space in FBH. Without a room, the Co-op has been forced to limit itself to Lit Hum and CC texts and ordering fewer books than it can sell. Although some council members lobbied hard to obtain space, most of them chose to ignore the matter, setting their sights on grander quests.

Dean's Discipline and the status of our rugby, lacrosse, hockey and squash clubs have been similarly ignored. While many of the protestors last spring complained that the College's disciplinary system is often harsh and arbitrary, the council left the issue on the back burner until this month. Even Columbia College Dean Robert Pollack has accepted the idea that the system needs a little reform, yet nothing has been done.

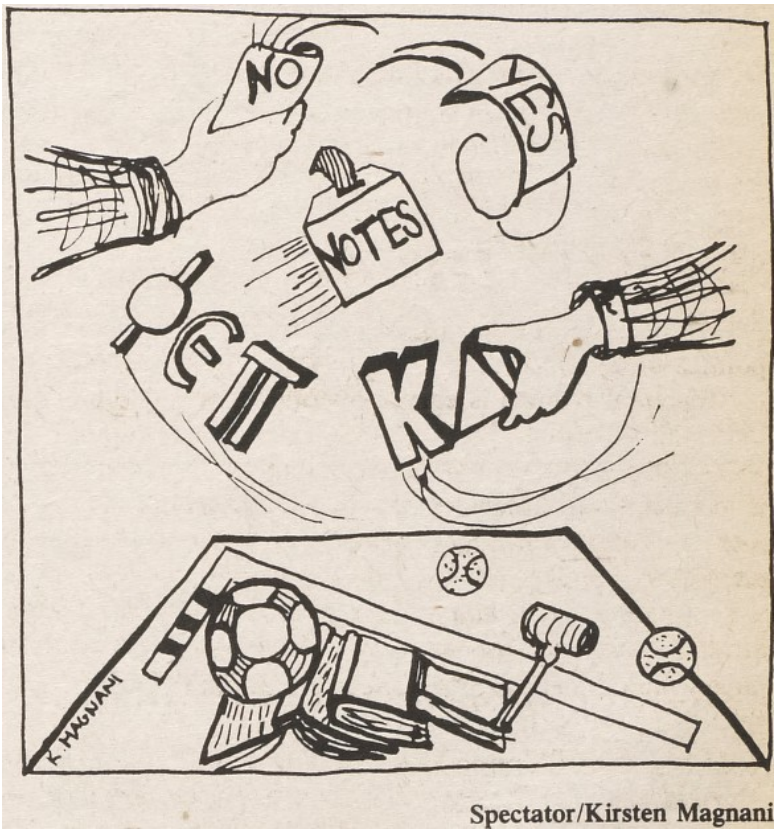
As for our club sports, the hundreds who participate do not receive the benefits of team status. They have to pay for much of their own equipment and transportation. Columbia is the only Ivy League school with such dismal support for its athletes. Our council, however, does not grant this important issue attention or action.

With such a dismal record of accomplishment, the student council demands our serious attention and action. It is time to stop the infighting and the focus on unpopular and counterproductive issues. It is time to make the student council begin to serve us and our needs, instead of the wild desires of a few, vocal and unrepresentative politicians.

Next week, those of us who have sat silently for so long need to become involved. We will need to search out those who offer important, if seemingly mundane, changes, instead of self-righteous promises for 'social justice' or a progressive approach to our fraternity system.

Neil Gorsuch is a Columbia College junior.

Fed Up
Neil Gorsuch



Spectator/Kirsten Magnani

Columbia Daily Spectator, Volume CXII, Number 105, 11 April 1988 — Comment "Progressives" Where have all the protests gone? [ARTICLE+ILLUSTRATION]

Comment

"Progressives"

Where have all the protests gone?

Visiting Day for prospective high school students would not be complete without rainy weather, long speeches, and a small protest. Last Monday, the heavens obliged, the administrators talked on and on, and our protestors made sure they did their part. All in all, a perfect day.

There was, however, an important difference between Monday's protest and past demonstrations. Throngs of students did not crowd the steps of Low Library, nor did chains seal the doors of Hamilton Hall. Instead, fifteen students wandered about, aimlessly criticizing whatever struck their fancy. With a couple of illegible banners and cheers leftover from the divestment campaign (''Hey Columbia, have you heard, this is not Johannesburg''), they merely demonstrated the trivial nature of this spring's ''issues''.

With the fraternity issue, the protest rules, and the recent Columbia College Student Council elections, these self-proclaimed ''progressives'' have been urging us to become involved. They charge that by sunning on the steps while protestors rally at the sundial, students have become ''part of the problem.'' If you believe in the current fraternity system—or think it can be reformed without effectively destroying it—you must be morally misguided. If you think the deans are capable of determining the validity of the election and that it is unnecessary for students to steal the ballot box, you have clearly erred. If you fail to recognize a pattern of repression and injustice, you are missing the conspiracy. Our protestors, it seems, have a monopoly on righteousness.

In all their muddled thinking, however, our ''progressives'' have become anything but truly progressive. Consider for example, their ''issue'' of the elections scandal. Columbia College election rules are a swamp of bureaucratic pettiness, unequaled even by the federal government. They are confusing, often unduly severe, and clearly in need of reform. Some candidates in this election may have manipulated them for personal gain. But is it ''progressive'' for a minority of students to unilaterally decide to invalidate this election? Sounds more like vigilante justice to me.

Instead of playing hot potato with the ballot box on College Walk on March 31, they could have directed their concerns to the deans, the student council, or the University Senate. The deans clearly want a sound and fair election; the senate and council can prevent these kinds of problems from recurring. If the elections commission needs reforming, reform it. Don't steal the ballot box and call it "progressive."

With the passage of amendments to the Rules of University Conduct, our activists mourn for the good old days when they could shut down campus buildings at whim. They compare the new rules that require blockaders to show their ID cards to South African regulations that force blacks to carry passbooks. In their hysteria and outrageously overdrawn analogies, the "progressives" lose sight of some basic facts.

The rule changes do not in any way inhibit peaceful marches or demonstrations that do not involve the padlocking of doors. They simply state that a blockade is a serious offense. Contrary to popular opinion, the rules do not state that blockaders will be automatically expelled or suspended; only those who participate in a blockade that lasts for "more than a very short period of time" will receive such a punishment. And students are currently required to surrender their IDs to guards when asked; this "change" is not really a change at all.

But even if this misinformation about the rules changes were true, why should true believers in civil disobedience object to them? The purpose of civil disobedience is to openly defy the law for a serious cause. Participants do not hide when the time comes to take responsibility for their actions; they proudly live with the results, knowing that their cause was worth the consequences. There is something noble in this position.

Columbia blockaders, however, want to have their cake and eat it too. They want the benefits of civil disobedience--making the entire community think seriously about an important issue—without the responsibility that accompanies it. They want to hide their identity when questioned, and to pretend that there was no disruption when asked about it later. There is no nobility in this stance.

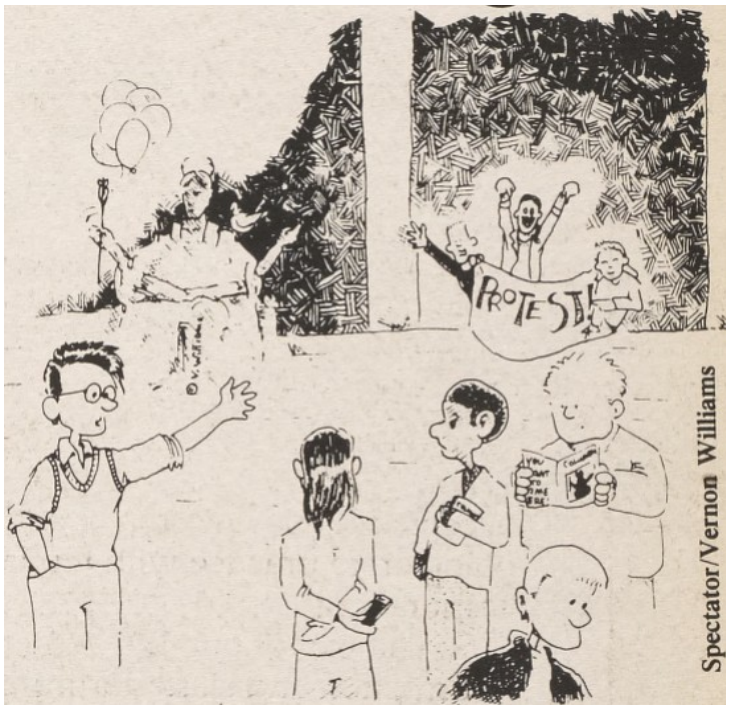
With their "issues," campus "progressives" have tried to convince us that we have an obligation to act. They insist that they are being harassed by "terroristic fascists." But what they forget to tell us is that they are asking for special treatment, acting as a vigilante squad while avoiding the weight of their own actions.

While campus activists made sure Visiting Day did not go without the traditional protest, this year's efforts ring hollow. At the core of this spring's demonstrations and rallies are

causes that inspire no one and offer no fresh ideas or important notions for the students or school to consider. There simply is no burning ''issue'' of spring, 1988. But don't worry: there's always next year.

Neil Gorsuch is a Columbia College junior.

Fed up
Neil Gorsuch



Spectator/Vernon Williams

Columbia Daily Spectator, Volume CXI, Number 89, 25 February 1987 — Comment Taking a stand: The University steps into the real world Overcoming a hegemony of ideas [ARTICLE+ILLUSTRATION]

Comment

Taking a stand: The University steps into the real world

Overcoming a hegemony of ideas

By Neil M.T. Gorsuch

Military recruitment. Divestment. Evictions. Each year at Columbia brings its own slew of protests and protesters demanding University action for social and political change. Implicit in the arguments about what stand the University should take on these issues is the assumption that the University should be taking any stand at all.

But can we make this assumption? Whether the University should pursue goals that go beyond the education of students—and how those goals should be determined—are questions that often go unanswered in the rush to draw up petitions and organize demonstrations. But these are questions that need to be asked.

Diversity: that cherished buzzword admissions officers, faculty, and alumni sprinkle so liberally throughout any discussion on Columbia and its students. The story goes, we all know, that at an Ivy League alumni party, the Harvard, or Dartmouth, or Princeton grad is easy to spot from across the room: each Ivy tends to produce a certain ''type'' of person, tends to manufacture a certain kind of behavior. But we Columbians assure ourselves that the CU alumnus is impossible to identify with confidence; we relish the notion that the Columbia ''experience'' is as varied as the alumni list is long.

And our devotion to diversity does have significance: through the different ethnic, religious, geographical, and economic experiences of our friends here, we can come to learn and appreciate new ways of seeing the world, and are able to take stock of our own points of view more responsibly than many of our peers elsewhere. No doubt: Columbia is a remarkable place.

But on at least one significant count, Columbia falls considerably short. Amazingly, radically different people from radically different backgrounds and locales share an incredible hegemony here on Morningside Heights in their radical politics. As the world and other colleges change with the times, as hair styles come and go, as career trends ebb and flow, Columbia remains entranced with the same slogans, styles, and sympathies it has had since the 60s. Remarkably, on issues of the modernization of our neighborhood, defense research by University professors, or divestment from South Africa, campus activists all remain solidly united behind certain policies they view as ''moral'' and irrefutable.

On today's Columbia campus, coalitions and committees

form to protect the ''oppressed'' Mill Luncheonette, surely the next victim of the big, bad Low Library landlord. But they forget to ask the Mill if it's actually being oppressed, if Columbia really is trying to oust them. See the Feb. 13 **Spectator**: ''We are now in the process of negotiating a long-term lease,'' says the Mill's Isidore Lederman.

Anti-JASON students meet to formulate plans to stop professors from researching for the Defense Department. But the protesters don't seem to remember that the academic freedom they seek to strip from the two physics professors is the same academic freedom that protected their university-affiliated Leninist friends from imprisonment during the 1950s.

Pro-divestment students call for the immediate withdrawal of University funds from all companies conducting business in South Africa. But in their haste to do the Right Thing, they are willing to overlook such mundane things as facts—namely, that many of these companies are themselves in the act of divesting. Committee and coalition members seem willing to sacrifice the large income from the endowment—which goes to pay for our need-blind admissions policy, among other things. And, of course, they dismiss the divestment decisions of corporations like General Motors (which did actually divest just last week) Coca-Cola, and IBM as ''bogus'' (see Lisa Cruumbs, American Committee on Africa, in the Nov. 19 issue of **Spectator**).

Overlooking the activists' dubious logic on these and other issues, the remarkable fact about Columbia is the consensus that so rapidly emerges among students and their ''leaders,'' and the rigid conviction with which they guard their positions. There is little or no room for dissenting voices: one is either Right or Wrong, Moral or Immoral, Compassionate or Heartless.

What is lost in this self-righteous search for the purportedly ''Moral Environment'' is the fact that no one has a monopoly on truth. Not Nelson Mandela. Not Lisa Cruumbs. Not even Mark Green. Only in an atmosphere where all voices are heard, where all moral standards are openly and honestly discussed and debated, can the truth emerge. Columbia must inevitably take a stand on divestment, ''gentrification,'' military research, and a host of other issues. But if its decisions are to be well informed, it must hear from all sides.

Just as we take a measure of satisfaction from the cultural heterogeneity of our community, so too should we relish a vibrant political heterogeneity. Why don't we hear arguments that the modernization of our neighborhood might actually be good for the community, that to prevent professors from spending their free time as they wish is a violation of academic and personal freedom, that divesting from companies on their way out of South Africa is not productive? Is it because such arguments would be Immoral, False, and Heartless? Or is it

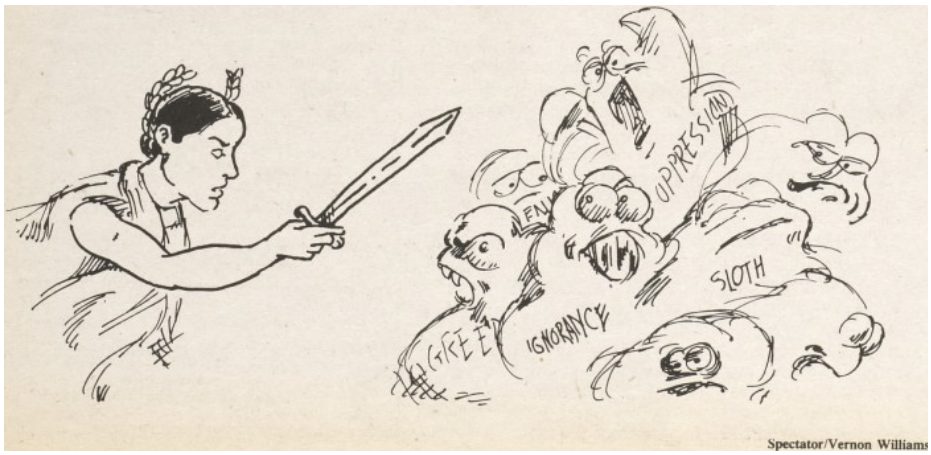
because it is not fashionable at Columbia to be anything other than a pro-Sandinista, anti-Reagan, ADHOC, uranium-pilfering protester?

Truth is: Columbia does have a moral responsibility. It has a moral responsibility to overcome the tyrannical atmosphere of ''ideas'' that has so dominated life on Morningside for the last 20 years; it has a responsibility to make the political, philosophical, and ethical experience here as diverse and varied as the cultural and ethnic experience. The image of Columbia as a haven of post-radicals, holed up in their River and Jay cubicles poring over plans for the next RealityFest must give way to a broader, more inclusive ethic. Diversity does not automatically translate into non-conformity. Diversity means, rather, the entire spectrum of experience: from Young Americans for Freedom to Young Socialists of America.

A truly pluralistic campus does not immediately and thoughtlessly cater to any one group or its notions; instead, it listens carefully to a cacophony of voices and realizes the inherent value and utility of them all. The automatic assumption that our coalitions and committees have captured the market on Truth, that the University is obliged to house anyone remotely associated with the campus, that divestment decisions of major corporations are necessarily ''bogus,'' that gentrificaton is the work of a white, male ruling class, needs to be seriously and vigorously questioned. If Columbia is to ever succeed in its self-imposed role as a pluralistic institution, the CU alumnus must become as unidentifiable in his political registration and philosophical orientation as he is in his ethnic, religious, and social background.

Neil M.T. Gorsuch is a Columbia College sophomore and an editor of the Federalist Paper.

There is little or no room at Columbia for dissenting voices: one is either Right or Wrong, Moral or Immoral, Compassionate or Heartless.



Spectator/Vernon Williams

the
Federalist Paper

a student publication in the tradition of Columbians Hamilton and Jay

Volume I Number 4 | Columbia University, New York City | 27 February 1967

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JASON FLAP BAFFLES PHYSICS PROFS

By M. Adel Aslani-Far

The Committee on JASON held its first meeting of this semester on February 11. These Columbia students, faculty, and alumni are protesting the involvement of two Columbia physicists with JASON--a group of scientists from around the country which criticizes and evaluates the cost-effectiveness and scientific feasibility of many military and non-military projects. The Committee met to "clear the air on the JASON issue," and to discuss the wording of a soon to be circulated student petition.

The Committee came under fire last semester after a November 15th advertisement in the *Columbia Daily Spectator*. The ad sparked faculty objections over the group's particular method of protest. Two Columbia physicists, Melvin Ruderman and Dept. Chair Robert Novick, were portrayed as members of JASON who "would appear to be indictable for developing weapons of indiscriminate killing."

The ad further claimed that the activities of Ruderman and Novick "may be considered to constitute serious misconduct." The Committee then officially lodged a complaint against Ruderman and Novick with the University, despite the fact that all JASON research is conducted off-campus and in the professors free time. The fourteen "members" of the Committee who signed the advertisement further claimed that "the mere fact of membership in JASON must place any individual member under gravest suspicion of being complicit in activities which may be construed as illicit."

The Committee's problems began when four of the "signatories" claimed that their signatures were used without authorization. History professors Eric Foner and James Shenton, Presbyterian Campus Minister Scott Matheney, and Episcopal Campus Minister Bill Starr claimed that they had in fact signed a statement regarding the involvement of Ruderman and Novick in JASON, but had not given permission for their signatures to be used in the full-page *Spectator* ad. Matheney was quoted in the December 4 issue of *Spectator* as saying, "The ad just drags some people's name through the mud, and that's not going to be helpful. The problem is villainization of two faculty members, and some of us don't feel that that's a healthy way of opposing this."

Without the support of some of its own members and a "disappointing" faculty response to the published complaint, the group is now seeking to change tactics, and rely more heavily on the support of the student body. The 15-20 people at the latest meeting discussed the group's new strategy. Brian D'Agostino, a graduate student in political science and organizer of the Committee on JASON, said that the anti-JASON activities at Columbia would serve "as a prototype for something we can do and will do at other universities after it has worked here." He admitted that the group's activities will "generate a controversy; I can guarantee it. We aren't looking for controversy, but we won't avoid it."

The Committee now intends to apply "mass pressure" through the circulation of a proposed petition. The petition, co-authored by Students Against Militarism (SAM), presently calls for members of the Columbia faculty to "act now to stop" JASON activities and to further discourage "the continued membership of [their] colleagues in the JASON group."

D'Agostino said that the petition "will change the political chemistry of the campus, and thus make it increasingly unfavorable for them (Ruderman and Novick) to continue their work on JASON." He continued, "At a certain point, members of the faculty will realize that it is time to do something. When they see the support on campus (through the petition), then the ball is in their court." Despite their "new" strategy, committee members, including D'Agostino, were apparently pleased that Professor Ruderman was "bouncing off the walls" after the ad appeared in November. "If we

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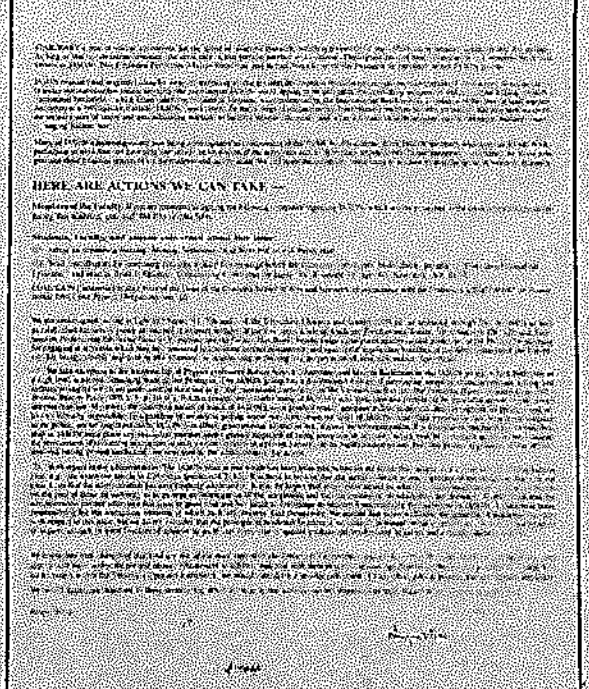
STOP WEAPONS RESEARCH: STOP JASON.



HERE ARE ACTIONS WE CAN TAKE —

Do these people know what they're doing?

THANK YOU, MARIO

> ...the decision that I've made I think is best for my state, best for my family, and, I think also, best for my party.
>
> --Governor Mario Cuomo, announcing his decision not to seek the presidency.

He forgot to mention "best for the country."

CLASSROOM CHATTER

From the very Ivy League Modern European History classroom of Professor John Mundy comes the classic quote:

"Napoleon was surrounded by a lot of people who thought he was an ass, and who he thought were asses. A common French experience."

THE EYE OF THE BEHOLDER

Ken Hechtman, CC'90(?), our much publicized uranium-pilfering protester, has proven once again that truth is relative, that all is subject to the eye of the beholder. Hechtman, recently overheard sermonizing on the busy life of a Columbia activist, dismissed one of Columbia's luminaries of the Left, the Students Against Militarism, as mere "Preppies for Peace!"

FIRST THING WE DO...

As faithfully reported in the 18 Feb issue of *Spec*, the Columbia Students in Solidarity with Nicaragua and the Columbia chapter of the National Lawyer's Guild have decided to back the new Nicaraguan "constitution." Here's the scary part: Lawyer's Guild president Karen Moulding stated that while "the American constitution is vague about individual rights," the Nicaraguan document guarantees specific "rights," including food, housing, and education. Apparently, a short lesson in Truth is in order: food, housing, and education are not, and cannot, be "individual rights." The rights of an individual *by definition* cannot extend to those things which are dependent on others for fulfillment.

Can you have a right to education without teachers? Can you have a right to housing without builders, architects, engineers, etc. (unless, of course, you build your house yourself, though it's doubtful that's what Gospodin Ortega and crew have in mind)? No.

The only way to achieve these ends is through the use of force--have teachers teach at gunpoint, have farmers farm with knives at their throats, and have architects design by taking their families hostage. It's a good thing the US constitution is "vague" about individual rights.

...LET'S KILL ALL THE LAWYERS!

In that self-same *Spec* came yet another treat courtesy of the Law School. Peter Canellos, a second-year law student, decided in true liberal fashion that counters no longer have to be fulfilled. He referred specifically to the celebrated Baby M case which, for some bizarre reason, is still before the courts as this is being written. Mr. Canellos, full of sympathy for Mary Beth Whitehead (an obviously deranged woman), reached the conclusion that her surrogate-mother contract should be declared null-and-void, for reasons to twisted to be reproduced here. Further, like the good liberal he is, Mr. Canellos decided (but *all* surrogate-mothering should be banned, because it is inherently coercive: "not only is the poor woman (sic) driven to give up her child, she is pressured to get pregnant in the first place."

Pardon us for being reactionary, but there used to be something in this country called the "sanctity of a contract," a phrase which basically means (means!?) that when two parties enter into an uncoerced agreement, they are morally and legally bound by it. And as for Canellos' warped definition of "coercion": no one "drove" Mrs. Whitehead to give up "her" child, or "pressured" her to get pregnant. She managed to make that decision *all by herself*. We know it's tough for the liberal mind to conceive of individual decisions and responsibility, but that's the way it happened. Sure, she's sorry now; she knows not to do it again. Every woman should be free to have the same choice; what's bad for one person is good for another.

PIERRE SPEAKS

Editor's Notes: Pierre Copeland's column has been unfortunately shortened this month. He had to leave town unexpectedly before he could complete his column. There is no truth to the rumor that his departure is due to the rash of insider trading arrests on Wall Street.

Never let it be said that my good friend Ken Hechtman doesn't understand fundamental economic theory. By refusing to buy soap and shampoo for what is clearly several years now, he has managed to artificially lower the market value of Johnson & Johnson stock. In a move reminiscent of my good friend Bunkie Hunt, he planned to corner the market when the stock prices hit rock bottom. Apparently, he then intended an aggressive bathing campaign to send the stock skyrocketing to unseen levels. Unfortunately, Ken's much-anticipated profit-taking on the NYSE was raked, as it were, by his Ollie North-like theft of Uranium 238. Ken Hechtman: the ultimate Capitalist.

QUOTES FROM PIERRE:

I never drink with liberals. The one time I did, I pulled out my Walther, shot him--and missed.

I believe in the trickle down theory: the servants' bathroom is directly below mine.

Lack of money is the root of all evil.

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of Columbia University
credo:
Veritas non Erubiscit

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THANK GOD WE DIDN'T GO TO WILLIAM AND MARY

We complain about the political climate at Columbia sometimes, but consider this report coming out of William and Mary College in Williamsburg, Virginia. Apparently, four radical students there have tried to initiate an advertising boycott against the school's student-run conservative journal, *The William and Mary Observer*.

The Williamsburg Gang of Four tried to explain their actions as simply "encouraging local businesses to consider what type of publication they are supporting." However, their letter to local businesses called the *Observer* "nothing more than a scandalous tabloid produced to shock and intimidate the student body."

It could never happen here. Knock on wood.

MORE EVIDENCE FOR THE DEFENSE...

A recent study by economists at the University of Southern California (USC) has discovered that nations with a lot of lawyers (such as the United States) have lower economic growth rates than countries with hardly any lawyers.

WE THE PEOPLE?

According to the 23 February issue of *U.S. News and World Report*, a recent Hearst Corporation survey established that "eight in ten Americans believe the Constitution declares that 'all men are created equal'; 64 percent say it establishes English as the national language, and 49 percent think the President can suspend it." And nobody believed former Chief Justice Warren Burger when he said chairing the Constitutional Bicentennial Celebration Committee would be a full-time job?

A FISH STORY

The *National Review* of 27 February carries this whopper of a tale:

"Coleman Young, the mayor of Detroit, admitted he didn't have a fishing license when he netted a beautiful 18-pound king salmon in Michigan waters. 'Nope,' said he. 'Never had. Don't believe in them. A wonderfully sensible attitude notwithstanding some local carping about the incident."

I DON'T KNOW ABOUT THE "READING" AND "THINKING" PARTS...

This little ditty called "How Can You Tell An American," comes from the 1938 musical *Knickerbocker Holiday*:

> It's just that he hates and eternally despises
> The policeman on his beat, and the judge with his assizes,
> The sheriff with his warrants and the bureaucratic crew,
> For the sole and simple reason that they tell him what to do.
> And he insists on eating,
> He insists on drinking,
> He insists on reading,
> He insists on thinking--
> Free of governmental snooping or a governmental plan,
> And that's an American.

MANO A MANO

The staff of *The Federalist Paper* would like to express its deepest thanks to D. Keith Mano, Columbia alum, scourge of the Left, and Contributing Editor of the *National Review*, for his keen (Gimlet) Eye. Truth is his kind words in the 13 February issue of *NR* are much appreciated. By the way we love to run the Playboy article, D. Keith; but it's just not controversial enough *for The Fed*.

Your Money Misused

By Eric Prager

Student political groups are a staple of life on Morningside Heights. These groups receive funding from various sources. But to receive funding from *campus* coffers, they must adhere to certain guidelines, which have been imposed by students themselves.

It now comes to light that in many cases, these guidelines are stretched and even ignored. As a result, Columbia and Barnard students alike may be surprised at how their money is being spent.

For example, Barnard's Student Government Association (SGA) appears to be loose with its funding guidelines. The SGA is run by a student-elected five-member board, which decides, among other things, how to allocate the $76 activities fee each Barnard student is required to pay.

Groups receiving money from SGA must follow certain criteria, according to Lisa Kolker, BC '88 and vice president for Student Activities.

"We hold the applications up to our constitution to see if they match up [i.e., to see if the groups' principles violate the constitution]," she said. If there are no violations, she added, the board of SGA decides if the groups would "add something" to the Barnard campus.

The SGA constitution states in Article IX, Section 3, that "no student organization affiliated with either a national or local political party shall be registered at Barnard College." Last semester the SGA gave $1045.00 to the Columbia chapter of the Democratic Socialists of America (DSA), which is registered in Lewisohn Hall.

The question arises: is the DSA chapter at Columbia an affiliate of the Socialist party? Andrea Miller, CC '89, designated president of the DSA by Barnard (though she insisted that there is no hierarchy in the DSA), stressed that the DSA here is a "chapter of the National DSA" and not affiliated with the Socialist Party of America. Furthermore, she said, the Columbia chapter does not receive funding from either the Socialist Party or the DSA itself.

The SGA apparently feels differently. An SGA booklet, intended to familiarize Barnard students with campus organizations, describes the DSA as a group which partakes in the "support of political candidates." This obviously entails affiliation with a "national or local political party," as forbidden in the SGA constitution.

Nevertheless, Lisa Kolker insisted that the SGA Executive Board "can interpret [the Constitution] any way [it] wants to." She added that many groups, including the DSA, were receiving SGA funding before the current board took office last September, and that the new board simply chose to continue the funding. She conceded that there is no way of monitoring funded groups to see if they pursue their stated goals, and that perhaps changes in the constitution were needed.

The SGA constitution states in Article IX, Section 1, that in order for a group to receive funding from the Activities Fees of the Barnard students, it must be composed of "ten or more Barnard students." Andrea Miller told *The Fed* that the Columbia chapter of DSA has a membership of twenty with "12-15 members who regularly attend meetings."

"In the beginning of the year our membership was distributed about 50-50 between Barnard and Columbia, but now the membership is more heavily weighted toward Columbia," she assessed.

According to Ms. Miller's estimate of membership numbers, then, the Columbia chapter of DSA no longer meets SGA's membership quota, regardless of how it stood last fall.

Earl Hall also seems to be guilty of ignoring guidelines. Students Against Militarism (SAM) is another group funded by the Barnard SGA, having received $500.00 last semester. This organization is also designated in the SGA booklet as a "political group."

However, Students Against Militarism is also registered in Earl Hall, which in theory does not admit groups which are strictly political in nature. Article IX, Section 1A of the by-laws of the Student Governing Board of Earl Hall (SGB) states that groups registered in Earl Hall should be "philosophical, philanthropic, or ethical in nature."

At Barnard, SAM is a political group; at Earl Hall, apparently, it is not. Earl Hall Office Manager Michael White noted that the by-laws are interpreted by the SGB and subject to their interpretation of "humanitarianism, morality, or ethics." The SGB is composed of one delegate from each of the member groups of Earl Hall, and therefore, White conceded, there is no system of checks and balances.

At the Feb. 2 meeting of the Columbia College Student Council, SAM received $150.00 from the Columbia College students' activities fund. The money, according to the minutes of the meeting, would pay to "bring over students and a professor from the University of Moscow, affiliated with Communist Party."

Alex Navah, CC '87 and chair of the student council, told *The Fed* that the council funded an "information session" and that the funding given could only be used for the designated event. The council, he went on, would be funding "a non-political objective of a *political group*." Again, to be a member group of Earl Hall, an organization cannot be political. Yet only the SGB of Earl Hall continues to buck the trend of calling SAM a political organization.

The Columbia Students in Solidarity with Nicaragua (CSSN) are also registered in Earl Hall. Fund-raising efforts are their only source of revenue, according to Adele Oliman, GS '87 and CSSN's delegate to Earl Hall.

The Fed obtained a copy of the Application for Renewal of University Recognition submitted by Ms. Oliman to Earl Hall. Question number 2 of the application asked for the name of the faculty or clerical advisor to the group, and whether the advisor is empowered to sign on behalf of the group. Oliman had written Rev. William Starr's name and phone number and empowered him with signing capacities. Starr is the Episcopalian campus minister and a member of Earl Hall.

The Fed asked Ms. Oliman about Starr's relationship to CSSN. She replied that Starr was a "friend" to the organization who "shares some of our goals," and who offers assistance in his "connections." The nature of the assistance, Ms. Oliman noted, is not monetary. She added that Starr is not a member of the organization.

When asked about Starr's signing powers for CSSN, Ms. Oliman denied that he had such powers. When confronted with a copy of the application, she stated that she did not remember why she wrote down Starr's name. Ms. Oliman maintained that there is "nothing secretive" and that *The Fed* is "making more out of it than actually exists."

Many students at Barnard were quite surprised to find out what type of activities their student activities fees are subsidizing. Christie Clifford BC '89 stated, "I wasn't sure where the student activities fee went, but I never thought it would go to politically oriented groups like the DSA and SAM. It only seems logical that they [the SGA] act in accordance with the rules they set for themselves."

"It's fine for the SGA to have goals outside of their Constitution, but to achieve them, they have to change their Constitution *first*," said Christine Giordano, BC '89. "Student activities fees are more appropriately used to enhance the social life on the Barnard campus--to pay for lectures and things of that nature. The money should be used to add to the campus life of all students, not a specific political interest group."

On the issue of the Columbia College Student Council funding a program of the Students Against Militarism, reactions were at least as pointed.

"It's an outrage! This must be why we have to pay so much to play pool in FBH and why it costs $34.00 an hour to play tennis at Baker Field," opined Mike Burns, CC '90, a self-proclaimed liberal.

"They [the CCSC] are using the money from my Student Activities Fee to support the actions of a group which I and many others are wholehearted opposed to," asserted Matthew Engels, CC '89, Vice-President of the Columbia Conservative Alliance.

"Agree with their aims of not, to cater to a political interest group is obviously not in the best interests of the student body as a whole," concluded Kirsten Meller, CC '90.

JASON

continued from page 1

systematically undermine support for JASON, then we will undermine JASON."

A great deal of the "controversy" surrounding the JASON issue here on campus stems from ignorance about the activities of JASON, and particularly those of Ruderman and Novick. Witness the following statement by Barnard Associate Professor of English, Marjorie Dobkin, in the December 4th issue of *Spectator*, after she had decided not to desassociate herself from the Nov. 18th ad: "I do regret that I didn't speak to the people who were named [in the ad]. I should have gone to them myself and asked them what's their side of the story (sic)."

The Soviet Union's launch of Sputnik in 1957 prompted the creation of JASON three years later. The goal: to bring together scientists and the military to study and propose new projects, including weapons systems. The organization was also intended to involve bright young minds; this aspect has continued to the present. Today JASON is composed of 40 individuals, the majority of whom are theoretical scientists. (A scant few are experimental scientists.) Professor Robert Novick, a member of the JASON steering committee, said "The members of JASON are honest brokers, in a sense. We don't care who gets the government contract, because as academicians we have virtually no conflict of interest. We are paid as government consultants and many times the government doesn't like our advice."

Professor Malvin Ruderman contends that there is a great deal of independence within the organization. According to him, JASON members are not chosen by the government, but by members themselves. When the group meets for seven weeks each summer in La Jolla, California, member choose their own projects. Therefore, Ruderman maintains that although there is a collective entity called JASON, the diverse individual activities of its members are important. "The projects I work on are my own choice. I feel very strongly about my work, and I am happy to defend it," he said.

Ruderman and Novick are puzzled at protests over their work; while the Committee has labeled the two professors "war criminals," none of them has bothered to enquire into the exact nature of the professors' work. Indeed, the November 18th ad in *Spectator* reads, "According to a 1982 *Spectator* article, JASON's work covers the entire range of military needs..." While many JASON members are involved in this type of work, not all are. Ruderman found it amusing that the Committee's information was gathered from the *Spectator*, rather than the JASON members themselves.

"I must emphasize the fact that JASON members individually choose their own projects," Ruderman said. "If I don't want to work on something, I don't have to. The worst part of it is that no one has ever cared to find out what work it is that I do."

"First of all, I am not involved in SDI research. I don't believe in SDI. There are many JASON scientists who don't think SDI will work," Ruderman continued. "As far as the automated battlefield in Vietnam, I did not work on that project either. There was a while there during the Vietnam War when I didn't even actively participate in JASON."

"How can you say that someone is indictable as a war criminal, when you're not aware of the nature of his

continued on page 6

KOLUMBIA

General Editorials are passed by a Majority of the Board of Editors

"Glorious conformity." This was the theme of an old Twilight Zone episode, in which all those who did not conform were weeded out of society. This is also a theme of life at Columbia in 1987.

But wait, you say: this is Columbia! This is a university with a Liberal Tradition, a campus which prides itself on its non-conformity! Well, maybe this was true once, but it sure as hell isn't anymore. Gone are the days (if they ever existed) when you could dress as you pleased, wear your hair as you pleased, and believe what you pleased, without fear of mean-spirited mocking from your fellow students. In 1987, you're either Correct or Defective.

Columbia's conformity is different from the outside world's; indeed, it is a less honest breed. Unlike the conformity of Ronald Reagan's America (which at the very least makes no claims of individualism), conformity at Columbia comes in the vastly more pretentious and dishonest guise of pseudo-individualism: the *stated* cry at Columbia is "Be yourself", but the *reality* is "Be like me, or be wrong."

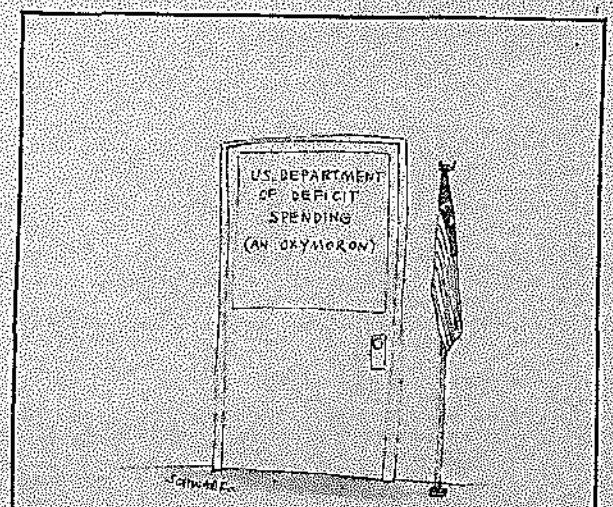
Restated, the implication is thus: "I'm an individualist. If you're like me, then you're an individualist too. If you're not like me, then you can't *possibly* be an individualist." This, unfortunately, seems to describe the thought pattern of many CU students.

Witness Luciano Siracusano's recent column in *Spectator*, in which he lumped everyone who does not share his taste in music, dress, and even *housing*, into one group, which he dubbed the "Unlinkables." To Mr. Siracusano (and the many on this campus whose thought processes are similar) it is apparently not enough to be what you want to be; you must be as *he* wants you to be. To paraphrase Whittaker Chambers, from every sentence of Mr. Siracusano's essay can be heard the command: "To a gas chamber go." You are not fit to be a student at Columbia if you dare to disagree with him.

Of course, this is by no means a localized problem. Almost every sub-group at Columbia mocks other sub-groups for the manner in which they dress, think and/or act. Almost every clique looks down on the others. It is ironic that at an institution which prides itself on its liberal heritage, a heritage which supposedly stands for tolerance and open-mindedness, cultural absolutism flourishes.

Columbia students often act on the principle of reverse snobbery. It's not culturally hip to prefer the Plex to Postcrypt. It's not cool to want to make money, work on Wall Street, go to Law, Business, or Medical School, etc. Anyone who does want to do any of the above is viewed in a condescending manner. This is what Pierre du Pont Copeland terms "granola snobbery," and it pervades the atmosphere of this campus.

The bottom line is not that you should *want* to work on Wall Street or go to the Plex, but that you should do what *you* want to do, and respect the fact that each person is unique, with unique likes and wants. Be who *you* want to be, not who Luciano (or anyone else) wants you to be. Dress as you want, not because someone told you that you have to dress in a certain manner to be Correct. Listen to whatever music you enjoy, whether it be Hank Williams, Peter Gabriel, the Beastie Boys, Beethoven, Charlie Parker, or even Bon Jovi. (Well, maybe not Bon Jovi.) Be yourself.



John Jay: Good Eatin'

By Amy Perkel

The soups of the day are Vegetable Julienne and Consommé. For the entree there is a choice of Shrimp Scampi, Chicken Piccata, Stuffed Shells, or Filet of Sole Duglere, all served with fresh broccoli and rice pilaf. There is the usual unlimited salad bar stocked with the usual vegetables, plus, for today, fresh spinach and red potato salad.

Ginger ale served in champagne glasses with a large fresh strawberry will be the beverage, and for dessert there are assorted mousse cakes, cheese cakes, and Cherries Jubilee. Dimmed lights, candles, white table cloths, and red and white balloons set off this romantic Valentine Day's meal. Where else on the Upper West Side can a student enjoy such a meal at a relatively low price and with no advance notice other than John Jay Dining Hall?

John Jay Dining Services has improved dramatically over the past few semesters. Noticeable differences are evident in both the food, and the physical environment.

Upstairs there is a selection of sandwiches and cereals, an expansive salad bar, and occasional hamburgers and hotdogs in a dining hall atmosphere.

Downstairs there is also a wide selection of food, but students can eat in front of two televisions in the newly renovated "Adirondack" style Pub, or relax in the sturdy, yet comfortable, couches and chairs in the back area.

In the Dining Hall, a student can always choose from three entrees--at least one of which is vegetarian. If by chance none seems appetizing, there is a variety of sandwiches available at the deli counter.

Now available a few times a week are hamburgers and hot dogs made on the grill; no longer must a student desiring grilled specialties go downstairs. Senior Eric Gerden, frequent diner and loyal patron of John Jay, believes that the option of "burgers and dogs has opened an entirely new area of lunch and dining. McDonald's has become obsolete." When asked about the sandwich condiment area which provides sliced tomatoes, pickles, onions, and lettuce for his sandwiches, Gerden enthusiastically called it a "forceful step towards true dining pleasure."

The salad bar has improved greatly since last year. Students have always been able to choose from the regular veggies such as lettuce, broccoli and tomatoes, but now they can also enjoy either potato salad, cole slaw, or macaroni salad, which are served on a rotating basis.

In addition, students can now usually find yogurt, cottage cheese, fruit preserves and a fresh fruit salad or jello dish at the salad bar. Fresh mushrooms and beets are a welcome change, and students also appreciate the now-regular addition of grated cheddar cheese, chopped tuna, and chick peas.

When asked why she prefers Jay's salad bar over Hewitt's, Barnard freshman Sue de Lara commented that she likes the chinese noodles. Eve Mikolf, Columbia junior, likes the granola-soy sauce combination. Only at Jay is she able to sprinkle granola on her salad and toss it with Kikkoman's soy sauce--a treat which Hewitt apparently lacks. Other students are thankful that the dining service now provides plates, as well as bowls, for the salad.

Variety does not stop at the salad bar. Other prime examples include a choice of fourteen cereals; ten sugar-coated, and four more wholesome.

The ice cream situation has also changed dramatically. No longer must students wait in lines for up to half-an-hour on Ice Cream Night only to find their favorite flavors gone, and only that mysterious purple flavor remaining. Now that every night is "Ice Cream Night" there are no long lines, and thanks to the suggestions made by frustrated ice cream eaters, there is a scarcity of purple ice cream.

Angela Hancock, Barnard sophomore, is very pleased that she is now able to cut her own portions of chocolate cream pie, as well as that all-important second piece of pecan pie. Brownies, blondies and all types of pies, cakes and canned fruits can now be found in abundance.

Debbie Lau, Barnard senior, comments that "although I do not have soup often, I like the fact that I always have two choices."

Microwaves also help increase variety. Originally installed so that students could heat up food, some students now use them to create their own meals, such as broccoli and cheese baked potatoes and rice krispie treats. Lorne Teitelbaum likes the fact that he can melt his favorite flavor ice cream over a brownie.

Obviously, variety is no longer a scarcity in this cafeteria. When asked why there have been so many noticeable changes in the past year, Director of Auxiliary Services Sally Ferris simply answered that the managers are always open to new ideas. They pay attention to the suggestions they receive that seem reasonable. (There is a suggestion box near the exit at Jay.) With as many as twelve hundred students dining in Jay on a typical Monday night, the managers receive large amounts of suggestions, and they are constantly trying to improve the Columbia dining experience.

Over winter break, the managers attended a conference at Syracuse University to discover new ways of preparing meals. Ferris stated that in addition to these conferences, there is always communication between universities in the New York area, including the frequent exchanging of recipes.

John Jay is changing. Leslie Gilness, Columbia junior who returned to the meal plan after being off it for three semesters, believes Jay to be a "cool place to get a tuna on wheat with a slice of muenster." Eric Price calls Jay a "whirling kaleidoscope of decent entrees, a good salad bar, stale sandwiches, and always beautiful women." Students are thankful that dining services takes their suggestions seriously. Clearly Jay is changing for the better; students can now have a very multi-option meal with a satisfied feeling, and can enjoy a compliment with and foodstuffs in their way, all

The Columbia Leftish Lexicon

By Andrew L. Levy

Freshmen often arrive at ---- wait, I'd better change that before I'm lynched by radical feminists and other left-wing bizarros.

First-year students often arrive at Columbia with their defenses down, blissfully unaware of the comedy/horror show which awaits them. The show I'm talking about is, of course, written, produced, and directed by the Columbia campus Left, and stars such luminaries as Students Against Militarism, Students in Solidarity with Nicaragua, and Associate Professor of Sociology Eric Hirsch. Some of those arriving students, having not yet been indoctrinated by the Left, are naive enough to bring certain bourgeois values with them; for instance, the belief that it's okay to spend money on a party even though there are starving people in _____, homeless people in _____, and American imperialist forces in _____. (Fill in the blanks yourself; by the time this sees print the fashionable places will probably have changed.)

By the end of their first semester, many students have been reeducated in the right direction (or, I should say, the left direction). They probably have attended their first *ad hoc* committee meeting (possibly the Ad Hoc Committee on War, Injustice, Hunger, Nuclear Weapons, Death, Heaven, and Hell), and have gained the necessary insight into just how the United States has managed to cause all the world's problems since around the time Christ walked the Earth.

Unfortunately, some students never get the message. Through some deficiency, mental or moral, they never quite get the hang of how to be a Correct Thinker. After much thought, I've come to the conclusion that what it all boils down to is a language problem.

You see, the Columbia Left uses a different language than what we are commonly brought up to believe is English. Oh, they use many of the same words, but the meanings they assign to these words are far, far different from what those of us not privy The Secret generally use.

In the interest of helping the poor, befuddled few who remain ignorant of the Newspeak spoken here, which, for lack of a better name, I call Leftish, I present this short, and by no means complete, Leftish Lexicon. Included also, at no extra charge, is a short lesson in Leftish grammar.

The rules are simple: when a word in a definition is in capital letters, it refers you to the definition of that word, and means that the two definitions are similar or identical. (See for example CAPITALISM and FASCISM.) This happens often; Leftish may be confusing, but keep in mind that it is the product of simple minds.

CAPITALISM--1. an inhumane system which forces people to depend on their own ability. 2. FASCISM.

CLOSE-MINDED--term which describes someone who disagrees with a liberal/leftist or with liberal/leftist dogma.

COMPASSIONATE--1. term which describes someone who believes that the government has the right to steal money from some people in order to give it to others. 2. see OPEN-MINDED.

CONSERVATIVE--1. reactionary. 2. FASCIST.

DISTRIBUTIVE JUSTICE--theft.

EMOTION--preferable to REASON. Never let REASON guide your actions when emotions will do the job. Remember that it is better to feel than to think.

FASCISM--limited government and individual rights.

FASCIST--1. someone who believes in limited government and individual rights. 2. see CLOSE-MINDED.

FEMINIST--1. someone who believes that women are naturally better than men. 2. someone who believes that women deserve special favors and preferential treatment.

FREEDOM--1. government control. 2. high taxes. 3. SLAVERY (e.g., Nicaragua).

FREEDOM-OF-SPEECH--the right to publicly agree with liberals/leftists.

IGNORANCE--see CLOSE-MINDED.

INDIVIDUALIST--1. statist. 2. someone with long, unkempt hair. 3. someone with messy clothing. 4. someone who wears black. 5. something "cool" to be with your friends as in "let's all go out and be individualists together".

LACK-OF-COMPASSION--1. belief that private charity is better than government handouts. 2. belief in individual self-reliance and self-worth. 3. belief that government does not have the right to use force against some of its own citizens for the benefit of others (i.e., taxation).

LIBERTARIANISM--1. never heard of it. 2. FASCISM.

MISOGYNIST--1. someone who believes that women are equal to, but different than, men. 2. someone against comparable worth.

OPEN-MINDED--term used to describe someone who agrees with a liberal/leftist, or with liberal/leftist dogma.

PEACE--1. unilateral disarmament. 2. Soviet superiority.

RACIST--term used to describe someone who believes that affirmative action is reverse discrimination, and that people should advance through ability rather than race.

REASON--1. something not to be trusted. 2. never heard of it. 3. see EMOTION.

SELFISHNESS--wanting to keep that which you earn. Never, ever use this word to describe the people who want to take what you earn for themselves. These people are to be called the "dispossessed," in order to make clear the fact that a) it's not their fault (whatever you've achieved is not due to your ability, but rather to your exploitation of "them".

SLAVERY--forcing people to earn their own living in a free marketplace. 2. CAPITALISM.

SOCIALISM--1. a good, just system ruined only by corrupt, greedy and SELFISH people who really should be taken out somewhere and shot. 2. something not really practiced in the Soviet Union. 3. something really practiced in Nicaragua, and they should be applauded for it.

A SHORT LESSON IN GRAMMAR

THE USE OF "REAGAN" AS A PREFIX:

Use this to describe someone or something you don't like (for whatever reason). For instance, someone with short hair, or neat clothes, or expensive clothes, or with different political beliefs is Reagan-youth. (Don't worry whether or not this person dresses like Reagan, or believes in the same principles as he does doesn't matter--as long as he or she does something illiberal.

Music not made by certifiably moral people (e.g., Springsteen, John Cougar Mellencamp, Jackson Browne, etc.) is Reagan-rock. Reagan-rock can also apply to specific songs, such as Madonna's *Papa Don't Preach*, a song about (wait, sit down and hold on to something) a girl who decides (are you ready for this) not to have an abortion (gasp!).

Pro-freedom, pro-capitalist literature would probably be called Reagan-lit, if any existed. Again, this doesn't mean that Reagan stands for freedom and capitalism (in fact, he doesn't particularly), but merely that such literature is not proper.

JASON CONTROVERSY

continued from page 4

as invitees? I think that Novick and I are not experts in astronomy. What about a good friend of mine on JASON who has devoted his life's work to minimizing the risk of accidental detonation of nuclear weapons? Is he a war criminal?"

Ruderman went on to say that the majority of projects he has worked on for JASON have been neither military in nature, nor classified. He contends that most of his work has been in the area of environmental issues, including studies on the effects of fossil fuels on the environment, the acid rain problem, and types of solar energy conditioning. He has also worked on increasing the reliability of the nation's nuclear early warning system.

On the issue of indictability, Ruderman asked, "If a scientist working for the government aids the safeguarding of the world is indictable under international law, does this mean that every U.S. serviceman along with Secretary of Defense Weinberger is also indictable?"

Professor Novick responded similarly: "These people are persons acting contrary enough when it comes to defense. They believe that even if a system is never used defensively, then it is bad.

"I feel that I have certain limits which I feel can best be used by my participation in JASON and serving my country," he added. "I feel that I am doing the national service if I can prevent unfeasible systems from being put into place."

Novick emphasized that "JASON members engage in a great deal of work that has peaceful applications."

"This year I will be working on a project for NASA," he noted. "In the past 3 and many, if not all, JASON scientists have worked on projects for NASA, the Federal Aviation Authority, the Department of Energy, and other agencies and branches of the government."

Novick was not a member of JASON during the 1972 Columbia protests over the group's activities, but the protestors did call for the resignation of Columbia physicists from JASON, actually *pressuring* Novick to join the group. Novick said, "The protestors *still* are not aware of the nature of JASON."

Another allegation made by the Committee on JASON is that Novick and Ruderman are guilty of professional misconduct. Rod Wallace, a Committee member and technical director of the Public Interest Science Consulting Service, said at the last meeting, "The misuse of professional skills is a norm in these scientists lending their ability in the manufacture of weapons of mass destruction and indiscriminate killing. We know the results of scientific collaboration with the military: the killing of people."

Wallace went on to say, "You simply can't use your professional skills anyway you want. There are limits on the use of these skills. You can't use your knowledge for anything (sic)."

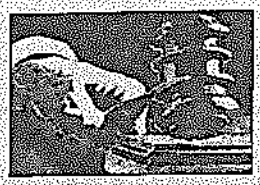
Novick and Ruderman feel that the Committee's actions "result from a general ignorance about JASON, and constitute a threat thereto to the academic and personal freedom of professors at major universities. As Ruderman pointed out, "My involvement with JASON in no way affects my duties and activities here at Columbia University. I do not research and I spend no time on JASON while here at Columbia. Therefore, my relationship with JASON is in no way the business of the University administration or the students for that matter."

Novick agreed, but stated that he viewed the issue as one of personal, rather than academic freedom. "I don't involve my colleagues here at Columbia with my JASON research, and as chairman of the Physics Department I have many responsibilities during the year to fulfill. The only connection between what I do here at Columbia and my work with JASON is that I'm known at Columbia and in the Physics Lab and as the Professor."

Ruderman is particularly concerned that the Committee does not realize the ramifications of its actions. "I recall a time in the 1920's when many professors and academicians were being accused of improprieties and other unfounded charges. That type of thing concerned me then, and I see the same type of pattern arising again. I question the group of protestors *really* want the University to become the moral arbiter of what professors and for that matter students do off campus?"

Ruderman continued, "What about a doctor who teaches in the Medical School, but performs abortions on his own time in his private practice? Does the University want to do something there, and is it appropriate for the University to do anything?"

The Committee claims that academic freedom is a moot point since "academic freedom is superseded by international law." Committee members stated that they "certainly respect First Amendment rights, but there is a point where we must take a stand."



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Modern Art Wing Opens at Met

By Jesse D. Greenberg

This month New York City celebrates the opening of what many consider its fourth "museum" of 20th-century art. In actuality it is the new Lila Acheson Wallace Wing at the Metropolitan Museum of Art (Fifth Ave. at 82nd Street).

The wing is considered a museum apart from the Met because of its sizable space, rather than for the works it houses. Costing $26 million, and named for the late co-founder of *Reader's Digest* (who gave $10 million toward its construction and maintenance), the extension is a full four stories and accessible through either the Rockefeller Collection of Primitive Art on the first floor, or the André Meyer 19th-century European galleries on the second floor.

Designed by the architectural firm Kevin Roche, John Dinkeloo & Associates, the Wallace wing boasts 59,[illegible] square feet of exhibition space—making it the second largest display area for modern art in the city (surpassed only by MoMA). Though a leader in terms of space and their other collections, the Met cannot yet compete with the Whitney, Guggenheim, and MoMA modern collections; the Met will have to acquire another 10,000 objects (it only has 5,000) before it matches MoMA.

Surprisingly, though, the collection has been growing and keeping up-to-date since 1911 when George A. Hearn donated $250,000 for the acquisition of paintings by contemporary American artists. Notable bequests to the Met since the Hearn donation include Picasso's *Gertrude Stein* (1906), given by the American writer in 1946; 400 paintings, sculptures, and drawings from the late Alfred Stieglitz's collection, donated by his wife Georgia O'Keeffe in 1949. Included in these collections and presently on display are: *Cow's Skull: Red, White, and Blue* (1931), given by O'Keeffe, and *The Figure 5 in Gold* (1928), a tribute to the poet William Carlos Williams, given by Charles Demuth.

In addition, there are works by other early American avant-garde artists Arthur Dove, Marsden Hartley, and John Marin. Scofield Thayer, a more recent donor to the Met, gave over 500 paintings, sculptures, drawings, and prints in 1982. Among these are Henri Matisse's *Nasturtiums and "Dance"* (1912), and works by such German and Austrian painters as Egon Schiele.

Selections from this bequest and the Berggruen Klee Collection (another gift of the same year), which consists of ninety works by Paul Klee, are also on display. The works by Klee are located in an intimate gallery on the Mezzanine level; the other bequests are scattered throughout the other 21 rambling galleries, juxtaposed with recent acquisitions spanning the last two decades.

Though a somewhat speckled 20th-century collection, William S. Lieberman, chairman of the department, and associate curator Lowery S. Sims have proven their professionalism in assembling the wing's premier exhibition.

The bulk of the exhibit is in chronological arrangement, with American and European works intermingled. It begins with the turn of the century near the first floor entrance, and concludes on the second floor with the most recent acquisitions. On the mezzanine level is a spacious sculpture court, running the width of the building, and capped off with a [illegible] ceiling of glass. Located there are works of Henry Moore, David Smith, Louise Nevelson, Jim Dine, Anthony Caro, Al Held, and Ellsworth Kelly. In the temporary exhibition gallery on the first floor one can "walk through" the environmental piece by Robert Rauschenberg entitled *1/4 Mile or 2 Furlong Piece*, an aural and visual documentary of his life experiences. The area provided for such a large assemblage is indicative of the monumental space the Wallace wing offers the grand-scale works of today's artists.

The ceilings are the highest you'll find in any of the city's modern museums; the views of Central Park and the New York skyline are a respite from the hustle and bustle outside. We can all surely look forward to the growth and [illegible] of the modern collection [illegible] through the roof garden which will open in June. Catch a glimpse of this unusual city spectacle Tuesdays 9:30–8:45, and Wednesdays–Sundays 9:30–5:15. Suggested contribution is $4.50.

AROUND TOWN'S
CITY LIGHTS:

The Museum of Modern Art—11 West 53rd St. Daily 11–6, Thurs. 11–9. Closed Wed. Donation $5.00. Paul Klee, thru [illegible]. [illegible], thru [illegible].

Pierpont Morgan Library—29 E. 36th St. Tues–Sat. 10:30–5, Sun. 1–5. $3 suggested donation. The Age of Bruegel: Netherlandish Drawings of the Sixteenth Century, thru 4/5.

New York Public Library—Central Research Building, Fifth Ave. at 42nd St. [illegible]. Gordon Parks: A Retrospective (Photographs), thru 1/28.

Wollman Ice Skating Rink—[illegible] St. at S.E. corner of Central Park. Adults $4.50, Skates $2. [illegible] (very [illegible]) [illegible].

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DEPARTMENTS

ARTICLES

COORS BOYCOTT

Furnald Stands Alone

BY KRIS WIGGERT AND MIKE BLOCK

This Fall, Furnald Grocery continues its boycott of Coors beer. Sam Park, CC '88, manager of the store, refuses to stock the beer because the Coors Company contributes to the Heritage Foundation and the Contras. The sustained campaign by Furnald comes despite a recent decision by the AFL-CIO to drop its own boycott, an action which caused the most powerful arm of the boycott coalition, Frontlash (AFL-CIO-supported), to withdraw. Joining Furnald in its continued effort are homosexual, Central American, and minority groups, which have leveled the additional charges of racial and homosexual discrimination against the company.

Some on campus feel that Furnald is not playing fair. "I think that the Coors boycott has become sort of a moral infatuation for Furnald," said Tony Augello, SEAS '89.

The Fed talked to several sources about allegations against the company. From the **Rocky Mountain News**, **The Fed** received a description of a controversial 1984 speech made by William Coors to the Denver Minority Business Association. In the 24 February 1984 edition of the **Rocky Mountain News**, the paper quoted Mr. Coors out of context, printing his comment that blacks "lack the intellectual capacity to succeed, and it's taking them down the tubes." Many perceived the quoted comment as racist, and a great uproar resulted.

According to the Federal Equal Employment Opportunity Commission (EEOC), fourteen percent of Coors' overall workforce and six percent of its managers are minorities, compared to national averages of thirteeen and three percent, respectively.

In an advertisement in the 26 February 1984 edition of the paper, Coors explained the comment in the context of the rest of the speech, maintaining that his intent was to describe his view that many blacks had not risen in economic status due to the position society forced upon them.

In response to the speech, several black groups considered and rejected the option of a boycott in March. Coors filed a libel suit against the paper in April. The suit was finally settled this year, in August. The paper printed a full apology to Mr. Coors, admitting that the way in which it quoted him might have caused a misunderstanding of his intent.

The Fed also took a look at the minority employment policies of the company. According to the Federal Equal Employment Opportunity Commission (EEOC), fourteen percent of Coors' overall workforce and six percent of its managers are minorities, compared to national averages of thirteeen and three percent, respectively. Also, in 1984, Coors signed two of the most comprehensive agreements with minority groups in corporate history, one with the Denver Economic Development Coalition, the other with Hispanic groups. Since the agreements were signed, there have been increased employment of minority distributors, increased purchases from minority vendors, and the production of advertisements in conjunction with minority firms. As another result of these agreements, Coors' contributions to programs for the poor, especially in the area of housing, have increased substantially.

According to company sources, Coors has had an explicit policy against homosexual discrimination for years, and was in fact the first American brewery to implement such a policy. The company considers homosexuality "a lifestyle decision" and keeps no records of the sexual preferences of its employees.

"I think that the Coors boycott has become sort of a moral infatuation for Furnald," said Tony Augello, SEAS '89.

From Coors and the EEOC, **The Fed** was able to learn of the company's employment of women. EEOC statistics state that twenty-six percent of the company's technicians and eleven percent of its managers are women. National averages are seventeen percent of the workforce and seven percent of managers. Also, Coors informed **The Fed** that one of the four regional sales managers is a woman, and the executive

continued on page 6

photo by Nathan Nebeker

What's missing in this picture?

WE BELIEVE YOU DEAN POLLACK. REALLY... WE DO...

In a recent "Dinner with the Dean" at Hartley Hall, Dean Robert Pollack related to attending students that after being back from a relaxing vacation in Vermont for only a short time, he was served a subpoena to appear on charges of verbal harassment. It seems a less-than-sane citizen of New York had filed suit claiming that the Dean of Columbia College had harassed him and irradiated him with a laser. The judge reportedly threw out the case, but indeed the Dean had to appear. We cannot account for all of the Dean's activities, but we would like to say that we certainly believe him on this one.

PART OF "A CROSS-SECTION OF AVARICE"?

From the Village Voice comes material so ludicrous it is almost beyond parody: topping the "Ten Worst Slumlords" list, Columbia, the Voice claims, has "...wrapped itself in the garb of academic enlightment...evicting tenants in a rapacious drive toward its Manifest Destiny."

Another fine example of why the *Voice* should make official its long-held motto: "All the news that print to fit."

The Federalist Paper
of Columbia University

Veritas non Erubiscit

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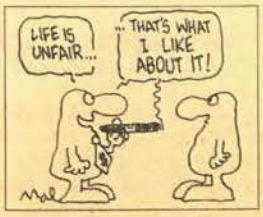
HEY, HEY! HO, HO! ROBERT BORK HAS GOT TO GO...

So said Columbia Journalism School in 1944 when they refused him an application. Subsequently, he was forced to attend law school. Everybody sing: Roar, Lion, Roar! And wake the echos of the Hudson Valley...



THE WORLD ACCORDING TO *WORKER'S VANGUARD*

From the 18 September 1987 issue of *Workers Vanguard* comes this interesting characterization:

"Jesse Jackson has now announced he will officially announce his candidacy for president on 10 October. This time around he's not even pretending to be 'independent' from the racist powers that be in the Democratic Party. His 'freedom train' chugs into the 'new' Old South where he's gone courting the 'good ole boys' of the Dixiecrat power structure, begging endorsement from the likes of George Wallace. In July, Jackson paid a call on Mr. Segregation, saying Wallace's administration was 'one of the most forward' of any Southern state. The president of the Louisiana Senate introduced Jackson as a 'son of the South.' Jackson did his job for the Democrats last time by pulling in four million blacks to register and then turning those votes over to Walter 'Quarantine Nicaragua' Mondale... [Further, Jackson has] a deep hostility to militant, integrated class struggle, the key to real *black and workers power*. ...Break with the Democrats! For black liberation through socialist revolution."

THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Cases in point: Tanaquil Jones, Mike Jones, and the ever-popular Ken Hechtman. It seems that Tanaquil Jones, GS '87--oops! GS '88, has returned for yet another fun-filled year leading the CBSC at our beloved institutution. Mike Jones, CC '87--oops again!? CC '88, is also back to lead the Class of '91 down the road to righteousness. Ken Hechtman, CC '90?, that Uranium pilfering product of the Admission Office's good judgment, was seen recently in an East Campus elevator (didn't his probation prohibit entering University buildings?). So you see, professional protesting (not to mention raiding physics labs) can be a life-long occupation.

MERCI CANDIDE

From Voltaire's "Candide" comes this handy lesson of the causes and effects of life as well as **The Fed's** own Soap Opera Synopsis for those of you who missed today's programming:

One day Cunégonde, walking near the castle in the little wood they called The Park, saw in the bushes Doctor Pangloss giving a lesson in experimental physics to her mother's chambermaid, a very pretty and very docile little brunette. Since Mademoiselle Cunégonde had much inclination for the sciences, she observed breathlessly the repeated experiments of which she was a witness; she clearly saw the Doctor's sufficient reason, the effects and the causes, and returned home all agitated, all pensive, all filled with the desire to be learned, thinking that she might well be the sufficient reason of young Candide, who might equally well be hers.

She met Candide on the way back to the castle, and blushed; Candide blushed too; she said good morning to him in a faltering voice; and Candide spoke to her without knowing what he was saying. The next day, after dinner, as everyone was leaving the table, Cunégonde and Candide found themselves behind a screen; Cunégonde dropped her handkerchief, Candide picked it up, she innocently took his hand, the young man innocently kissed the young lady's hand with a very special vivacity, sensibility, and grace; their lips met, their eyes glowed, their knees trembled, their hands wandered. My Lord the Baron of Thunder-ten-tronckh passed near the screen and, seeing this cause and this effect, expelled Candide from the castle with great kicks in the behind; Cunégonde swooned; she was slapped in the face by My Lady the Baroness as soon as she had come to herelf; and all was in consternation in the finest and most agreeable of all possible castles.

ACADEMIA'S "FOR-BIDEN" FRUIT

As Joseph Biden (D-Delaware), now former Presidential candidate and still Chairman of the Senate Judiciary Committee, hinted over the last few weeks that Judge Bork lacked integrity, news that good ol' Joe had "misstated" his own credentials arose. His "degrees held" and "awards received" have been misrepresented in the past. He has been accused of plagiarism in law school, and it turns out he purloined phrases from British Labor Party leader Neil Kinnock--of all people.

We find it interesting that someone who graduated from law school 75th out of 86 students--he had a little trouble remembering that, too--has the *cajones* to tell a Yale University Law School professor, someone whose appointment the American Bar Association gave its highest rating, what the First Amendment says.

AND SPECIAL THANKS TO THE *MIAMI HERALD*...

From *Newsweek* comes the report that the *Miami Herald*, in response to a recent *New York Times Magazine* story, "Can Miami Save Itself?--A City Beset by Drugs and Violence," offered a few stabs at New York. Included were the following:

"The bad news is: They haven't collected the garbage since 1967, and lunch costs as much as a Lamborghini.

"The good news is: You're allowed to shoot muggers on the subway," and "Smart New York subway riders carry two guns, in case one is stolen."

WE THE PEOPLE?

As we noted last semester, the 23 February issue of U.S. News and World Report contains a remarkable survey. It established that "eight in ten Americans believe the Constitution declares that 'all men are created equal'; 64 percent say it establishes English as the national language, and 49 percent think the President can suspend it." While we at **The Fed** remain divided on the Bork nomination, we are all amazed at the rapidity with which people have judged this Original-Intent scholar when so very many of them clearly don't know what the intent of the original was...

BOOK CO-OP NEEDS PERMANENT SPACE

BY DAVID VATTI

By this time, every Columbia student has ventured into the Barnes and Noble bookstore in the basement of Ferris Booth Hall and gaped at the prices for textbooks. In addition, Core Curriculum books are often out of stock, and used texts are sold at nearly new book prices.

"The prices in the bookstore are ridiculous," says Mike Murray CC '91. "The other day I paid fifty dollars for a physics book that has been in print for fifteen years."

This kind of situation is what prompted Kaivan Shakib and Ajay Dubey, members of the Class of 1989, to organize a bulk buying service for Literature Humanities and Contemporary Civilization texts in the Spring of 1986. Freshmen could place advance orders for new texts and receive discounts up to twenty percent. Initially, the book co-op was able to provide service to over one-hundred and fifty people.

This Fall, under the continued leadership of Shakib and Dubey, the book co-op sold out a larger stock to a greater number of students. "Such success has begun talk about starting a full-time discount bookselling operation that would sell not only new texts at discount prices, but also give students better deals on the buying and selling of used books," Shakib says.

"I think a full-time book co-op is a great idea," says Liz Ceppi CC '91. "If I had heard about it this year, I would not have gone anywhere else. On one occasion, I paid ninety dollars for four books at the bookstore. It would be nice if the University cooperated with students to make a full-time book co-op a reality."

"The prices in the bookstore are ridiculous," says Mike Murray CC '91. "The other day I paid fifty dollars for a physics book that has been in print for fifteen years."

Shakib and Dubey say that to start full-time operation, and meet such demands, has two prerequisites. First, a permanent space for the book co-op must be found. The University has continually denied the book co-op permanent space. This year and last, the book co-op operated out of temporary space in room 106 of Ferris Booth Hall.

"I would like to use the pool room on the fourth floor of Ferris Booth Hall (FBH) as a permanent space for the book co-op and the credit union," Shakib says. "Right now, it is an incredible waste of space and I'd rather see the pool tables moved to Levien Lounge on the first floor of FBH."

"I think Kaivan has neglected to consider the large number of students who use the pool room," responds Chuck Price, Director of Student Activities for Columbia College. "However, I think that if the book co-op was to operate on a year-round basis, I would cooperate with them in finding a room. But, they have to prove that they are capable of doing so."

Dubey, in turn, stresses that acquiring permanent space in FBH *first* would allow the book co-op to be more cost effective and, thus, able to pass greater discounts on to the students, *immediately*. "A permanent space in FBH would make us just like any other club," Dubey says. "It would totally eliminate any kind of rent payments and therefore, lessen any costs students would have to bear."

Dubey also says that the book co-op may want to diversify by selling textbooks other than just those for Literature Humanities and Contemporary Civilization. "It is ludicrous to pay nearly fifty dollars for some of the science and mathematics textbooks," he says. "With tuition already so high, there is no need for students to be raked over the coals for books."

However, Dubey indicated that such expansion of the book co-op would raise expenses considerably. Selling science textbooks could add between $15,000-$20,000 to an already growing budget. "Such large sums of money mean that the book co-op is a serious operation meriting permanent space," says Dubey. "It is absolutely necessary that we get the University's cooperation on this matter."

Furnald Grocery has also been talked about as a possible site for the book co-op. The storage room adjacent to the store might become the book co-op if replacement space for storage could be found. A nearby room, presently controlled by University Residence Halls (URH), would have to be obtained for this storage area. Furnald discussed the acquisition of this room with URH officials but presently the talks are in limbo and there are indications that the space may be used for other purposes.

"I think the problem was that Furnald Grocery took the space and then formally applied for it," says Shakib. "I assume that URH did not approve of such tactics and withdrew cooperation on this matter. Yet, I do like the idea of having the book co-op in Furnald, if possible."

"With tuition already so high, there is no need for students to be raked over the coals for books."

"Frankly, I feel that Furnald is the best place for the book co-op," agrees Chuck Price. "The book co-op blends in with the entire concept upon which Furnald was founded. The needs of the Columbia community are best known by the students within it."

While talks for the acquisition of a permanent space have stalled for the present time, a second issue, central to establishing a full-time book co-op, needs attention. Shakib and Dubey would like to see the book co-op achieve work-study status. Work Study is a program in which the Federal Government subsidizes labor costs to a variety of organizations.

The advantages of work-study status are numerous. At present, the book co-

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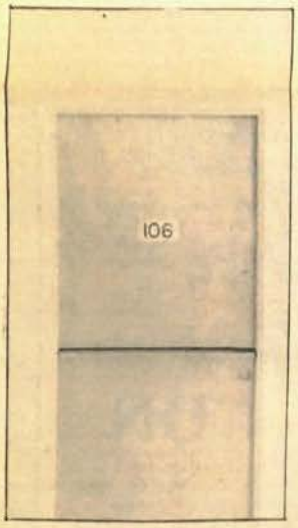
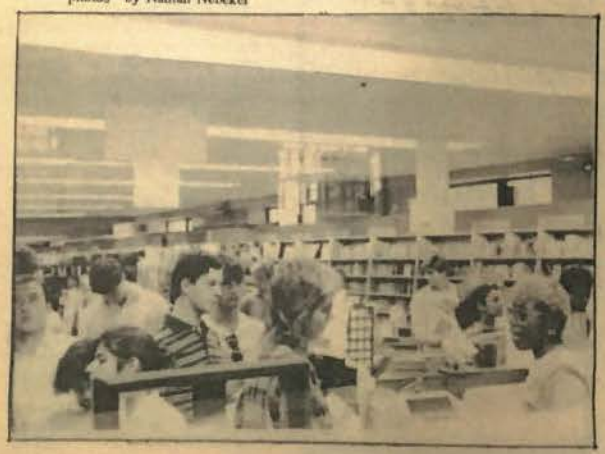


photos by Nathan Nebeker



Closed door of Book Co-op (left) while students empty their pockets at Barnes and Noble (below).

Courts on Campus Disappearing

Tennis Anywhere?

BY ERIC A. PRAGER AND ADAM TOLCHINSKY

When the three tennis courts behind Uris Hall were built ten years ago, it was with the understanding that eventually they would have to give way to new academic facilities, Athletics Director Al Paul told **The Fed**. This will soon reduce the number of on-campus courts from four to one (the court in front of John Jay Hall). Options are now being explored for the replacement of the lost courts.

In the Fall of 1988, a new engineering building will be built on the lot behind Uris which now contains three courts. Many students, already concerned by the scarcity of courts on campus, are disturbed by the prospect of a further reduction.

"It's incredibly difficult to reserve a court on campus as things are now. I can hardly ever get a court at a time that I don't have classes. It would be impossible if there were fewer," Jerry Godfrey, CC '90, states. "Also," he added, "it's absurd that we have to pay two dollars to reserve a court on our own campus; I've spoken with friends at other colleges, and none of them have to pay to reserve courts on their campuses." David Thanassi, CC '90, agrees, "It's ridiculous that we have to pay two dollars to reserve a University court."

Al Paul himself sees the problem: "We need more courts; I wish there could be more courts. It comes down to the space factor." He explains that it is part of the price we pay for being an urban institution.

Jerry Ronigan-Fenwick of the Department of Buildings and Grounds is presently looking into replacing the courts. Ronigan-Fenwick notes that while the search for suitable sites is only in its exploratory stages, it is likely that similar facilities to the ones being closed will be built.

Possible locations for the new courts include Pupin Plaza and the plaza in front of the International Affairs Building. Ronigan-Fenwick says that he is looking for four or five sites. According to Paul, even rooftops were considered, but are now viewed as impractical because of such obstacles as air conditioning units. Factors such as noise will have to be considered with potential sites that are next to academic buildings or residence halls.

The remaining option for Columbia students interested in playing a game of tennis at reasonable cost is the Tennis Center at Baker Field. The center is privately maintained but free for students with a valid CUID. The center has seven clay courts, four of which are "bubbled over" in the winter. Only the four covered courts are lit.

Tennis Center Director Dan Rivkind told **The Fed** that it is "not difficult" for Columbia students to make same-day reservations for an outdoor court in the morning on week days or on a weekend. The Columbia tennis teams have the courts reserved from two to six on week days. It is "difficult" to reserve a court at night as members of the Tennis Center have this period all but completely booked through the season, Rivkind notes.

Jitendra Joshi, SEAS '90, summarizes, "An Ivy League school has an obligation to its students to provide better facilities than four tennis courts in bad condition and some others one hundred blocks away."

ELECTION "SCANDAL"

New Questions Raised

General editorials are passed by a majority of the Board of Editors

Questions about the integrity of College elections are serious and important. No doubt. But the manner in which the allegations regarding Kaivan Shakib's election to the Student Council last Spring have been made raises concerns about their authenticity.

The allegations printed in **Spectator** over the last several weeks have come from one source: Dan Schacter, CC '87, former Election Commission Co-Chairman. He claims that Tony Calenda, CC '89, present Commission Co-Chairman, stuffed the ballot box on behalf of Shakib. His only evidence: the claim that Shakib appeared to have few votes after the first two days of voting and received one hundred votes on the third and final day.

Schacter further claims to have discussed the matter with the full Election Commission immediately after the election. Yet, **The Fed** has learned that he, in fact, did not consult Calenda, other Election Commissioners Victor Mendelson, Eric Won, Ahmet Khan, Ilona Nemeth, Stephanie Meyer or even his fellow Co-Chair Ed Marcantonio.

Why did Schacter lie about discussing the matter with the Commission? Why did he wait until now to make his accusations? Where did he hear rumors that Calenda was stuffing the ballot box? What leads him to believe them? And why did he choose to talk with a newspaper about his claims before addressing them to the Commission he chaired or to the deans, whose job it is to investigate matters of academic honesty?

All of these are crucial, yet unanswered, questions. Perhaps the only insight into the matter is **The Fed's** recent discovery that Schacter remarked to a fellow Commission member he "just wanted to make a little trouble for Tony [Calenda] and Victor [Mendelson]."

We cannot say that Schacter is inventing these claims solely for his personal entertainment. Yet, we cannot see any reason for his silence regarding the matter until making his allegations this Fall in **Spectator**.

Perhaps the greatest irony in the whole episode is the fact that the allegations revolve around Shakib. Of all the candidates up for election last Spring, Shakib was one of the "sure bets" to garner a seat. He had spent two years working hard for concerns the campus clearly supports--one year as Freshman Class President and the other as the founder and organizer of the Book Co-op. It is safe to say that it would have been a much greater surprise if Shakib had not made the Council.

The single piece of evidence Schacter offers--that it *appeared* Shakib had few votes heading into the final day of voting--is less than convincing. No tally of votes is supposed to be taken until after the final day; there is *no way of knowing* whether Shakib in fact had few votes after two days. And, even if he had, one cannot deny the fact that on the third day, Shakib did mount an impressive drive to get his friends and supporters to the polls. All close observers of the Spring elections do remember that.

Today, Vice Chairman Shakib and the rest of the Council sit in the unenviable position of trying to advance their agenda for the year while also trying to justify themselves as a legitimate and representative Council. Their work and their titles have been subverted by claims that were never presented in the channels designed to deal with them. These claims, true or false, will hang unnecessarily over the heads of Council members for the rest of the year.

JTS-GS Students Ignored

BY HEATHER LOREN AND RACHAEL HAMMER

General Studies (GS) students are the ones who sit in the front of your introductory composition class, confident that they will soon be writing the great American novel. They are the ones who, unsurprisingly, ace the History of World War II course--after all, they were there. These people cannot be regarded as typical members of Columbia's undergraduate student body.

This particular division of the University serves people who have already entered the work force and are merely taking a night class or two to continue their education. Many are experiencing college for the second time and come in with great motivation, intent upon applying course work toward their advantage in the outside world. Though the College does its best to educate the GS student without infringing upon the younger members of its community, there are, however, some of us under-21 GS students who need and desire more integration.

Columbia College will not permit us admission to orientation events and activities. We are not in the Freshman Directory and cannot even purchase a copy.

Students leaving high school may earn two B.A. degrees by combining programs of study at the School of General Studies of Columbia University and at the List College of Jewish Studies at the Jewish Theological Seminary. This dual curriculum, referred to as "The Joint Program," has a major flaw. GS policies are not answering the needs of these young freshmen.

Joint Program students were originally placed in General Studies due to a problem of semantics. In 1953, it was deemed that one could not be enrolled in two schools and be considered a full-time student at both institutions. The fact is, however, that we are in school full-time; to find such a student taking anywhere from 18 to 24 credits per semester is not unusual.

What upsets us most about the entire situation is that we have the necessities of full-time students. In order to complete the program, we must often study five years, as well as many summers; yet, we are not provided the academic guidance required to handle the intricate and rather confusing transferal of credits between schools.

We attend Columbia to attain a well-rounded liberal arts education; however, we are denied access to the Core courses like Contemporary Civilization and Literature Humanities. The administration argues that there is only enough room for Columbia College students, yet Engineering students, members of an equally separate university division, may attend.

We are not an insignificant population at Columbia; we are just an ignored population. There are over 100 participants in the Joint Program who wish to be included in campus life at Columbia. As entering students, we would like to meet other 18 year olds, but Columbia College will not permit us admission to orientation events and activities. We are not in the Freshman Directory and cannot even purchase a copy.

Although we live in a dormitory only four blocks from Columbia's campus, clubs do not poster the bulletin boards, and there is no campus newspaper service.

All of these factors lead us adrift into further anonymity. We simply want the chance to be recognized as the 18 year-old Columbia students that we are and to be offered the full collegiate experience.

CON

continued from page 5

his disregard for precedent and a majoritarian position is *Griswald vs. Connecticut*. This 1965 case overruled a state statute that prevented the use of contraceptives, even between married couples. Of this case Bork states: "The majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish [and] impairs their gratifications. . ."

The Constitution is necessary for judgement of cases, but because the amendment process is slow and only deemed necessary in extreme cases, it is not sufficient. The court must follow a trend of constitutional precedent respecting original intent, but in a thoroughly modern context. Obviously, Bork is not willing to do so.

Bork's extreme position on majoritarianism and judicial restraint shows disregard for individual rights and inhibits progressive social change. With regard to original intent, he shows contempt for the court system by ignoring constitutional precedent. Keeping these factors in mind, Bork is by no means a wise choice for justice.

PRO: BORK PHILOSOPHICALLY FIT

BY KIP CORWIN
AND RACHAEL HAMMER

Contrary to the claims made by many here on Morningside Heights and beyond, Judge Robert H. Bork is thoroughly qualified and philosophically fit to serve on the United States Supreme Court. Bork's own legal and scholarly qualifications are well known and not disputed even by his most vitriolic enemies.

In a rare move by a sitting Justice, John Paul Stevens has stated, "Judge Bork is very well qualified. He will be a welcome addition to the Court." The conclusion of a review of Bork by the American Bar Association assessed him as "exceptionally well qualified for the position," the ABA's highest recommendation in such an assessment. However, Bork's political attitudes combined with his philosophy of judicial restraint have unnecessarily upset many.

Indeed, Bork's political philosophies can be categorized as conservative, but this should play no role in the decision. Bork is a staunch believer in judicial restraint, the philosophy that the role of the Supreme Court is strictly to decide on a law's constitutionality. He does not believe the Supreme Court was established for, or has any right to impose new law. In accordance with this philosophy, Bork does not offer verdicts based on his personal political beliefs, but only on the legitimacy of a law in reference to the established judicial system.

An important illustration of this is his stance on abortion. It is widely promulgated that Bork is against abortion. This belief is a misconstruing of his statements on the issue. Bork does not contest a woman's right to have an abortion, but only that Roe v. Wade is not a constitutionally sound basis for guaranteeing such a right. His criticism is of the legal integrity of the decision, not of the legitimacy of its effect.

At the core of the Bork battle is the issue of majoritarianism: the extent to which the will of the majority as opposed to the will of the court, should be the source of law making. Advocates of judicial restraint believe that the court should respect the majority. To them, decisions regarding public policy should be made in the legislative bodies (e.g., the Congress, state assemblies, or city councils) expressly elected by the people for that purpose. The role of the Supreme Court and other inferior courts is not to enact laws but to determine their constitutionality and legal legitimacy. This fundamental distinction is crucial in assessing Judge Bork accurately.

Criticisms of Judge Bork have often been widely exaggerated and laced with melodrama. In the words of Senator Edward M. Kennedy (D-Massachusetts), Bork would create a "land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters...and writers and artists could be censored at the whim of the government." These fears of having a number of the rights which we take for granted rescinded by Bork exist on very shaky ground. Bork is a well-known advocate of *stare decisis*, Latin for "stand by things decided." In the words of Columbia University Law School Professor Henry Monaghan, "He respects tradition, precedent, and continuity in the law."

The problem a student of original intent, like Bork, may have with these and other decisions lies not in the ends the Court pursued but in the often *convoluted reasoning* it employed to reach them. An excellent example of this is his position on the Court's decision to force the Federal Government and the District of Columbia to desegregate. Bork has always supported the landmark Brown v. Board of Education decision which initiated the civil rights movement, declaring it "surely correct," and one of "the Court's most splendid vindications of human freedom."

But the Brown decision was based solidly on the reasoning of the Fourteenth Amendement, the jurisdiction of which is clearly limited to the *states*. Thus, while Bork has never opposed desegregation of the Federal Government and the District of Columbia, he would advocate legislative means or well-reasoned judicial ones to obtain it. He remains consistently concerned about the reasoning, the intent of the Constitution and its amendments, in all Court findings.

Judge Bork is a strong proponent of vigorous exercise of First Amendment rights. His opposition to the current proliferation of libel suits, which risk inhibiting a writer's expression, proves that he feels freedom of speech must be protected. His decisions in cases involving the press have always been favorable. He opposes measures that might "threaten the public and constitutional interest in free, and frequently rough discussion."

Bork's positions on the more volatile issues should not result in his being labeled a right-wing extremist. Without question, he has modified his position on certain issues such as abortion and civil rights, which are emotionally charged. Has it occurred to those who would condemn Bork so readily for "flip-flopping" that thoughtful scholarship involves changes in the realm of ideas? Would any of us consider worthy of intellectual respect someone of sixty whose ideas had remained static since the age of twenty?

If the end of judicial activism ever occurred, we would enact laws through legislatures that reflect the desires of constituents and not judicial whim. In other words, lawmaking would return to legislatures and the public realm, and not be pre-empted by a court that has too frequently acted in the role of a legislative body.

It is a valid objection that legislators can often be unfair or unenlightened. However, if one acknowledges the potential fallibility of the thousands of elected officials, how secure can one be about the omniscience of nine Justices? The Supreme Court, a body of unelected, unaccountable and tenured justices, self-imbued with the power of enacting legislation, could potentially usurp the authority of the legislature, as Bork feels has happened.

In the hearings, Senators will, no doubt, vote idealogically, not purely with respect to judicial theory. It is time for this partisan maneuvering to stop. The amount of time that his confirmation has taken, as well as the brazen attempts to malign his credibility are contemptible. Neither Bork's judicial philosophy nor his views on the controversial issues make him an undesirable candidate.

CON: MAJORITARIAN EXTREMISM

BY NATHAN NEBEKER

There has been much debate regarding the nomination of Robert Bork to the Supreme Court. Though the common arguments against his confirmation are based on inaccurate interpretations of his views, there exist compelling reasons not to endorse his appointment to the Supreme Court.

The arguments of Bork's opponents are founded on questionable logic. An illustration is as such: "We are pro-choice, Bork is pro-life, we disagree with Bork, therefore, Bork is no good." Or, "We endorse civil rights legislation, Bork opposes such legislation, we and Bork differ on this point, therefore Bork is unqualified". Not only are these statements a misinterpretation of Bork's actual reasoning on the issues, they do not supply any concrete reasons to oppose him.

Such arguments which are based on opinion are not arguments at all. They are simply declarations, statements which are easily countered with the equivalent converse statement, e.g., "We are pro-life, Bork is pro-life, we agree, therefore Bork is good." "Arguments" conducted on this level are nothing more than a bantering of differing opinions.

Despite the fact that much of the "discussion" regarding Bork is of this nature, there are well-founded and objective reasons for opposing his confirmation. To understand these, one must have knowledge of the three major principles that encompass Bork's judicial philosophy: majoritarianism, judicial restraint, and original intent.

Majoritarianism is the principle espousing that the source of law must necessarily and exclusively be the will of the popular majority via legislature. Judicial restraint, a related principle, states that a court system must never be a source of law, but only an interpreter of the law, as to resolve ambiguities within it.

Original intent is the principle of upholding laws strictly in reference to the original intent of the Constitution, and not in reference to contemporary social or political pressures.

Certainly these principles are cornerstones of a democracy, but none are without need for interpretation and qualification, and each entails a question of degree. That is, to what degree should the will of the majority be allowed to infringe on personal liberty? Also, which actions of the court would constitute a usurpation of legislative authority? Certainly, complete lack of judicial restraint would eliminate the necessity for a legislature, while total judicial restraint would eliminate the need for a court.

Bork's interpretations of these principles are objectionable, in that they do not respect individual rights, social progress, or constitutional precedent.

Bork's stance on majoritarianism would engender a tyranny of the majority. If the only source of law is popular majority, and the court interprets the law only in ambiguous cases, laws that infringe on the rights of individuals who dissented from the majority could very well exist. Similarly, a short coming in the law where individual rights are not *explicitly* protected would provide license for infringement.

A clear example of this is the recent ruling regarding sodomy laws. On the assumption that the majority of the American population does not approve of homosexual conduct, it would be nearly impossible to enact laws protecting an individuals choice to engage in such behavior. Bork, not finding in his interpretation of the Constitution any protection of sodomy, would uphold such a law.

Considering the principle of original intent, one must bear in mind that the Constitution was written two hundred years ago in a social context very different from today. Changes in moral, medical, and social issues have stressed the application of the Constitution extensively. The framers clearly anticipated this, as the Constitution is deliberately vague, and designed to accommodate social change by allowing for contemporary interpretation. How specifically one defines original intent determines to a large extent the license for social change.

Earl Warren adopted a rather liberal interpretation of original intent, and in doing so, affected much-needed social change during his tenure, including Brown vs. Board of Education. Of the Warren Court, Bork stated in the *Indiana law Journal*, "The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance...occupies a philosophically impossible position."

This is to say that many decisions of the Warren Court were without basis in the original intent of the Constitution. In other words, he believes the victories of liberty won in that era would not have been endorsed by the original intent of the Constitution, demonstrating that his philosophy of judicial restraint does not accommodate social progress of this sort.

Bork's extremist tendencies are also proven by his record of breaking constitutional precedent. Cases in which this is demonstrated by either his ruling or his published opinion are numerous. The 1942 decision of *Skinner vs. Oklahoma* which struck down the required sterilization of 'habitual criminals' Bork considers "improper" and "wrongly decided". Also the 1948 case of *Shelly vs. Kraemer*, where a state court decision to respect contracts that included a "private, racially restrictive covenant" was struck down, was condemned by Bork.

He has stated that *Roe vs. Wade* is an unconstitutional decision, and we can expect it to be overturned under his appointment. There exists a popular misconception that he is simply against abortion. In fact, his argumentation against *Roe vs. Wade* is based on strict constitutional principles and not on moral grounds. He does not oppose abortion per se, but he fails to recognize court precedent and individual liberty, thus rejecting the right to choice.

Perhaps the most blatant example of

continued on page 4

Book Co-op

continued from page 3

op is staffed by volunteer workers. But, if the book co-op were to expand, full-time employeees would be needed. The labor costs would then have to be absorbed by the students. "Federal subsidies, however, through work-study status could absorb up to eighty percent of labor costs," Shakib and Dubey agree. "This would ensure students a greater discount on a multitude of books."

"Frankly, I feel that Furnald is the best place for the book co-op," agrees Chuck Price. "The book co-op blends in with the entire concept upon which Furnald was founded. The needs of the Columbia community are best known by the students within it."

Furthermore, work study would allow for a greater number of employees, which would allow the organization to sell a greater number and variety of textbooks. "In all honesty, I don't think we could ever operate on a scale like Barnes and Noble," says Dubey. "However, I can envision the book co-op ultimately becoming in size and scope like Furnald Grocery."

The University receives a great deal of rent every year from Barnes and Noble, but Shakib and Dubey do not feel that this is pertinent to cooperation from the Administration. "After all, the University has a 99 year lease agreement with Barnes and Noble," Shakib says. "Barnes and Noble may not be happy with the competition with the book co-op, but they are not going to leave either."

"The University ought to stop being a corporation and start acting like the academic institution it is supposed to be," Shakib added. "It is important that the University Administration understand that Barnes and Noble is not treating Columbia students properly and cooperate with students to establish at least one good bookstore on campus."

Furnald

continued from page 1

director of Coors Light brand is a woman. The brand director position is the highest position held by any woman in the brewing industry. Coors has also been called "one of the more progressive employers in the state of Colorado" by the President of the Colorado Women's Political Caucus.

Coors' most recent change in labor policy resulted in the AFL-CIO dropping its boycott. The company, which had not been previously unionized, will now allow unions to organize in its breweries if the workers so desire. Also, the company has agreed to hire workers who already belong to a union.

The AFL-CIO reversal has left those who continue the boycott somewhat isolated. To some, Furnald's support of the boycott is a symptom of a campus disease. "I think the whole Coors thing has been blown out of proportion. People here like to have something to protest about. It's funny sometimes the efforts they make to stir things up," said Myeng Oh, SEAS '90.

However, Sam Park insisted that he would never sell Coors at the grocery until the company stops contributing to conservative causes. He added that, in his opinion, it would be bad business for Furnald to stock the beer because of the risk of bad press for the store.

The Fed asked Park if, having decided to boycott Coors on the basis of what he knew about the company, he would exercise the same policy for all articles on Furnald's shelves. Park admitted that he did not research the political activities of all the companies whose products Furnald stocks.

To some, Furnald's support of the boycott is a symptom of a campus disease."I think the whole Coors thing has been blown out of proportion. People here like to have something to protest about. It's funny sometimes the efforts they make to stir things up," said Myeng Oh, SEAS '90.

In the view of Tony Augello, such activities are not Furnald's responsibility: "Why is Furnald unilaterally making the decision to boycott Coors for the entire school? I think it's ridiculous for them to pretend they 'know what's best for us' or what is moral. And I think it's even more ridiculous for them to carry on, in a quixotic fashion, a boycott the AFL-CIO and the rest of the country has already ended."

Weston at the Met

BY STEPHEN LATER

A display of photography by one of the United States' most accomplished and talented photographers is being hosted by the Metropolitan Museum of Art through October 31, 1987. Entitled "Edward Weston: A Centennial Retrospective," the exhibition's approximately 100 photographs--from the collection of the Center for Creative Photography at the University of Arizona--illustrates his major thematic periods and traces the evolution of Weston's concept of his art.

Born in California in 1886, Edward Weston soon realized his calling and, by 1917, his pictoral photography had earned him admission to the London Salon of Photography. What distinguished his work from that of his contemporaries was his ability to go beyond the physical, to blend it with the spiritual in a unique fashion. One is captivated by his portraiture: it exudes an almost mystical quality. Such early platinum and silver prints as "Enrique" (1919) and "Epilogue" (1919) are stunning not only in their composition, but in their virtually spiritual nature.

In June, 1922, Weston wrote that "[s]uccess in photography, portraiture especially, is dependent on being able to group those supreme instants which pass with the ticking of a clock, never to be duplicated--so light, balance--expression must be seen--felt as it were--in a flash, the mechanics and technique being so perfected in one as to be absolutely automatic."

Weston's residency in Mexico from 1923 to 1926 produced some wonderful work and, more importantly, signaled a shift in his work from the studio to the outdoors. The exhibition displays a varied assortment of his Mexican photographs, including such works as "Pulgueria" (1926) and the humorous "Excusado" (1925). Reflective of these efforts was his remark that the "camera should be used for the recording of *life*, for rendering the very structure and quintessence of the *thing itself*, whether it be of polished steel or palpitating flesh."

This trend towards a celebration of life was carried over into Weston's "extreme close-ups" of nature--of seashells, minerals, and vegetables. "Shell" (1927), "Kelp" (1930), "Pepper" (1930), and "Orchid" (1931) demonstrate his ability to distill nature down to its very essence through his mastery of the camera.

"I have never lost the desire to grasp that intangible something which haunts my ground glass," wrote Weston to fellow photographer Alfred Stieglitz. This trend towards distillation continued as he ventured to the New Mexico desert in 1933 for his well known landscape series. The exhibition's "Red Rock Canyon" (1937) is a wonderful revelation of the photographer's love for his art and for the sheer beauty of nature.

Weston once said that he felt that the "subject matter is immaterial--the approach to the subject, the way it is seen and recorded is the critical task..." This theme--of the role of the photographer--is reflected throughout the different periods of his work; the photographer is more than the vehicle through which nature is recorded, he is an integral part of that which is recorded. In short, Edward Weston's genius manifested itself in his ability to capture the soul of his subjects, be they natural or human. This exhibit presents a unique opportunity to view his work, and it is one not to be missed.

Edward Weston: A Centennial Retrospective, through October 31, 1987. The Charles Z. Offin Gallery and Galleries for Drawings, Prints and Photographs at the Metropolitan Museum of Art.

AROUND TOWN'S City Lights

Galleries

Knoedler, 19 E. 70th St., is hosting a works-on-paper show displaying, among others, Motherwell, Graves, and Stella. Knoedler also maintains permanent display of Graves' sculpture and a visit is certainly warranted. **Hirschl & Adler Modern,** 851 Madison Ave. b. 70th and 71st. Sts., is also displaying prints by Stella as part of a group show through early October.

At **Bernard,** 33 E. 74th St., a group show including paintings, drawings, and sculpture by Giacometti, Klee, Leger, Picasso and Segui runs through October 10, 1987

The Museum of Modern Art, 11 W. 53rd St., is displaying: "Projects: Tom Otterness" through October 13, 1987. "Surrealist Prints from the Museum of Modern Art" and "Projects: Louise Lawler" both run through November 8, 1987. "Henri Cartier-Bresson: The Early Work" through November 29, 1987.

MUSEUMS

At the **Cooper-Hewitt Museum,** 5th Ave. at 91st St.: "Art Nouveau Bing: Paris Style 1900" through October 11, 1987. "Underground Images: School of Visual Arts Subway Posters, 1947-1987" through November 8, 1987. "Safe and Secure: Keys and Locks" through October 18,

At the **Whitney Museum,** Madison Ave. at 75th St.: "Twentieth Century American Art: Highlights of the Permanent Collection" and "Calder's Circus."

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the

Federalist Paper

"Veritas non Erubuscit"

a student publication in the tradition of Columbians Hamilton and Jay

Volume II Number 2 | Columbia University, New York City | 26 October 1987

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FINAL EXAMS

Is a Study Day Enough?

BY M. ADEL ASLANI-FAR

The perennial issue of "Study Day" at Columbia is once again resurfacing as students begin to contemplate those not-so-far-away final exams. Many students and student leaders on campus feel that a single study day is simply inadequate. They cite much longer "reading periods" at other Ivy League Universities.

Rich Wagreich, SEAS '90, sums up his frustration with the situation. "I think it's very big of the University to give us a full twenty-four hours to study for finals," Wagreich says sarcastically. Student leaders are listening to people like Wagreich and are trying to overcome the obstacles which have prevented expansion of the study period. But, inadequate polling of the student body and bureaucratic resistance to change, student leaders say, have foiled past attempts to rectify the situation.

"If the students want it," says University Senator Tom Kamber, CC '89, "then we'll fight for it." Kamber and University Senator Richard Froehlich, CC '85 and Law '88, bring up the issue of a 1986 survey conducted for the University Senate by Sociology Professor Alan Barton. The survey was the result of consideration of the issue by the Senate Education Committee.

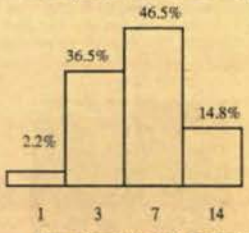
Among the several questions on the survey were two regarding study week. Kamber and Froehlich, however, criticize the manner in which the issue was presented to the student body. Kamber says, "The gist of the questions was 'Do you want to give up Election Day [two-day holiday] for two extra study days at the end of the semester?' If it's presented like that, of course people are going to say no."

Froehlich, disputing the wording of the survey, says, "The survey was silly. The real question is 'Do students want a longer study period?'" Froehlich also faults the distribution of and response to the survey. "Only 750 surveys were distributed," Froehlich points out, "and only 7.2 percent of those responded to the question. That's hardly an effective measure of student opinion."

In a recent *Federalist Paper* poll, page three of this issue, almost 400 students responded to the question "How many free days do you think would be adequate to study for finals?" In all, an overwhelming 97.8 percent of the respondents favored at least three days of study prior to final exams. Of those, 46.5 percent favored seven days of study and 36.5 percent favored three days, while only 2.2 percent preferred the present one day study period.

Froehlich says that another poll to be conducted by the Senate may better ascertain student opinion on the issue. "The Education Committee was content with the findings of the 1986 survey," Froehlich asserts, "but I don't think that students on campus even know about that survey. If they do, I don't think the majority agree with the findings."

For its part, the Columbia College



Days adequate to study for finals

Student Council is also addressing the issue in its Academic Affairs Committee. Committee Chair Rob Spingarn, CC '89, hopes to organize a college-wide questionnaire that will touch on the issue of Study Day. "We're hoping to distribute it in conjunction with the Freshman election in November," Spingarn says, "but we want response from all four classes."

Columbia College Associate Dean Michael Rosenthal asserts that the College is not opposed to expansion of the study period. "I feel that the exam week itself is very intense. The telescoped nature of the study day adds to this problem," Rosenthal says, "but the students have said in past referendums that they do not want it." Rosenthal explains that New York State regulations regarding classroom hours restrict the flexibility that Columbia has in dealing with the issue. Any expansion of the study period, he says,

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Students studying in Butler Library's Main Reading Room

TIDBITS FROM THE FIRST *FED* POLL

A few people took advantage of the "comments" box and their anonymity to express some interesting views. A few opinions:

On newspapers:
"Stop writing like your 50 years old." (No, there's no typo in that last sentence)
"Your paper probably sucks" No doubt an avid reader.
"The *Spectator* should be renamed the *Instigator* for its sensationalistic nonsense." (The views expressed here do not *necessarily* reflect the views of the staff)

From someone who defies normal political classification:
"BLOCK BORK. Let's build a gym in Morningside Park." (calling Mark Rudd...)

Choice for President:
"Marx." (and they thought Reagan was too old to run for President)
"Trump should run for pres." (With Zeckendorf as VP, perhaps?)
"Power to the people" (would they all fit in the White House?)
"I would have loved Gore, but Tipper lost the election for him." (from an irate Twisted Sister fan)

On campus life:
"I love this school!" (from a College freshman)
"I miss my parents." (from a third-year Law student)
"Better pizza needed." (obviously you haven't tried V&T's)

The Federalist Paper
of Columbia University

Veritas non Erubiscit

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GOOD CALL COACH

Varsity Football Coach Larry McElreavy after the 10 October Columbia Football game at Princeton:

"I'm puzzled by [the fans reaction to the football team's losing streak]. We're a liberal institution. We're constantly reacting to a cause. They're sympathetic to causes all over the country--unemployment, racism, all the things they should be socially aware of. Yet why in the same breath then would they wish something like that on their own classmates. That escapes me and it frustrates me."

WIN A SIX OF THE SILVER BULLET

If you can name the gentleman pictured below, *The Fed* will treat you to a half dozen tasties. Submit your answer, your name, and your phone number to us at 206 Lewisohn Hall. If there is more than one correct response, we'll choose a name out of a hat. Staff members of *The Fed*, of course, are ineligible.

STUPID *FED* JOKES

Q. How many psych majors does it take to screw in a light bulb?
A. None, when it's ready to screw in, it'll do it by itself.

Q. What is a quartet.
A. An East German symphony orchestra after a tour of West Germany.

An older Muscovite walks into the large department store to place an order for a new Lada.
The dealer takes his money and tells him to return in seven years.
"In the morning or afternoon," the customer responds.
"What does it matter, it's in *seven* years!"
Responds the customer, "The plumber is coming in the morning."

WHERE'S THE BEEF?

A Stark County (Canton, OH) judge is considering whether to dismiss a wrongful death lawsuit that claims a shooting spree in a McDonald's restaurant was partly caused by an overdose of Chicken McNuggets.

Judge James R. Unger heard arguments Thursday [8 October] in the $5-million lawsuit filed by Etna Huberty, whose husband, James, killed 21 people and injured 19 others at a McDonald's before he was shot and killed.

Attorneys for McDonald's asked Unger to dismiss Mrs. Huberty's claim that the chemical monosodium glutamate, used in foods as a flavor intensifier, was in Chicken McNuggets her husband ate and reacted with lead and cadmium that built up in her husband's system triggering his violent behavior.

The McDonald's brief said McDonald's served 4.1 billion McNuggets in the U.S. from January to July of 1984 "without incident of violence."

Sidney [Ohio] Daily News

WHO ARE THE PUNK LESBIAN EPIC POETS FOR GAY RIGHTS?

Here are a few of our favorite chants from the 11 October Washington, D.C. rally for various gay rights causes:
"Ho, ho, hey, hey, half the Ivy League is gay."
"Two, four, six, eight, how do you know your friend is straight?"
Also making an appearance:
"Cross dress and cease fire."
"Better blatant than latent, better latent than never."

WHAT WOULD MARY JO HAVE SAID?

The *New Bedford Times* (Massachusetts) recently published a report which gave an account of the *Mya* (the Kennedy family's 50 ft. schooner) and her apparent mishap off the Hyannis coast during a storm. The *Times* quoted a Coast Guard officer as saying that when he arrived at the scene of the accident, the crew of the *Mya* were unruly and arrogant.

One person called an officer a "peon" while the rest of the party was observed to be "disoriented." In addition, the boat was "cluttered with beer bottles." The quoted official said that he and his crew were in radio contact before they arrived at the scene, but the messages they received from the *Mya* were unclear: "One minute they're laughing, the next minute someone gets on [the radio] and they're frantic. A day earlier a man had been knocked off the vessel into the ocean by the boat's boom and had been taken to Cape Cod Hospital for treatment.

Six days later, the Coast Guard denied the published account in the *New Bedford Times* story and said that the official was wrongly quoted in the article.

MORE *MONKEY BUSINESS*

The Soviet Union, concerned about *their* lack of bad press lately it seems, have sent an ape into space; this mischievous monkey has recently gotten an arm free and has been wreaking havoc on the interior of the space capsule. The press would be unaware of this development, rumor has it, if the Soviets had not requested that the press follow their monkey into space.

ADIEU ANDY

Dear Mr. Levy,
(with all due respects)

I was genuinely distressed to read that the once incisive and original Levy bylines have dissolved into institutionalized mush (cf. *Spec.*, Sept. 8, 1987). I was and still am a potential fan of the witty, dashing and courageous literary style of the inimitable Andrew Levy. The problem is that recent *content* has resorted to *ad hominem* arguments of little literary or political merit. Although I unabashedly chuckle at the thought of George Bush being beaten with tropical fruit, I hardly find such trash worth its way onto the editorial page of *Spectator*.

Overriding the excuse of two months of summer vacation, it reads as if it were written on beachfront property as an accompaniment to a six-pack of Molsons (no Coors jokes, I'm sick of them too). Not that *Spec* is the pinnacle of campus talent, but you have capabilities which lie above your recent editorial. Please, Mr. L., show us something new. Don't let *The Fed* degenerate into a sounding board for the hopeless presidential campaign of Peter du Pont who, presently backed by private funds and the utterly helpless CATO institute in D.C., will eventually settle into a life of more worthwhile cocktail parties in Wilmington, DE, and an eventual career as a yacht designer in Maine (or something to that extent).

Mr. Levy, in good faith, I challenge you to challenge your readers. Integrate your ideas, your style, and your temper into the mainstream political process and you may emerge with something worthwhile.

Very truly yours,
A Columbia College Senior

ad hominem:

P.S. Ayn Rand is a cultural dinosaur by all means but Hospers is O.K.

Grade Inflation in the Core?

BY ERIC A. PRAGER AND DAVE VATTI

Many students have expressed concern about the disparity in grading among instructors in different sections of Core Curriculum courses in Columbia College. *The Fed* spoke with each of the Department Chairmen to find out the requirements and grading policies in respective courses.

Masterpieces of European Literature and Philosophy, Lit Hum, has a set reading list, (which can be added to by individual instructors), and it is required that each instructor give a midterm exam, a standardized final exam, and assign at least two papers per semester. "[Ideally, there would be complete fairness of grading in each section of Lit Hum, but realistically] you'll never get uniformity; each class is autonomous, and it should be," Chairman James Mirollo says. Lit Hum, in one semester according to the *Columbia-Barnard Course Guide*, had nine sections with class averages below 3.00; six sections had class averages above 3.5.

To foster a semblance of uniformity in grading, the following steps are taken in the Lit Hum department. New instructors are oriented as to the meaning of grades. Often, new instructors will show papers and tests to Mr. Mirollo or other professors who are more experienced with the course.

There is no formal system, however, for multiple readings of papers or tests. (The question of the feasability of having a grading committee for the standardized final exam has been raised, Mirollo notes, but with the number of exams involved, this is impractical.) Frequently at regular departmental meetings, issues and problems pertaining to grading are addressed.

Mirollo encourages instructors to delineate their personal requirements for specific grades; this, he feels, eliminates much of the misunderstanding between instructors and students regarding grades. Those students dissatisfied with their grades, who have already tried to resolve their difficulties with their instructors, can appeal to Mr. Mirollo; "student discontent," he states, "is low."

Masterpieces of the Fine Arts, Art Hum, has no stated course requirements, there is a course outline in the form of a general syllabus. Each instructor is encouraged to give final and midterm exams as well as two or three papers, according to Art Hum Chairman Jerrilyn Dodds. Obviously, this precludes any sort of grading by committee since there is no standardized examination of student work. Ms. Dodds notes that instructors are encouraged to tailor the curriculum of each section to student interest ("one of the wonders of the Socratic method," she notes). She adds that there is "no need to hold a whip over Columbia College professors."

Ms. Dodds maintains the guideline that, "if an instructor isn't giving out any A's there is a problem; likewise, if an instructor isn't giving out any C's, there is a problem." As with Lit Hum, students having difficulty with the grading process may appeal to the Department Chairman. Ms. Dodds states that she, as a matter of policy, is willing to assemble a committee to review a questioned grade (though this hasn't been done in her four years as Chairman).

Masterpieces of music, Music Hum, Department Chairman Katherine Rohrer notes that the standard course requirements for Music Hum are a midterm, final, and two papers, one of which must be a concert report. Ms. Rohrer further explains that any additional papers and exams may be administered at the discretion of the instructors. "In addition, the syllabi are determined wholly at the discretion of the individual instructor," says Ms. Rohrer. "It is not unusual for sections to study entirely different pieces save a few."

"Potentially, such freedom could lead to a disparity in grading between the various sections," Ms. Rohrer continues. "However, I do require that all instructors file syllabi with me so that I have some idea of what is being taught and what criteria is being used to determine grades."

Despite such autonomy, Music Hum seems to have the least disparity in grading among its sections. "We're extremely concerned about grade inflation and teachers who give very low grades. At the end of each term, I take the grade charts of all my instructors and tally them," Ms. Rohrer explains. "Then, I compare the results to what I consider to be a satisfactory range. I think it reasonable to expect all sections to fall around my prescribed range (40% A's, 40% B's, 20% C-F, incompletes, etc.)."

Only two sections out of twenty for the Spring 1987 term were "way out of line" with her target range. One teacher gave nearly every student in that particular section A's while another's distribution was situated at the extreme opposite end of the scale. To address such a situation, Ms. Rohrer meets with the instructors involved. Although she won't tell an instructor how to grade exams or papers, she does remind them of the basic departmental standards.

"On occasion, I will get the staff together and invite someone from outside the department to analyze selected concert reports. Hopefully, the instructors will realize objective standards for grading such papers," She adds.

In contrast to Music Hum, Introduction to Contemporary Civilization in the West, CC, seems to have a wider spattering of grades. According to the *Columbia-Barnard Course Guide*, there were 7 sections of CC in which the class grade point average (GPA) was at least 3.5. At the other end of the scale, there were 3 sections in which the average GPA was below a 3.0. Ainslie Embree, Chairman of CC, responds that this could be due, in large part, to the autonomy that CC instructors are given.

"The reading list is rather rigid and there are general course requirements such as a midterm, final, and two to three papers," Mr. Embree says. "Also, instructors may add requirements as they wish and there are no guidelines as to classroom format. It is important to note that teaching styles and thus, grading will tend to be different from section to section."

"Also one must consider that lower grade distributions are not necessarily the fault of the instructor," Mr. Embree adds. "I have had teachers inform me that entire sections seemed very apathetic towards the material discussed in class. Cases as such need to be taken into account when looking at low grade distributions."

The Fed asked, Mr. Embree if the CC department prescribed some set standards of grading to which teachers must adhere. Mr. Embree admits that this issue of grade inflation had never been raised and thus, grading was completely subject to the discretion of the instructors involved.

continued on page 7

Students: You Made the Call

BY KRIS WIGGERT

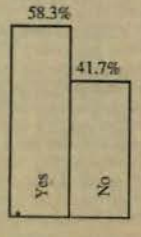
On October 1st, *The Fed* conducted its first poll of campus opinion on University related issues. Questions on the poll ranged from an inquiry concerning library hours to a hypothetical Presidential election. Response to the poll was encouraging, with close to four hundred students participating.

The poll's ten questions gave an interesting and often surprising picture of student opinions. The initial two questions dealt with views on the Core Curriculum. First, *The Fed* asked students, "Do you think there should be uniform grading in Core courses (i.e., a common board of preceptors which grades all work from every section)?" 64% of those polled voted against implementing a system of standardized grading. Regardless, there has been some controversy over the inflation of grades among various sections of Core courses.

Proceeding with the issue of the Core Curriculum, question number two asked, "On the whole, do you feel the quality of the teachers in Core courses is satisfactory or unsatisfactory?" An overwhelming 78% of the respondents were satisfied with their Core instructors, although there was frequent disapproval of Art Humanities (Art Hum) and Music Humanities (Music Hum) instructors. "The grad students who teach Art and Music Hum are often incompetent or extremely boring," a student commented.

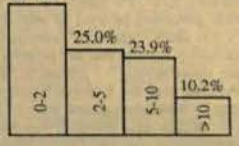
Next, *The Fed* looked into student views on campus library facilities with question three, "Do you think Columbia provides adequate facilities for quiet study in its libraries?" Question four, consistent with this theme, asked "How many hours, on average, do you spend per week in the library?" 58.3% of the respondents to question three were satisfied with the Columbia libraries, while 41.7% of the respondents were not.

Students had many complaints about the libraries, such as the problem of excess noise, but the most common was the lack of a twenty-four hour library. This problem could prove especially vexing to the one-third of those polled who spend at least five hours a week studying in the library. A conservative extrapolation of this percentage means that up to 1000 students spend several hours a week in a library that provides a single room for extended study hours.



Question 3:
Adequate quiet areas in libraries?

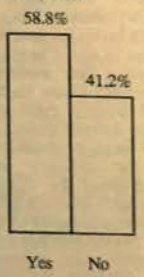
Question 4:
Hours per week spent in libraries



Continuing with its inquiry into student study habits and preferences, *The Fed* asked, "How many free days do you think would be adequate to study for finals?" A 46% plurality of students supported a week-long study period, while nearly all of those polled (97%) felt that at least *three* days were needed to prepare for finals. Currently, there is a one-day gap between the end of classes and the first day of finals. Such results are particularly interesting because University officials feel that student apathy towards an extension of the study period has fostered inaction from the Administration.

Another area of controversy lately has been crowding of University dining facilities, which has been especially acute on Sunday nights. Of all campus dining facilities, only John Jay dining hall is open on weekends. The other large dining areas, Johnson and the Lodge, close after dinner on Friday. In its poll, *The Fed* included a question on weekend eating habits, and found that student response mandates the opening of additional dining facilities. 36% of those polled eat at least four meals on campus over the weekend, and a 57% majority eat at least three.

Seeking more student reactions on University facilities, *The Fed* asked, "Do you find Columbia's gym facilities to be adequate?" Then, *The Fed* proceeded to ask, "Do you think that expanded weekend gym hours would be helpful?" While approximately 59% of respondents found facilities to be adequate, 87% were dissatisfied with the hours on weekends during which they were allowed to use the gym.



Adequacy of gym facilities

Finally, *The Fed* explored University plans for development of Morningside Heights, an issue that has become very prominent. Recently, there was an announcement of the projected opening of a new coffee shop, for which additional space will probably be provided by the area currently occupied by Amir's Falafel, whose lease

continued on page 5

For Better and For Worse

General Editorials are passed by a majority of the Editors.

Last semester, in the 9 May issue, we reported on Columbia's poor showing in Rhodes and Fulbright scholarship competition. We found, for instance, that since 1908 Harvard and Yale have had 228 and 170 Rhodes scholars respectively while Columbia garnered a mere 15. Why such a discrepancy? A large part of the problem, we discovered, was the lack of a central scholarship office, like those at Harvard and Yale, devoted to advising students on the procurement of such scholarships. Columbia, simply put, did not consider this service for its students a high priority.

Today, however, we are happy to find Columbia reconsidering these dismal figures. Dean Blake Thurman has been authorized funds for a new computerized scholarship advising system to be on-line by the end of the semester. This system will consist of terminals where students and even faculty members can input information about themselves and receive a list of scholarships, fellowships, and grants for which they may be eligible and interested. This is indeed a step in the right direction.

Thurman is also engaging the services of a Teacher's College graduate student interested in higher education administration who is doing research on the various scholarships available to students. This student is working closely with Dean Thurman and the CC Dean of Students office to inform potential applicants of the many scholarship opportunities available to them.

These are encouraging signs about the state of academics and student services here at Columbia. But, as these improvements take place, distressing signals come our way from the University Libraries.

Soon after the semester began, library administrators announced a potential cutback in the regular library hours and on library use during final exams. This is, in fact, the opposite of what students deserve and *pay for*. The library facilities and hours were already inadequate before this new round of threats. As we reported last January, the library system is operating with *one-third* fewer employees than it had before the severe budget cuts of the 1970's; Chuck Henry, an Assistant Director at Butler, said in the mid-1970's Columbia had some of the "best hours anywhere in the country."

These inadequacies are well described in Strategies of Renewal, the recently released Report of the Commission on the Future of the University. In the report, the condition of Butler Library is correctly termed "deplorable." The report goes on to state, "It is overcrowded, poorly lighted, poorly ventilated...The normal undergraduate will buy every assigned book he or she possibly can afford in order to avoid having to go there." Heading into midterm exams, and eventually finals, the library problem will become even more acute, as students crowd College and the Reserve desk during the restricted hours.

To alleviate some of the congestion, the Columbia College Student Council (CCSC), in a measure originally proposed by Duane Bartsch, CC '89 President, has sensibly put forth a number of proposals for the University Libraries "to be implemented alongside current reform efforts (not in their place)."

First, the CCSC plan calls for an extension of overall library hours until 12 a.m. and extension of College Library hours until 3 a.m. In both cases, this would mean a one hour increase over last year's library schedule. This, as the Report states, "would be a positive step toward establishing Butler as an institution that places as much emphasis on studying facilities as it does on maintaining its vast collection."

In an innovative way, the Council has proposed to alleviate the crowding in College Library during final exams. The proposal calls for the Main Reading Room on the second floor of Butler to be open until 2:30 a.m. during finals, as an alternate study area.

The next two proposals regard the Reserve Library specifically. First the Council proposes that some of the library's $313,000 allocation for new book purchases be used to establish a CC/Lit Hum collection "composed of secondary sources that are presently in too short supply." Secondly, it is proposed that the Reserve Library be open 24 hours during final exams. This past policy was revoked, the library says, because too few students made use of the facility after 3:00 a.m. to justify the maintenance cost. The Council's consultations with students show otherwise.

Finally, the proposal calls for the establishment of larger designate areas where students may eat while studying. The Council's rationale is that if a suitable place were established where eating was permitted, then enforcement of the other areas would be greatly facilitated.

Are any of these proposals outrageous for students coffing up $17,000 yearly? Are they out-of-line with the conditions that exist on campuses comparable to our own? Is it reasonable for Columbia to continue operating its libraries in the 1980's as if the endowment were contracting instead of expanding? We hope that Low Library answers these questions in the same manner the College Dean of Students office is beginning to respond on the scholarship issue.

Constructive Criticism

BY NATHAN NEBEKER

Complaints have been made recently that not enough women are employed in the construction of Barnard's new dormitory. Those who have leveled the complaints urge Barnard to force Tishman Realty and Construction Company to hire more women. Not only does this position attack the effect and not the cause of the situation, it attacks the wrong body and is patently sexist.

It seems there is a New York City law requiring that 6.9% of construction company crews working on sites subsidized by the government be women. Women currently constitute less than one percent of the Tishman crew at Barnard.

It is reported that this law is rarely enforced in New York. We are fortunate that such accidental justice occurs.

If someone feels there should be more female construction workers, it is backward procedure to seek laws forcing the employment of women. To simply mandate that there be more female construction workers is a policy ignorant of the cause of the situation. There are few women construction workers because it is a job for which, historically, men have been predominantly interested and qualified. The number of interested and qualified women for construction is quite limited.

Whether it seems a sexist statement or not, one cannot deny that men are generally physically stronger than women. Because it requires hard physical labor, construction work is generally more suitable for men. This, however, is not a reason for having more men than women as construction workers. With the increased use of machinery, less hard physical labor is necessary. Also, just because it is generally true that men are physically stronger than women, there could certainly be some women who are strong and skilled enough to do the job well.

It is necessary to foster construction interests and skills in women. It is also necessary that these women be not only qualified for the position--but the best qualified.

For such women to get construction jobs, though, they need to be not only strong and skilled enough, but they need to be stronger and more skilled than their male competition. If a woman is hired because it is required by law, and she is any less qualified than the male worker she replaces, the result will be resentment toward her from the other workers and a reinforcement of the male workers' contempt for women in that situation. If their fellow worker is replaced by a woman, and they have legitimate grounds to prefer the old male worker over the new female worker, such a move will only solidify the belief that construction is a man's job.

Those who request more female construction workers assert that there are women who are qualified enough for the job. Whether they are more qualified than their competition is questionable. A company wants to, and should only have to, hire those individuals most qualified for the company's needs.

To force companies to hire someone based on his or her gender or race, and not his or her qualifications, is fundamentally wrong. Not only does it infringe on the rights and efficiency of the company, it is a racist or sexist move in itself.

If Barnard were to force Tishman to hire more women, it would be an infringement on Tishman's rights to hire whom they thought were the most qualified people for the job, and it would hamper efficiency as well. It would also create unfounded bases for hiring.

An individual, ideally, should be offered a job based on his or her interest and ability relating to that job. Just as if someone is denied a job based on race or sex, if someone is hired because of such secondary characteristics, it is wrong.

In other words, there should not be women working on the Barnard dorm simply because they are women, as that is clearly sexist. A well-qualified woman is offended if she is hired simply because she is a woman, and not because she is the most qualified for the job.

Laws that enforce quotas are inherently wrong, as they necessitate a given number of people to be hired based on secondary characteristics, such as gender or race. These characteristics should have nothing to do with the job, either positively or negatively.

Laws that enforce quotas are inherently wrong, as they necessitate a given number of people to be hired based on secondary characteristics, such as gender or race. These characteristics should have nothing to do with the job, either positively or negatively.

Admittedly, the ideal that an individual gets a job based solely on qualifications is indeed merely an ideal. It would be foolish to assert that sexual discrimination does not exist and all employment decisions are merit based, especially in sectors of heavy male tradition such as construction.

But the way out of this is not to simply mandate that there be more women construction workers. It is necessary to foster construction interests and skills in women. It is also necessary that these women be not only qualified for the position--but the best qualified. They need to be more qualified than the male workers that they will replace.

Therefore, if for whatever reason, groups want to increase the number of women in construction, it is necessary to encourage female interest in construction and provide means by which interested women can become better qualified than the present construction work force. It is further necessary to ensure that construction companies are free to hire those who are most qualified, be they male or female, without hindrances from anyone.

In this way, the women on construction sites will be there because they belong, and not simply because they are women.

Acropolis of America

BY KIP CORWIN

Although it is not readily apparent, New York City occupies land that is actually quite fertile. Underneath the superstructure of pavement and buildings, beyond the labyrinths of the subway and sewer systems (which often seem interchangeable), lies powerful, active soil, which, coupled with our temperate climate, continually challenges the creations of humanity. Left untended and unmaintained, structures imposed artificially by humanity upon this environment will inevitably fall into ruin--much sooner than one might imagine possible.

To an unfortunately extensive degree, this phenomenon has beset Columbia's environment. Those of you from Sunbelt cities might be tempted to ascribe the often pitiful condition of some buildings and facilities here to mere "age." I've heard from some that New York and Columbia cannot help but appear as they do--they are simply "old."

Oddly enough, precisely the opposite is the case. While Columbia has indeed existed since 1754, the campus we have today is less than 100 years old; similarly, the Upper West Side and Harlem were rural retreats for city dwellers less than a century ago. The advent of the IRT (now the #1 train) subway in 1904, which created a rapid link with urbanized "lower" Manhattan, served as a catalyst for the wide-scale growth that followed.

Seen from this perspective, Morningside Heights is awfully young to have grown decrepit so quickly. Other universities in the United States and England have physical plants far older than ours, which only survive because of continual, diligent care. To its credit, Columbia has recognized this problem in its community and now pursues an active policy of renewing and restoring its immediate environment.

This policy is not a calumnious plot to "gentrify" the neighborhood to the point of uselessness, nor is it a concerted aggression against any particular group of people. Rather, it reflects an understanding that in this climate, with its harsh winters and high humidity levels, property not restored and repaired regularly will inevitably decay--eventually past the point at which restoration is feasible.

Contrary to the claims of those who begrudge any attempt by Columbia to ameliorate conditions for its students, faculty, and staff, the university is not embarking upon some sort of Manifest Gentrification Destiny. For example, a common, and legitimate, complaint about gentrification citywide centers around its tendency to force out businesses that provide basic, essential goods and services: the local hardware store, the green grocer, the cleaners, and the shoe repair. All too often these establishments are replaced with overpriced, specialized ones of little use to the community overall. Hence, we witness the classic Manhattan diatribes about the demise of the friendly neighborhood druggist who is replaced by some idiotic boutique. Fair enough.

But events in Morningside Heights, reported earlier this month in the *Spectator*, are proving that this pattern is not prevailing here. Instead, many of the smaller businesses are simply being moved off Broadway--in many instances, just steps around the corner. The net result will be an expanded range of goods and services available on the Heights, not to mention an increase in jobs. Smaller, more personalized stores need not suffer, because they usually operate in a different market than larger ones. For instance, The Mill Luncheonette, a perennially popular coffee shop, would not lose business to a newer, fancier restaurant, because each serves a separate purpose. A healthy neighborhood ought to have a balance between ritzier and simpler alternatives.

In three out of four directions, geography restricts the extent to which Columbia can expand its so-called "sphere of influence" with property purchases. To the north, Harlem encompasses a little over five square miles. Columbia exerts almost no influence there--elevated subway tracks and several large public housing projects effectively prohibit expansion. To the east, the cliffs of Morningside Park serve as a barrier; even the park itself (let alone the streets beyond) is strictly off-limits, as the turmoil in 1968 made quite clear. To the west lies the Hudson River. Consequently, University influences extends only to the five or six blocks immediately south of the main gates on Amsterdam Avenue and Broadway.

Surely, a major national university is not behaving capriciously when it desires the few commercial blocks immediately adjacent to its campus to fill its needs and the economic demands of its population. If Columbia is to remain competitive, both with other Ivy League universities and scores of other first-rate institutions, it must be able to provide an environment capable of satisfying the wide range of demands an immensely diverse student body has. People who mistakenly believe that Columbia is merely trying to "sanitize" the neighborhood to impress visiting suburban parents miss the crux of the issue. It is not the parents who need to be impressed, for even the Upper East Side at its toniest cannot provide the ridiculously bucolic serenity of a Princeton, but the students, current and future, who are entitled to a reasonable level of services.

Moreover, the *real* gentrification that is sweeping the Manhattan Valley--the segment of the Upper West Side extending between Broadway and Central Park West, from 96th to 110th streets--cannot be ascribed to Columbia. Despite many genuine problems, New York has enjoyed an expanding economy in many sectors for some time now, placing severe upward pressure on the housing market. Someone once remarked, in the face of all this, that professors are not Yuppies. If this is so, it is undoubtedly preferable for Columbia to take charge of the housing stock in the neighborhood, lest private realty or development firms do so, thereby drastically increasing the cost of living beyond the means of students and faculty.

Morningside Heights was once known as the "Acropolis of America," an appellation that today seems to be a combination of the pathetic and the ludicrous. Nonetheless, the reputation was not created in a vacuum. Some of the commercial structures along Broadway today are severely deteriorated and notoriously shoddy. Yet, the overwhelming presence of architecturally impressive, once luxurious apartment houses along Broadway and Riverside Drive, coupled with their brownstone counterparts, lends credence to the plausibility of this neighborhood's historically stately origins. With our commanding river views and impressive vistas over much of America's greatest city, Morningside Heights could justly claim itself analogous--if not entirely equal--to the magnificence of the Parthenon. A farsighted urban renewal program, which strives towards the eventual restoration of buildings, parks, even the subway station, will ensure that our Acropolis of America does not become a ruin itself after a tragically truncated heyday.

A view of Riverside Drive

Federalist Paper Poll

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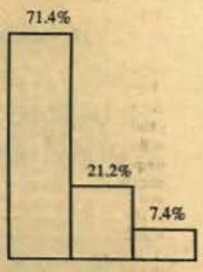
is due to expire soon.

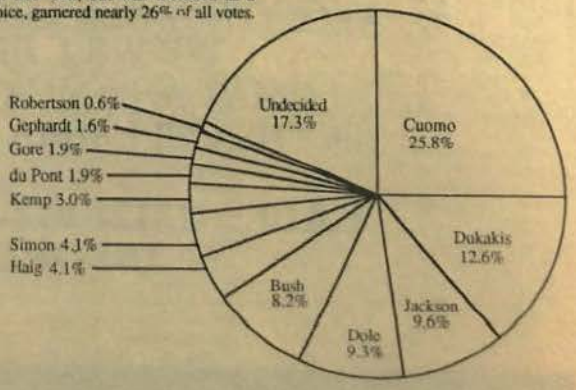
The Fed polled student opinion of the issue with the question, "Do you think Columbia's general plan for development of Morningside Heights (e.g. the planned new coffee shop) will be beneficial for both the University and the neighborhood?" Nearly three-quarters of respondents expressed support for University activity in the area. Some supported an even more comprehensive plan.

"Columbia should immediately pursue an aggressive purchasing and development program for the Heights. We now stand in a position to greatly improve our endowment and physical plant due to the imminent discovery of the Upper West Side," one student commented.

Regarding national issues, *The Fed* did use one question in its poll to gauge the results of a mock Presidential election. Respondents picked from among twelve candidates, six Republicans and six Democrats. Surprisingly, New York Governor Mario Cuomo, who announced that he will not run, but was included as a choice, garnered nearly 26% of all votes. He was the only potential candidate who had a greater number of supporters than the number of those undecided. Overall, Democratic candidates received nearly 56% of the vote, twice the 27% given to Republican candidates, the most popular of whom was Senator Robert Dole at 9.3%.



Attitude towards University development plan for Morningside Heights



The Hudson River School at MMA

BY STEPHEN F. LATER

"American Paradise: The World of the Hudson River School" opened its doors at the Metropolitan Museum of Art as the first major exhibit of such works in over forty years. "American Paradise" follows the lives of these painters from the New York social circles in which they met, to the Catskills where they were provided with the magnificent wilderness which inspired their romantic, yet unique, view of nature.

These eighty-five Hudson River School canvases represent the first American school of landscape painting; the works illuminate the artists' emotions regarding the natural beauty of their nation, its destiny, and their God. "American Paradise" is centered around key Hudson River School figures, such as Thomas Cole, Asher B. Durand, Frederic E. Church, John F. Kensett, and George Inness. The exhibition illustrates the rise of this distinctly American school of painting in the 1830's as well as its demise due to the more urbane tastes of an industrialized nation in the 1870's.

Thomas Cole was acknowledged in his day as the founder of the Hudson River School; in fact, *The Oxbow* (1836) determined the formula for such landscape painting. Influenced by Claude Lorraine's work of the seventeenth century, Cole set forth the characteristics that would mark the first generation HRS artists: balanced composition, a wide panorama, and light brushstrokes which served to minimize the role of the artist in the work. Their renditions of nature reflected not only the idealizing influence of Romantic poetry upon their work, but the liberties taken in the name of a high moral tone: re-arranged landscapes marked by wind-swept trees and fierce storm clouds co-exist with placid farm fields and gentle sunlight.

Cole's *Falls of Kaaterskill* (1826), although technically unsophisticated, was the first *American* landscape attempting to break from European tradition. It called upon Americans to regard their wilderness with awe and as a source of inspiration. As the painting's Indian observed the wilderness--much like his ancestors had done for centuries--the white man, too, should respect Nature. Comforting the country's populace, *Falls of Kaaterskill* represented a uniquely American ideal: Nature, undersettled and unspoiled.

The Oxbow illustrates the changes and challenges that faced the emerging Republic; the Connecticut River serves as a great divide, representing the transition from rural to settled nation. Indicative of settlement, one side of the River is characterized by well kept farms and placid skies, yet the other side is marked by fierce thunderstorms and untamed, unpopulated wilderness. The painter is depicted in the wilderness--yet he is a small and insignificant detail, overwhelmed by Nature's wonders.

Asher Durand is considered the second great figure of the first generation Hudson River School artists; his *Kindred Spirits* (1849) depicts Thomas Cole and William Cullen Bryant standing in awe of Nature's beauty. The work is technically far more complex than earlier paintings: the trees and river repeatedly pull the viewer to the two great figures observing the magnificent scene from a cliff.

The School's second generation, including such men as Frederic Church and Albert Bierstadt, achieved the popular acclaim and financial reward that alluded the first generation. Frederic Church was Cole's only real student and his work included several wonderful contributions to the Hudson River School. Church's *Twilight in the Wilderness* (1860) is considered to be the finest HRS landscape, depicting a spectacular scene observed by a sole eagle. It is argued that the red sky and dead trees foreshadow the Civil War, as well as an end to the innocence and to the American wilderness fantasy.

In terms of popular appeal, *The Heart of the Andes* (1859) is perhaps the best known work of the HRS, travelling to London and Boston for public viewing at the time of its debut. A result of Church's two trips to South America, the notably detailed painting depicts a lovely natural landscape marked by a small village, yet a village in which the largest building is the church, symbolizing the widespread acceptance of the Gospel.

George Inness characterizes the final stage of the Hudson River School nearly fifty years after Cole painted *Falls of Kaaterskill*. His work was greatly influenced by the Barbizon artists of France and he gradually shed the technique and composition dictates of the early HRS in favor of a more intimate vision of a *populated* landscape: the dream of an under-populated wilderness had been lost. The demise of the Hudson River School's idealism is widely acknowledged to have been brought about by the Civil War, the ensuing loss of innocence, and the more cosmopolitan tastes of the post-War public. America had surrendered her wilderness fantasies in favor of industrialization and urbanization, thus rendering obsolete Cole's idealization of nature.

The Hudson River School, however, stands as an important milestone in the history of American art as well as a great aid in understanding the history of the United States during this transitional period. The exhibit, which runs through 3 January 1987, is a unique opportunity to view an excellent gathering of these important works.

George Inness, Clearing Up (detail), 1861

GRADES

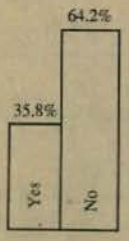
continued from page 3

Logic and Rhetoric, the College freshman composition course C1007, is described as "closely supervised and highly standardized," by Acting Director of Composition Sandra Prior. In weekly departmental meetings, there is little talk of grades. "That's not what we're interested in," notes Ms. Prior. Talk focuses, rather, on what defines a first-rate or an unacceptable essay. She adds, "All the instructors are grad students. They tend to be tough graders, but they don't have to be; it's a tough course." She estimates an appropriate median grade to be between B-minus and B. The *Course Guide* class averages range from a modest 3.43 down to a class average of 2.29.

Instructors are encouraged to define for their students the quality of work required to receive a given grade. As was noted in other departments, this tends to reduce the potential for tensions arising between instructor and student. Course work towards the end of the semester is often weighted more heavily, Ms. Prior explains, because students are not expected to produce top essays from the start. Despite the efforts of department heads tmay have far reaching implications. Can a graduate school differentiate A work at one undergraduate institution from A-level work at another? According to Richard Badger, Dean of Students in the University of Chicago Law School, grade point average (GPA) is not as important as the applicant's overall academic record. He says that GPA standing within the pool of applicants from a given school is more important than standing within the entire pool. He adds that he has seen an increase over time in the average GPA of applicant pools.

At the University of Pennsylvania, Assistant Dean of Law School Admissions Fran Spurgeon stated that in an attempt to diffuse the situation of grade inflation, her admissions committee weighs rank in class more heavily than GPA. Ms. Spurgeon notes that a 3.0 will place a student in the top 20% of his class at Williams whereas a 3.4 will only place a student in the middle of his class at Stanford. Statistics like these alert admissions officers to schools, like Stanford, where grade inflation seems rampant, she points out.

Yet, a system that is based upon class rank does not escape the importance of a student's GPA. Approximately, 3000 students in Columbia College fulfill the requirements of the Core Curriculum. Thus, these courses have a significant impact upon GPA's and subsequently, play an important role in determining class rank. Ms. Rohrer summarizes the situation when she says, "I do believe that there should exist some degree of autonomy with respect to the instructor but, fairness to students in all sections is important, too."



Question 1:
Uniform Grading

STUDY

continued from page 1

will involve a trade-off on the part of students. The most feasible trade thus far, he explains, has been the Election Day break which students "are not willing to give up."

For example, Harvard University, Rosenthal's undergraduate alma mater, has a fourteen-day reading period before final exams. Exams for the fall term are taken in late January *after* Christmas Break, Rosenthal points out, in order to accommodate this schedule. The spring term exams at Harvard are in late May. Harvard College Registrar Margaret Marguerite Laws says that the reading period was even longer in the past, but was shortened to its present length about ten years ago. Spingarn does not think that the Harvard model is possible at Columbia. "I don't think too many people here like the idea of having fall term exams after Christmas Break," Spingarn says.

Froehlich points out a better model: Cornell, which, like Columbia, has to abide by New York regulations. This term, classes began at Cornell the week before Labor Day and will end on a Wednesday the week before Columbia classes end. Exams do not begin until the following Monday. Thus, students have Wednesday evening, and Thursday through Sunday to study for their exams. Cornell also has a mid-semester break, equivalent to our Election Day Break. The extended study period is possible at Cornell because classes begin a full week before Labor Day.

Kamber and Froelich point out that the faculty at Columbia has expressed its opposition to beginning classes before Labor Day. Because the expansion of the study period may involve a complete overhaul of the University Calendar, Kamber contends that the administration may not be willing to undertake the considerable difficulties involved. "Everyone here is afraid," Kamber says, "that it [expansion of the study period] will hurt their interests." As such, he and other student leaders are focusing on alternatives that will perhaps work within the present calendar or will require the least concessions on the part of any single segment of the University population.

The central point of their argument is that it is not necessarily the Election Day break which must be eliminated. Spingarn relates some of the proposals that his committee is considering. One plan, based on the normal calendar year in which classes end on Wednesday and finals begin two days later on Friday (not the case this semester), is to eliminate the exams on the first Friday of the exam period and have them spread out over the next week or on the last Friday. The Literature Humanities and Contemporary Civilizations exams are those most affected by this plan, but the rationale is that so few students take both courses in the same year and thus the incidence of conflict is very low.

Another idea is to extend the exam period itself so that students will have more time between their exams to study for each. This may involve having exams on Saturdays as Yale University does on occasion.

The issue amounts to getting a proper assessment of student opinion on the matter and proceeding from there to work with the administration, faculty, and students themselves in reaching a compromise. Kamber says, "I think it needs more aggressive action. The people I've talked to want the extra days of study, but they and the rest of the student body need to make their voices heard. Only then can we effectively pursue the issue."

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Volume II Number 3 | Columbia University, New York City | 23 November 1987

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ARTICLES

DEPARTMENTS

WKCR: Is Anybody Listening?

BY NATHAN NEBEKER AND ADAM TOLCHINSKY

If you scan the various radio stations at the far left of the FM dial, you will come across 89.9 FM WKCR, Columbia's own radio station. Though most Columbia students are aware that the campus radio station exists, it commands only a small portion of this campus' listening audience. Many say this is due largely to WKCR's musical format; they feel that it does not cater to student tastes, and that it has gradually distanced itself from the college that supports it.

Though it is not generally recognized on campus, WKCR has a very respectable public reputation, built on the number of quality jazz shows it airs. According to Evan Spring CC'89, WKCR Jazz Director, 40% of the station's air time is devoted to jazz. WKCR also schedules many hours of "New Age" (electronic) and classical music. In addition, WKCR airs poetry readings, a comedy show, various Columbia sporting events, and a variety of ethnic music.

Although the programming does not get a great deal of listener support from students, WKCR does not seem eager to adopt programming which would attract more of the student body. Says Spring, "We're real snooty about that [WKCR's programming], but rightfully so."

The purpose of the station as stated in their broadcasting manual is "...to serve the undergraduate students of Columbia University as a training ground for broadcast[ing]...

Spring states that WKCR prides itself on playing music that is unavailable elsewhere. WKCR is one of the few jazz stations in the New York area and one of the few to emphasize classical music as well.

The issue that arises is that while WKCR is foremost in jazz and classical, these are genre which do not have wide appeal to students. The station bills itself as "The Alternative", and concentrates on playing "music that you can't hear anywhere else." Stemming from this policy, WKCR has a rigid programing format that excludes music they believe is available on other radio stations.

The "alternative" edict has gradually come to mean "no rock and roll." The station believes that this genre is adequately covered on other stations, such as WXRK (K-rock), WLIR, WNYU, the NYU station, WFDU, the station of Fairleigh Dickinson University, etc. During his time as New Music director in 1985, Saul Fisher, CC'85, prohibited the playing of any rock on the New Music Show.

He stated that WKCR had a "major ideological ax to grind" and that only music he described as "difficult" (John Cage, , Phillip Glass, Art Bears, Residents, etc.) could be played. The current music director, Danny Moses, CC'88, has started a trend away from this extreme position of choosing music designed for obscurity over appeal, though the majority of the music is still "difficult" by most collegiate standards.

Many students believe that the policy of excluding rock and roll is unfounded. One argument is that the entire spectrum of the rock and roll genre are not adequately covered by other stations. The music choice of the other stations believed by WKCR to fill the desire for rock and roll is by no standard comprehensive. WXRK specializes in

"We are not a rock and roll station. People who are in to 'rock and roll' are not going to come up here to DJ."

oldies music, and other radio stations available in Manhattan are less than consistent in their programming choices. Says Fred Schultz, CC'90, "They could expand what they see their

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Photo: Kip Corwin

"Is anybody out there?" Students have expressed interest in a revised programming format for campus radio station, WKCR.

AND THE WINNER IS...

Chapin Clark, CC '90, who correctly answered the "Win a Six of the Silver Bullet" contest in our last issue. His recognition of Mr. Leon Leonwood (you can call him L.L.) Bean has brought him a taste of that Rocky Mountain spring water--fine work Mr. Clark! Mr. Clark's name was drawn from a hat containing the names of the three correct entrants: Mr. Clark, Mr. David Bresch,CC '88, and Miss Gertrude Finnegan (*See letter below.* A high school Latin teacher, and also the pseudonym for a certain student at Barnard--we know who you are and it's only a matter of time until we...).

I SAID, "NOW DOCTOR, MR. MD, CAN YOU TELL ME WHAT'S AILING ME?"

He, unfortunately, did not say, "Yeah, what you need (what you really need) is good love." Psychiatrists in the Soviet Union provided some very interesting diagnoses from the "symptoms" of some of their dissidents:

Symptom: Critiquing discredited Soviet geneticist T.D. Lysenko,

Diagnosis: "Paranoid delusions of reforming society" (Z. Medvedev)

Symptoms: Distributing copies of the Universal Declaration of Human Rights,

Diagnosis: "Suffers from a mania for the reconstruction of society" (M. Kukovaka).

The Federalist Paper
of Columbia University

Veritas non Erubiscit

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SOUNDS LIKE LIT. HUM. MATERIAL TO US

Former President Jimmy Carter recently published *Everything to Gain*, a touching account of some of the most significant episodes of his life. Here are a couple:

"I learned that my daddy's mother climbed out the window at age sixteen and eloped with a travelling salesman named Mr. Smith, who was crippled and twenty-five years older than she was. I'm saving these anecdotes for our grandchildren." *So that's what happened to Amy!*

"My wife has never been more beautiful than when her face was covered with black smut from scraping burned ceiling joists, and streaked with sweat form carrying sheets of plywood..." *Sure James Earl, whatever you say.*

DID YOU CATCH THAT LAST ISSUE OF THE *RECORD*?

For all of you Iran/Contra buffs out there who feel a void in your lives now that the hearings are over, here's a little trivia with which to impress your children when the Genus 5 version of Trivial Pursuit comes out.

Representative Bill Alexander, Jr. (D-Arkansas) requested (and received) that three and a half years of Boland Amendment debate (from both the House and the Senate) be included in the June 15 issue of *Congressional Record*. That issue would ordinarily have been 25 pages long; it was, instead, 428 pages long--at a cost to the taxpayer of $197,382 (for the 403 page addition alone). We at *The Fed* felt that it was worth it; it made a nice addition to our summer reading lists (and we've always felt that the *Record* is much too short).

WHERE IS THE HUMAN-ANIMAL LIBERATION FRONT WHEN YOU REALLY NEED IT?

On the AP wire for 7 November was the report that a 400-pound bear was seized by police at Ms. Kitty's, a private club, in Kansas City, Kansas. It seems that customers in the club were paying $5 each to wrestle Toby, a defanged brown bear (a $100 prize was offered in this competition). Police intervened after the first match; neither wrestler was injured, officials said. A Mr. Burlie Webb of Hot Springs, Arkansas, Toby's owner, was charged with one count of illegal exhibition of a wild or exotic animal.

Letters...

THE TWO CRITERIA FOR CONSTRUCTION WORK...

To the Editors:

Mr. Nathan Nebeker's *Opinion* column of October 26 is one of the most sickening, ill-informed pieces of garbage that I have ever seen in print.

It is obvious that Mr. Nebeker's perception of "construction jobs" are [sic] based upon a lifetime diet of beer commercials rather than any kind of first-hand experience in the industry. As a former administrative manager of a general contracting firm, I can vouch that there is no such thing as the generic "construction job" to which Mr. Nebeker seems to refer. Erecting a building requires heavy machine operators, ditch diggers, steel workers, carting laborers, concrete pourers, masons, glaziers, plumbers, electricians...Need I go on? Persons of all sizes and shapes, talent and skill, who are members of the construction industry. Are we to believe that the men presently employed in these jobs all attended little training programs to "foster interest" in the industry and "acquire skills?" Hell, no. Construction jobs are attractive because they pay relatively high wages to anyone willing to bust their ass 40 hours a week, and because there is an apprenticeship hierarchy within which valuable skills can be learned on the job.

Among my duties in my former job was the hiring and firing of framers and sheetrockers, and the carpenters helpers. Mr. Nebeker's talk of who is the "most qualified" has little meaning in the real world. In hiring our workers, I asked myself two questions: "Can this guy get up in the morning?" and "Can he stay sober until 4:30 in the afternoon?" Workers with these "skills" constituted the majority of our crew, were paid $10 per hour, and were often supplied with basic tools. It is not necessary to have a crew filled with 6'5" Norwegian cabinet makers; we hired more runty guys than we did big ones, and yes: we did hire women. On the occasions that we did have problems between the men and the women on the crew, investigations usually proved that the issue was something on the level of the women objecting to the guys peeing in the hallways, and it was the men who were penalized. Male chauvinism is a bigotry as repulsive as any other, and it cannot be tolerated in the workplace: it is a personal problem.

I guarantee you that there is nothing contained in testosterone that increases the skills required for any job in the construction industry.

Sincerely yours,
Elizabeth Rothwell, GS

CORRECTION

Adam J. Levitt co-authored, with Kris Wiggert, the piece "Students: You Made the Call" in our last issue. We apologize for failing to recognize his contribution.

CONSTRUCTIVE CRITICISM, PLEASE...

The author responds:

I am amused to see such an emotional response to my article, though the energy is misspent, as the context of the article was not understood.

My intention was not to provide a description of status quo in the construction industry, but to provide an argument against the group wanting to impose hiring quotas of 6.9% women on the Barnard construction site. This group has instituted the training programs attacked as fiction in the above letter.

Indeed I have had experience in construction, and from my experience, construction does require some skill. I regret situations exist where employee candidates are in the deprecated position so described. One must admit, though, that if the luxury of being able to choose between two candidates for a job, is presented, both being early risers and non-drinkers, the choice would be for the more qualified of the two.

The letter states that to get a job, any job, on a construction site, one must only be punctual and sober for at least half the day... that anyone willing to "bust their ass," can be hired. This serves as evidence that no sexism exists in the construction industry. If this is so, those calling for 6.9% are misinformed.

The alternatives I proposed were advice to those wanting to affect the employment structure of the construction industry. If we can take the evidence presented above as accurate, then the free market allows no problems of sexism beyond stray urination, and change is not necessary.

As I welcome constructive, objective criticism, I am disappointed to see that the letter, while entertaining, has very little to do with the arguments presented in my article.

Nathan Nebeker
CC '88, SEAS '89

A FINE POINT ON STUDY DAY

Dearest *Federalist* Staff:

That handsome fellow pictured on page two of your latest issue is none other than the illustrious *vestiarius*, Mr. L.L. Bean.

If, perchance, I shall have won this little contest, please donate the libations to your favourite politically-incorrect charity, or pour the pervile substance down the sink, since I am hardly the beer-guzzling type.

Also, regarding your cover story on Study Day: aren't we ignoring the real issue here? Given that the exam period ends December 23, when are we to do our Christmas shopping (not to mention the baking!)?

Once again, *The Fed* overlooks the obvious.

Vale,
Miss Gertrude Finnegan

Are CBSC Tactics Productive?

BY JASON SIPPEL AND KIP CORWIN

Following the events at Ferris Booth Hall last March, many are attempting to address the problem of racism on our campus. In the words of the steering committee of the Concerned Black Students at Columbia (CBSC), the group seeks "to counter racism and the threat of racial violence" and has assumed "a role of educating the community." The group has pledged to "deal with racists and racism in our own way and on our own terms."

Controversy, however, has arisen in the wake of last month's student council affair and incidents last year--including a confrontation between members of the CBSC and College sophomore Wayne Stoltenberg, and allegations of racism and harassment leveled against several residents of McBain Hall. Many dispute the propriety of the group's actions, and question whether its activities are in fact productive toward achieving its stated end of eliminating racism.

Late last spring, a Barnard student, Lydie Pierre-Louis, was involved in an argument concerning the CBSC blockade of Hamilton Hall with a Columbia sophomore, Matt Engels, and several other residents of the fifth floor of McBain Hall. During the dispute

Jared Goldstein indicated that as a result of their actions, the group had set an unfortunate precedent which has resulted in council members' attempting to circumvent the agenda.

another resident, Bob Giannini, began bouncing a wadded sheet of paper against a wall. The paper wad then brushed against Pierre-Louis's shoulder.

The incident resulted in a Deans investigation and the charge that Giannini had, in his words, "bounced a balled object off her [Pierre-Louis] head." The Deans cleared both Engels and Giannini of any wrongdoing, but prior to the their decision, the CBSC circulated flyers accusing the McBain residents of "verbal and physical harassment" and calling for the expulsion of the "racists" involved.

In May, members of the CBSC approached another student, Wayne Stoltenberg, during finals week in his John Jay dormitory room. They accused Stoltenberg of having uttered a racial slur two months prior to that time in connection with the Hamilton blockade, and demanded an explanation.

Stoltenberg emphatically denied ever having made the comment and questioned why those who confronted him had waited two months before doing so. He said that he had spoken with the source who allegedly ascribed the remark to him, and the source denied having done so. As the students departed, CBSC member Charlese Mayo dismissed Stoltenberg's denial, saying, "Yeah, but we know you're lying, you jackass."

More recently, a delegation from the Black Students' Organization (BSO) confronted the student council while it was in session, demanding that their own concerns be addressed in place of the scheduled agenda. According to council member William Woo, "they [the BSO] held the door closed, harassed us and refused to let out a couple of council members." The BSO charged Junior Class President and council member Duane Bartsch with having made a racially insulting comment three weeks earlier.

In a letter to the *Spectator*, BSO members Heather E. Moore and Charlese Mayo defended the group's actions on the grounds that "the council decided to ignore us," and cited their "assumption that we had every right to address the council as students at this university and constituents of every member of that council."

Kamber further noted that "if you are raising racial tension to achieve a goal, then that might be the opinion of some in the group...raising tension can be a productive thing."

According to Kaivan Shakib, Vice-Chair of the Student Council, the right of a given student organization to suspend the business of the student council was at stake in this confrontation. He noted that to get on the agenda, a group must "call up Jared [Goldstein, Chairman of the Council] and submit [proposals] in writing twenty-four hours before." In addition, he said any student may address the council during the open session at the end of the council meeting.

Goldstein noted that nobody had

Wayne Stoltenberg questioned the CBSC's attitude of "guilty until proven innocent," while Goldstein disputed the efficacy of the BSO's action in the council.

approached him about this matter prior to the meeting; he felt that the BSO was acting "at, not through, the council." BSO members voiced the complaint that rather than immediately addressing their concerns, the council went on with its next order of business. "When the council decided to ignore us and go on to its next order of business, we decided to establish our presence by directly addressing council members," Mayo and Moore stated.

Shakib did not dispute the organization's right to address grievances during the open forum, but charged that "they [BSO] chose to ignore it [the rules of procedure] and for effect they decided to go ahead." Goldstein indicated that as a result of their actions, the group had set an unfortunate precedent which has resulted in council members' attempting to circumvent the agenda.

Other council members were more sympathetic. University Senator and council member Tom Kamber felt that the BSO action was "consistent with their other strategies...it was effective." Kamber felt that "the organization was legitimately pursuing [its] goals." While Kamber agreed that "it might

[Kamber] defended the group, citing their lack of understanding "of how the council works; they're not on the council.

have been a little better" had the BSO waited until the open forum, he defended the group, citing their lack of understanding "of how the council works; they're not on the council...so we are talking about two different perspectives here."

Yet, many students question whether the means employed by the BSO and CBSC are useful in "educating the community." As Shakib points out, "some of the BSO should have called up Duane [Bartsch] and asked to meet him one-on-one...they've made a point of starting a class to ease tension, yet instead of educating Duane they came in and intimidated him."

Wayne Stoltenberg questioned the CBSC's attitude of "guilty until proven innocent," while Goldstein disputed the efficacy of the BSO's action in the council. He felt that while their tactics were effective in the short term, they are ultimately counterproductive because they violate the "reason for procedure, which is to protect everyone's rights."

On the other hand, while these organizations' conduct may be inflammatory, Shakib said that "a protest group is not involved with dealing with sitting down with people, [with going] through the proper channels." Kamber further noted that "if you are raising racial tension to achieve a goal, then that might be the opinion of some in the group...raising tension can be a productive thing."

WKCR

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purpose as a station is, in order to widen their appeal. There is more music around that isn't on the radio that would appeal to students."

Others feel that because such music is perhaps available on other stations is not sufficient to exclude it entirely from the format. "Just because you might be able to hear a certain kind of music, like The Dead if you're lucky, on other radio stations, is no reason why our own college station shouldn't play it. Especially if students would love to hear it.", states Andrew Walsh, CC'89.

Why does the station feel it has the right to play music not oriented towards the Columbia community? Money may be part of the answer. Spring claims that, while WKCR receives some $45,000 from the University annually, the station raises an additional $130,000 through on-air fundraising drives. This presumably makes the station unwilling to change, because if they were to radically alter the music they play, they could well lose a substantial portion of those donations.

Another example of WKCR's isolation from the campus community is the large number of on-air personalities who are not Columbia students. This is most striking in the jazz department, where Spring says some 2/3 of the DJ's are not presently Columbia students, although some are Columbia graduates.

According to Spring, many of these older DJ's are "institutions" and have tremendous experience in jazz as well as contacts with jazz musicians. Without these DJ's, it would be more difficult to have jazz musicians perform live sets from the WKCR studios over the air. Also, these "institutions" have a large following and thereby increase the station's ability to fundraise.

It is difficult for a student to assume the time slot held by an "institution," a move which requires the approval of that musical department's director. However, it is possible for students to intern with the older DJ's, that is, to sit in on the show and work with them. This is an option which the station believes is of high educational value.

Officially, the station is an undergraduate student organization, and chartered to be for students. The purpose of the station as stated in their broadcasting manual is "...to serve the undergraduate students of Columbia University as a training ground for broadcast[ing]... and to give students an opportunity to develop an appreciation and knowledge of diverse musical traditions."

However, the stations philosophy seems to have limited this endeavor. Many students that wish to be involved later find that their interests do not fit in to the established interests of the station and thus are not encouraged to get involved. Students who sign up for involvement on activities day very often indicate some form of rock as their interest. The station makes no effort to include these students.

Says Larry Trilling, CC'89, "When I signed up on activities day, for what my musical interest was, I put 'progressive rock'. I had other friends that put classical and other things. They got called back, and I never did. Later, when I was talking to a station member about it, I asked what happened, and she told me that basically if I wanted to play rock, I couldn't be on the station. At that point, I decided not to pursue it."

Members of the station do not feel that the programing choice is too restrictive. They see the programing as designed for educational value, creativity, and obscurity, and not appeal. Joe Zollo, SEAS '88 and the Director of Operations and Engineering for the station states "The point of the format is not to appeal to the most people possible, but to create an atmosphere for those who have the interest to learn."

The objection many students have against this is that if they cannot play music in which they have some interest, they will not have the interest to learn about the station. In response to this, station members state that there is little educational value in playing music one already likes.

Tim Merello, CC '88, hosts a show on Saturday afternoons that plays

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No Looking Back

General Editorials are passed by a majority of the Editors.

Minor indiscretions by public officials in their youth were once dismissed as normal, understandable, even forgivable. No electorate ever punished Edward Kennedy for cheating on a college Spanish exam; no one thinks less of many of our former presidents who were well known for womanizing in their earlier days. The demise of Joseph Biden's aspirations for the White House and, Judge Ginsburg's for the High Court, however, suggests that the media and the public are taking a new view on the past adventures and misadventures of present public officials.

The philosophy behind this new view of our leaders--that most any item in one's past is fair game--seems destined to profoundly, and negatively, affect collegiate communities around the country. The stark realization that one's moves and words today "can and will be held against" one forty or fifty years hence can only inspire unproductive anxiety in students who aspire to such positions.

And, in fact, *The New York Times* last week reported evidence that the trend has hit home. *The Times* found that many students are beginning to express fears of being open and honest with acquaintances and friends, even close ones. They are coming to the realization that one's actions in college and one's conduct as a young adult will be examined in relentless detail should one choose to enter the public sector.

One bare fact cannot be ignored. College students ought to be held responsible for their actions to a certain degree. To foster such a sense of responsibility and maturity is one of the primary purposes of a college education.

A college student faces choices extending from illegal drinking, drug use, and cheating to civic duties such as voting and participation in government. These are all important decisions. No doubt. Yet, in examining details of any individual's decisions, a more reasonable and understanding line ought to be drawn between relevant and irrelevant information.

We ought not to forget that there is something vital and useful in the curious, if imperfect, youth--something that should not be stifled. Just as clearly as the media and the public are moving into a new era of understanding youthful indiscretions, the truth of the inscription over the fireplace in John Jay Hall seems even more sensible to us:

Hold fast to the spirit of youth,
let years to come do what they may.

Helping the Homeless

BY ADAM J. LEVITT

In response to a *U.S. News and World Report* poll (Oct. 26) that rated Columbia's undergraduate divisions eighteenth in the U.S., Columbia College Dean of Students Roger Lehecka said, "students turn down most of the schools that are ahead of us on the list, in great numbers, to come to Columbia."

Although the statement was made in an angry defense, it rings true. As Dean Robert Pollack said, "Despite what *U.S. News and World Report* says, we're definitely among the top schools. How can Columbia not be at the top if general education is a criterion? How can it not be at the top if social life is a criterion?"

The current student body chose to attend Columbia for precisely the reasons stated by the deans. For many of us, acceptance to Columbia was the fulfillment of a dream. We knew what Columbia had to offer, and, polls and criticisms notwithstanding, we wanted to come here.

Nowhere is this more true than in the case of Columbia's transfer students. Unlike incoming freshmen, transfers have had previous college experience. We have attended other schools, and have considered them unable to fulfill our wants and needs. Over 1000 potential transfer students filed applications with Columbia College for entrance in September 1987. Of the 1000 applicants, Columbia accepted 58 students, of whom 55 chose to register at Columbia. Many people in this choice group selected Columbia over many schools that were ranked higher in the *U.S. News and World Report* poll. We knew what we wanted in a college, and Columbia was it.

Unfortunately, the University Administration has done little to convince us that we made the right choice. Even as we received acceptance letters, more than half of us were quickly informed: "Unfortunately, we are not able to offer housing to you this term. We do not believe that any on-campus housing will be available at any time during this fall term or succeeding terms."

The only way to get on-campus housing, we were told, is to get onto the waiting list. Housing assignments are handed out off the waiting list, with upperclassmen taking priority. Even then, the housing is only guaranteed one semester at a time. This posed a tremendous dilemma for the thirty transfers who were not offered immediate housing. We wanted to attend Columbia, but were being given no help with our accommodations, and our waiting list prospects would do nothing more than guarantee us an itinerant, unguaranteed existence for our years at Columbia.

Our only realistic option was to find off-campus housing. As a city-based institution, Columbia should have realized that reasonably priced housing in the Columbia area is an oxymoron of tremendous proportions. Not only is off-campus housing prohibitively expensive, it is also hard to find. Many of us are now living in small apartments and are paying 30% to 60% more than students in Columbia housing. To compound this situation, Columbia first mailed the unhoused transfers a list of other transfers (for apartment sharing purposes) in the middle of August. Transfers must have had this housing problem in the past, and it is puzzling as to why Columbia first thought to mail out such a list to us with less than three weeks until orientation, leaving us with virtually no time to make necessary apartment-sharing arrangements.

Off-campus housing leads to two other problems as well. The Centrex phone system employed by the University is available only to residents of Columbia-owned buildings. Intracampus Centrex calls are free of charge, and can be placed to any "280" extension. Students in non-Columbia housing must pay approximately twelve cents per campus call, and are unable to connect with numerous Centrex extensions that are under repair.

Another problem faced by many transfer students is campus mail, or the lack thereof. Mailboxes are given only to residents of Columbia housing. This means that most transfer students have never received any campus mail. Although the majority of campus mail is not terribly important, it is still a service of Columbia College that is not available to many of us. Events that are announced via campus mail pass us by unnoticed, leading to a sense of unnecessary alienation from the rest of the campus. Barnard, at least, has a commuter mailroom in Macintosh Hall; it would be wise for Columbia to do the same.

Once in the school, transfer students pay the same tuition, attend the same classes, and do the same work. For these reasons, we should receive equal treatment from the Columbia Administration. Columbia is a fine school; it truly is the transfer's school of choice. If it were only a bit more accommodating to those so eager to attend, Director of Admissions James McMenamin's comment--"the good news about Columbia has been percolating for the last six or seven years,"--would become common knowledge, and allow Columbia's already outstanding reputation to find its proper place in any poll. Even one as meaningless as *U.S. News and World Report*.

No-win Candidates:

Why Run?

BY MIKE BLOCK

Jesse Jackson, Pat Robertson, and Alexander Haig have no chance of winning the nomination of their parties. How these unfortunates play their cards, however, will have a great impact in 1988. In fact, candidates with no realistic chance of coming out on top must adopt a political strategy directed at influencing their party platform, rather than at actually winning the nomination. Otherwise they will be wasting everyone's time.

Although this strategy may appear obvious, successful execution requires adroit timing and political savvy by no-win players. First, however, these candidates must gain influence. Once they accomplish this task, their parties will be forced to incorporate their views into the platform, because these candidates could toss their support to dark horse candidates or take their voters outside the party. In order to gather influence, they must distinguish themselves from the anonymous pack of candidates and widen their political bases to draw more support.

Jackson, whose lack of experience in government makes him a no-win candidate, can gain influence by shaking the image that he is only running for blacks. He should do this by proposing educational reform, an issue crucial to minority, inner-city residents, but one that also affects all strata of our society. Stressing a back-to-basics education has a nationwide appeal, especially as global "competitiveness" emerges as the season's Washington buzzword.

Jackson ought to address the issues of curriculum, teacher salaries, qualifications for teachers and administrators, and the trend towards professionalism. Establishing a back-to-basics education plan with no emphasis on vocational programs and a definition of the role of teachers would draw widespread appeal to Jackson. Teachers are tired of teaching things like home-ec, sex-ed, and child development; they do not want the role of hall-monitor, fight-referee, and values-educator. Parents on the other hand, do not want the schools teaching their children values (even though they often do not teach them); instead, they want more quality in teachers and more quality in curriculum.

Working together with the NEA and other educational interest groups to devise a major plan to restructure our education system would give Jackson a powerful lobby not limited to one segment of voters, as well as issue prestige, where voters would turn to Jackson. Jackson's original supporters would benefit from the political punch of Jackson's enhanced image.

Robertson's principal obstacle in terms of wide-spread appeal lies in his television evangelist image. He must appeal to a secular audience and distance himself from the sordid scandals of "men of God." Though some may argue that that devout Christians are his only power base, Robertson cannot be too zealous in separating himself himself in the camp of fundamentalist extremists. Robertson has an advantage in that people already perceive him in such a bad light that he cannot do worse. Strange as it may seem, Robertson can increase this advantage simply by acting rationally, by maintaining some modicum of integrity, and by covering some secular issues.

Robertson must underscore all-American themes: strong defense, family, religion, the work ethic, minimal government, and firm commitment to allies, not rail against fellow Republicans. Engaging in negative politics destroys Robertson's credibility. He should emphasize an "All-American" message that coincides with Republican themes and tactfully avoid being associated with Reagan Administration failures, something most front-running Republican candidates cannot avoid. Adopting Republican themes in connection with his unique background, Robertson will draw many of the religious sector otherwise split among other conservatives. Furthermore, support drawn from other Republicans would improve the lot of the religious sector. By appearing sensible Robertson can lend credibility and influence to a fringe group.

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Honor Code?

EDITORS' NOTE: The Academic Affairs Committee, in conjunction with the College Student Council, has been considering the implementation of an honor code. The issue has, very clearly, engendered a great deal of debate. Below, The Fed *offers two dramatically different views on the matter: on the Affirmative is Nancy Murphy,* Fed *writer and member of the Academic Affairs Committee; on the Negative is Nathan Nebeker,* Fed *Associate Editor*

YES:

BY NANCY MURPHY

An education at Columbia teaches ethics in the classroom. Outside the schoolhouse door, however, the lessons of Plato and Aristotle are left behind. Daily interactions on campus fail to reflect our studies. We have failed, Administration and student body, to establish a system in which abstract morals can find substantive applications in our lives.

Part of the problem stems from Columbia's lack of an honor code.

Honor codes can help to create a climate of respect for an educational institution and its members. As a formal expectation of honesty, it forces people to think about their actions--thus, positively affecting the manner in which they treat each other. Honor codes do not work miracles. They cannot forge saints from criminals. But honor codes can stimulate thought. In creating expectations of honesty, they compel us to evaluate our actions.

An honor code may apply only to academic issues. If a student knows of an infraction, he must act upon it. *Action need not entail, however,* reporting violators directly to the deans. For example, one may approach a cheater after an exam and threaten to report a second occurrence. Violators are compelled to refrain from cheating again. Such peer pressure can be as effective as a formal disciplinary process.

Outside the schoolhouse door, the lessons of Plato and Aristotle are left behind

At Columbia, many students claim to have seen cheating in large lecture classes. But the individual student feels no obligation to confront cheaters and will not take the trouble to bring the matter to the deans. Calling a cheater to task is onerous. Reporting cheating is often considered inappropriate "squealing." Currently, unless a proctor catches someone cheating, dishonesty flourishes without reproach. If every student were a potential proctor, the incidence of cheating would surely decline.

Academic honor codes are positive as well as preventative. In creating an atmosphere of mutual respect and honesty, a genuine sharing of ideas could take place. Currently, if we discuss paper topics or exams, we risk having our ideas plagiarized. If Columbia explicitly demands academic honesty, students would feel more comfortable in exchanging thoughts.

An honor code would create the expectation of honesty. Columbia students, I believe, would live up to these high expectations. At present, too many students view cheating as acceptable. An honor code could change Columbia's *Zeitgeist.*

The moral behavior in the Columbia community has shown need for such an honor code. Perhaps the most widely publicized example of this is the recent elections "scandal." It eventually came to light that there had been no scandal at all; everyone involved was cleared of wrongdoing. Yet allegations flew and false rumors spread. The pain of false defamation must still hurt the victims. Those weeks of unnecessary rumor would not have occurred if the students involved had been expected to act in accordance with a code of moral standard. Any suspicions would have been voiced immediately last March, and a climate where the truth of the matter could be discovered far more expediently, and without the incurred costs, would exist.

But an honor code is not a panacea. It is incapable of creating ethics where none exist. An honor code is invaluable in codifying unstated expectations.

An honor code which extends beyond academic issues to encompass all aspects of life at Columbia could be even more effective. If students were explicitly required to treat each other with dignity, and if an effective disciplinary process existed as an outlet for grievances, many campus problems could be avoided.

But an honor code is not a panacea. It is incapable of creating ethics where none exist. An honor code is invaluable, however, in codifying unstated expectations. By creating a framework in which honesty is the norm and aberration is effectively dealt with, the individual will feel greater personal obligation to behave.

NO:

BY NATHAN NEBEKER

Ah, how we all wish we lived in an ideal world.

Regrettably, we do not. Throughout our lives we must confront and accept many things that are bad, wrong, unjust, unfair, and irritating. As students, we are not excepted; we are forced to deal with cheating, plagiarism, and the like--general academic dishonesty.

It has been proposed that, to aid in the battle against these evils, an honor code be established at Columbia. The problems with this vary from abstract to purely practical, and once presented, will clearly illustrate that an honor code is not the answer which we seek.

The first argument is somewhat abstract, and is as follows: If the end which we seek is high moral fiber among the student body, we must understand the nature of morality. Morality is not simply obeying the rules. Surely, our curriculum here teaches us that rote, obedient behavior is not tantamount to moral correctness. Morality is the searching for justice through actions. It is in reference to justice that we must act to be moral, not in reference to following imposed rules. Therefore, the imposition of some behavioral guidelines will do nothing to further the moral quality of those among us who need it.

In addition, the methods used by an honor code to "insure" integrity have little to do with morality. The establishment of means by which cheaters can be more expediently punished would not improve the moral quality of the student body. For college age students, the infliction of punishment for wrongdoing has little effect on behavior. Methods appropriate for altering behavior in children are often not appropriate for adults. Only an understanding of the virtue of good behavior is a legitimate motive for good behavior; only this understanding is an effective motivator of good behavior. A system of punishment is easily understood and circumvented by an adult.

Furthermore, morality is not of the nature that it can be institutionalized. Morally right behavior is taught on an individual level and at a very young age. An honor code would be inappropriate and too late for those who need to be taught the difference between right and wrong. By the time people are in college, they know very well the difference between good and evil. Their choice to follow one or the other would not be affected by some formal, abstract rule of honesty.

However, the purpose of an honor code is presumably not to teach morality, but to create an overriding atmosphere of honesty by which students will model and evaluate their behavior. Indeed an honor code would have no educational value, as it would be espousing things people already know. The value sought would be in the influence on behavior.

It is unlikely that such an atmosphere, as pursued by an honor code, would have any effect on individual behavior. From day to day, none of us give much thought to the stated rules and regulations of the University. We conduct our lives in response to things that come before us. A moral rule as vague, formal and abstract as an honor code will not enter our minds as we act. Some wish of the administration about our behavior, even formally stated and promulgated, will not take precedence over our immediate needs and motives as we act.

Not only would such formal action not touch our lives, but the necessary atmosphere for the ends pursued currently exist.

It has been established that an honor code would serve no educational purpose. Its purpose would be to make those who cheat reflect on their actions, and allow those wishing to attack cheating to do so.

However, the climate exists now for these things to happen. People doing wrong are well aware of it. Those who cheat on an exam do not consider that it is right, but rationalize it in reference to their immediate situation. They are unable to justify it wholly to themselves, and only perform the twisting of considerations necessary to let themselves go through with it. It takes only minimal honesty for someone in that situation to realize their actions as wrong. An honor code would provide nothing toward this end.

Alternatively, the climate exists for those wishing to attack cheating. Every precedent exists for those wishing to take action. No one would challenge the legitimacy of reporting cheating. Yet though this climate exists, cheating is not attacked as often as it should be.

The imposition of some behavioral guidelines will do nothing to further the moral quality of those among us who need it

Clearly a lack of this climate is not the barrier for such actions. Not only does the attacking of cheating require legitimacy, it requires fortitude. To speak aloud amidst the silent tension of an exam in order to report transgression takes a lot of nerve. Those wishing to pursue justice of this sort could not use the crutch of an honor code by which to further their pursuit. A formally stated rule of honesty will do little to boost an individual's personal need for fortitude in such a situation. That cheating is not exposed more often does not reflect a lack of an honor code, but a lack of fortitude on the part of those in a position to take action.

In addition, as college is preparation for the real world, an honor code would hamper the collegiate experience. Cheating and dishonesty run rampant in the real world, New York City serving as a prime example. Anyone wishing to do business of any sort with others must acknowledge the flagrant dishonesty and immorality that occurs on a day to day basis.

There is no honor code to appeal to outside of school, and by that token,

continued on page 6

No-win

continued from page 4

As for fringes, Alexander Haig can score by criticizing the mistakes Reagan made after Haig resigned as Secretary of State. Harping on blunders and on the Administration's foreign policy debacles, Al Haig could seize national attention by formulating a clear, comprehensive foreign policy plan that would lead the U.S. into the twenty-first century. Though Haig's impressive foreign policy experience gives him an advantage in foreign policy debates, he must avoid a hard-liner image.

Instead, Haig should put forth foreign policies that would entail compromise without major concessions. Such a plan should focus on relations with China, the Soviet Union, and allies, as well as address the problems in Central America, the Middle East and South Africa. Calling for harmonious relations with allies, arguing for a strong, efficient Defense Department, showing flexibility, Haig may be able to steal some of the spotlight. By emphasizing the delicacy and intricacy of the foreign policy issues, Haig can distinguish himself from the other candidates who lack his experience, and improve his political recognition.

When these no-win candidates acquire influence, they can use it to the advantage of themselves and their supporters by securing concessions or agreements in certain important areas: appointments, issues, and interest

groups. Jackson, for instance, can adopt this political strategy to force the Democrats to address the problems facing the poor. Robertson can make the Christian segment a powerful interest group within the Republican party. Haig can snag a Cabinet or a advisory position. Such deal-making has the added effect of reinforcing party unity behind the actual nominee, because he is forced to touch base with more voters.

But no matter how much influence these candidates gain in the next eight months, none of them will ever get nominated or elected. For any of these candidate to foster any illusions about this fact would be a waste of their time as well as the ardent support of their followers. Adopting a more realistic strategy, these three candidates can give other views a voice that would otherwise not be heard, and more voice to those usually given a ceremonial nod. In doing so, these candidates, who will never become president, may improve the way we govern ourselves.

WKCR

continued from page 3

American music, namely soul, gospel, blues, rockabilly, country, etc. Of the programing format, Mr. Merello states "I don't see any rigidity in the programing. If you really want to get on the air, you can." When asked if one could get on the air to play rock and roll, he responded, "We are not a rock and roll station. People who are in to 'rock and roll' are not going to come up here to DJ."

The institutionalization of the station's programing choices seems to have created a Catch-22 for students wishing to get involved. The station asserts that there are no barriers for students to come to the station with musical interests, and eventually get on the air. However, these musical interests must fit into the "alternative" format. Otherwise, the student will be very unlikely to get on the air. For example, when asked if one were to develop an interest in Heavy Metal, even if it were of a type not generally available elsewhere, (Motorhead, Mettalica, Anthrax, Dio, etc.) station members admit that it would be extremely unlikely that such a show would be granted.

Station members state that even if it were possible for the station to widen their student appeal, it is not important to do so, as they already have enough students willing to fill up the air time. They feel that the current level of student involvement is adequate.

The College administration differs on this point. Dean Robert Pollack has stated he suspects the level of student involvement is too low, and that he "[does not] think this is a healthy way for the station to be."

Members at the station discourage change in the format, namely in the introduction of rock music, stating they do not wish to become another top 40 station, or another average "college" radio station. They feel that a change in format would result in diminishing the educational value of the station as it stands, and eliminating the alternative it now offers.

Though student complaints against the station and recommendations of remedy are varied, no one seems to be advocating a move in the Top 40 direction. The students that disapprove of the current format admit there is virtue in the things that the station accomplishes. But they believe that since WKCR is a student organization, they could serve that purpose much better by being more accommodating of students' interests.

Code: NO

continued from page 5

there should be none in school. It is tempting to try to produce a cloistered, idealized atmosphere in our little collegiate society, but we would be wrong by so doing. If we were to succeed, our college experience would leave us totally unprepared for the sleaziness and difficulty of the non-academic world.

As we will have to afterward, in school we must learn to attack dishonesty ourselves, and discard this idealized wish for a higher authority to which we could appeal. We must learn by observation that although it may win in isolated situation, cheating indeed produces no prosperity. We must develop the fortitude with which to fight wrongdoing internally; as, all too often in the world, nothing is true, and everything is permitted.

Tiffany at MMA

BY KIRAN M. KUMARAN

Triumphs of American Silver-making: Tiffany & Co. 1860-1900, at The Metropolitan Museum of Art includes approximately twenty silver and gold objects and a number of drawings, dies, and patterns which illustrate steps in the production of these objects. This exhibition traces a short period in the history of one of America's premier champions of the decorative arts and does so with understanding, shedding new light on objects whose artistry is often taken for granted.

Of particular interest are several exceptionally delicate watercolor studies of magnolias. They are as accurate as botanical drawings but possess an added grace attributable to their decorative end. They were used as sketches for the life-size flowers of matte enamel on the Magnolia Vase, which was inspired by the pottery of ancient Pueblo cliff-dwellers. The vase is breathtakingly magnificent, standing thirty-one inches tall, blending artifice and naturalism in a manner reminiscent of the Rococo.

The Magnolia Vase is only one of several master-works which derive their inspiration from a surprising variety of sources, demonstrating the ingenuity of Tiffany & Co.'s craftsmen and designers.

Other notable works of large scale are the Bryant Vase and the Adams Vase. Both are commemorative and utilize classical models, yet the final products are startlingly dissimilar in their effect.

The Bryant Vase was made in honor of William Cullen Bryant--poet, newspaper editor, and a founder of The Metropolitan Museum of Art--on his eightieth birthday. It is in the form of a Greek vase and is decorated with scenes representing events in Bryant's life and his various achievements. It is simple, solid, and direct, exuding a serious, almost stoic rectilinearity, befitting a man of Bryant's stature and works. While pleasing to the eye, the vase doesn't move beyond its initial intent. As with many history paintings, it would be insufficient and probably unsatisfying to view it purely as a decorative object.

The Magnolia Vase is only one of several master-works which derive their inspiration from a surprising variety of sources, demonstrating the ingenuity of Tiffany & Co.'s craftsmen and designers.

Soaring far higher into the realm of fancy is the Adams vase, appreciable solely for its beauty, divorced from its stated intent. Made of gold, semiprecious stones, and enamel for Edward D. Adams in 1904, it stands a slight nineteen and one half inches with an almost Oriental splendor. The figures--representing agriculture and commerce, etc.--are integrated into the vase's design to a much greater degree than those of the Bryant vase. Rather than encasing the vase in a false geometricity, the figures bend and flex with its subtle curves. The sensual interaction with the vase's other decorative devices renders the total object one of both exquisite detail and remarkable synthesis.

This exhibition traces a short period in the history of one of America's premier champions of the decorative arts and does so with understanding, shedding new light on objects whose artistry is often taken for granted.

This exhibition includes some smaller works of interest which reflect prominent design trends of the 1870s and 1880s. The strong influence of Islamic art in the 1880s lent inspiration for a brightly enameled and gilded tea set of 1885-86. The influence of Japanese art was strong as well; in 1878, Tiffany & Co. won the Grand Prix at the Paris Exposition for their Japanese-style silverware which has been included in the show.

Adams Vase: circa 1893-1895. Gift of Edward D. Adams, 1904. Permanent Collection, The Metropolitan Museum of Art. Photo courtesy MMA

Triumphs of American Silver-making will run at The Metropolitan Museum of Art through 10 January, 1988 in the American Wing. It is a deserved celebration of the decorative arts in America and is certainly a pleasure to view.

Elections Investigating Commission Report

EDITORS' NOTE: In our first issue this semester we addressed the "Scandal" related to the Spring 1987 College Elections. Since that time, an Investigating Commission has been formed to probe the allegations that were made. The Commission's Report, signed by the its members, College Dean of Students Roger Lehecka and University Senators Ellen Ostrick and Leon Friedfeld is below.

Dear Columbia College student:

The commission formed to investigate the allegations about last spring's elections would like to report its findings. We interviewed members of the Elections Commission, past and present, and examined the contents of the ballot box which contained both the cast and uncast ballots and other pertinent information. After lengthy and thoughtful deliberations, the Investigating Commision found:

1. Only one past Elections Commission member suspected foul play by Anthony Calenda.

2. Various Elections Commission members concluded that there were only two feasible ways in which a member of the Elections Commision could tamper with the ballot box:

a) To forge the signatures of eligible voters and to cast ballots for each of the forged signatures.

b) To cast ballots without signing the official roster.

3. The Investigating Commision counted the signatures on the official roster and compared the total to the number of ballots cast. Having a discrepancy of only 20, the Investigating Commision ruled out the plausibilty of intentional ballot casting without signing the official roster because this amount would not have been enough to alter the outcome of the election.

4. The Investigating Commision also ruled out the plausibility of forging signatures. Since there were additional shifts after Anthony Calenda's manning of the ballot box, students who had not in fact voted, but whose names were forged on the list, would have revealed any foul play when they attempted to vote. Members of the Elections Commission concurred that this method would be too risky.

5. The Elections Commision's procedure allowed us to determine the total number of ballots cast during the time that Anthony Calenda was in charge of the ballot box and for whom those votes were cast. Each ballot is numbered and each Election Commission Member writes on the sign-up sheet the number of the first empty ballot at the start and at the end of his shift.

a)The 209 votes cast during Anthony Calenda's shift were comparable to other shifts during that time period.

b)The 60 votes cast for Kaivan Shakib during Anthony Calenda's shift was not an unusually large number of votes and did not represent a large percentage of the votes cast at that time period.

c)Although the allegation charges that votes cast during this time period were enough to "win Kaivan his seat as vice-chair," in actuality Shakib received a minority of his votes at this time. It is clear from our review of the ballots that Kaivan Shakib received a substantial number of votes at all time periods during the election.

6. Because the discrepancy in count, votes for Monica Byrne-Jiminez were resolved upon recounts by the Elections Commission, and because Frank Guzman resigned from the Elections Commission, we did not pursue this matter as carefully. It is impossible to distinguish here between an honest mistake and intentional miscounting. We were pleased, however, to see that the Elections Commission procedures make cheating in this fashion very difficult.

In view of the findings, the Investigating Commission finds the allegations against Anthony Calenda unfounded. The Investigating Commission therefore reports that Kaivan Shakib received his votes in a legitimate election. It is the commission's hope that the Columbia College Student Body maintain its faith in the members of the Elections Commission who ran an organized and efficient election, as well as the members of the Student Council who won their seats in a respectable and deserving manner.

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Federalist Paper

"Veritas non Erubescit"

a student publication in the tradition of Columbians Hamilton and Jay

Volume II Number 4 | Columbia University, New York City | 8 February 1988

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DEPARTMENTS

Campus Democratic Socialists:

SGA Funding Questioned

BY ERIC A. PRAGER

The Student Government Association (SGA) of Barnard College is responsible for the budgeting of the $76 Student Activities fee that each Barnard student is required to pay yearly. The SGA Constitution enumerates the qualifications a group must have to receive funding and the responsibilities of groups receiving funding. Article IX, Section 3 of this constitution states, "No student organization affiliated with either a national or local political party shall be registered at Barnard College."

The Democratic Socialists of America (DSA) Youth Section has a chapter registered at Barnard; the chapter received $732 this year. Part of this allocation was for DSA co-sponsorship of the DSA Youth Section Annual Winter Conference, 12-14 February, 1988, which will be held at Barnard.

The brochure advertising this conference contains a section entitled "Who We Are"; this section lists the past and present activities of the DSA. Among the present activities is "participat[ion] in the Jackson campaign." In the section entitled "This Conference" the DSA states: "One of the ways we will translate our political beliefs and priorities into concrete actions will be by canvassing in New Hampshire before the February 16 Democratic primary." And, "The DSA Youth Section Rainbow task force is organizing transportation from New York City to New Hampshire to canvass for the Jackson campaign."

Neither SGA President Lisa Kolker, BC '88, nor SGA Vice President for Student Activities Doris Hertzfeld, BC '89, knew that DSA intended to use Barnard student funds in this manner, they told *The Fed*. Ms. Hertzfeld states, "I had no idea," while Ms. Kolker agreed in a phone interview that it appears that DSA misled SGA regarding the use of its grant. In DSA's grant proposal to SGA the support of political candidates noted in DSA's brochure was not mentioned under the heading of the Annual Winter Conference.

In the 27 February 1987 issue of *The Federalist Paper*, it was brought out that DSA had not fulfilled its membership responsibilities to SGA regarding, among other things, adequate Barnard membership to receive funding. In a letter to the editor, printed in the 9 May 1987 issue of *The Fed*, the SGA Executive Board wrote: "If the DSA were to have an event in support of a political party or candidate, they certainly would not be able to access any funds, and their registration would be revoked."

Ms. Hertzfeld told *The Fed* that this statement is still operative. She added that she intends to speak with DSA representatives before taking action.

Andrea Miller, CC '89, the DSA liaison to SGA, told *The Fed* that "the brochure is misleading," and explained that because she was out of the city she was not involved in the writing of it; others in the Columbia University DSA wrote the brochure. Ms. Miller described the structure of the DSA (specifically its Youth Section) as comprised of campus groups involved in educational and electoral work, with some campus groups involved in only one of the two. She maintains that the Barnard group is involved only in educational work.

Ms. Miller was unable to reconcile the SGA Constitution's provisions forbidding "affiliation with...a national political party" with her group's brochure describing a "canvass for the Jackson campaign" at the New Hampshire Democratic primary.

Barnard students seem to be in agreement that the use of Student Activities fees by a group which describes itself as being involved in a political campaign is improper. Alex Giannaschelli, BC '91, states, "I don't want my Student Activities fee used to promote a political campaign. Whether I agree with the campaign or not, that isn't what Student Activities fees are for."

Laura Burns, BC '91, adds, "Other groups on campus have to struggle for funding and often do not receive enough. The very least SGA should do is follow its own constitution in the distribution of our money." Susan Cooper, BC '91, summarizes, "If they want to change their constitution, that's fine. Unless and until they change it, though, groups that violate the rules should not be funded--they should not be recognized."

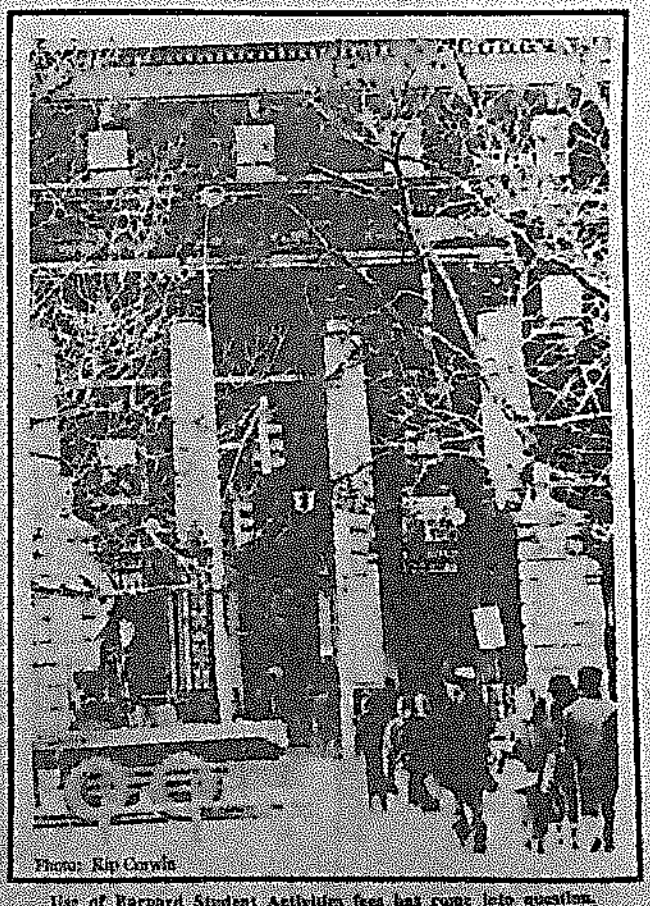

Photo: Kip Corwin

Use of Barnard Student Activities fees has come into question.

MONTH IN REVIEW 2

U.S. EXPANSIONIST POLICY IN NICARAGUA?

"The United States is pursuing an illegal policy of expansionism and revolution in Nicaragua," we've all heard so often. What does *The Fed* have to say, you ask? Do unto others...

"But let us suppose that weapons have reached El Salvador from here. This is possible. More than that, it is possible that Nicaragua combatants have gone to El Salvador...."
- Interior Minister Tomas Borge
Bohemia (Caracas, Venezuela)
April 20-26, 1981

"This revolution goes beyond our borders. Our revolution was always internationalist from the moment Sandino fought [his first battle]."
- Interior Minister Tomas Borge
Managua Domestic [Radio] Service
July 19, 1981

"Of course we are not ashamed to be helping El Salvador. We would like to help all revolutions."
- Defense Minister Humberto Ortega
New York Magazine
September 12, 1983

"We will never give up supporting our brothers in El Salvador."
- Commandante Bayardo Arce
New York Magazine
September 12, 1983

"We say to our brother Arafat that Nicaragua is his land and the PLO cause is the cause of the Sandinistas."
- Interior Minister Tomas Borge quoted in "The Sandinista-PLO Axis" by the Center for International Security, February 1984, reported by AP
July 10, 1985

"If it were possible to export [revolution there], we would be doing so to neighboring Honduras."
- Interior Minister Tomas Borge
Trybuna Ludu [official daily of the Polish United Worker's Party]
July 2, 1987

And if assisting partisans in Nicaragua is wrong because they have other avenues within their free system for redress of their grievances, just remember what our friends at *La Prensa* found out...

"They [*La Prensa*] accused us of suppressing freedom of expression. This was a lie and we could not let them print it."
- Captain Nelba Blandon, chief of the Department of Communications in the Ministry of Interior, as reported by AP
January 29, 1984

(Compiled by the Office of Public Diplomacy For Latin America and the Caribbean, United States Department of State, August 1987)

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of Columbia University

Veritas non Erubiscit

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A CLASSIC LESSON

Take away in any kind of State, the Obedience, (and consequently the Concord of the People,) and they shall not onely not flourish, but in short time be dissolved. And they that go about by disobedience, to doe no more than reforme the Common-wealth, shall find they do thereby destroy it.

Thomas Hobbes
Leviathan
Part II, Chapter XXX

DEMOCRATIC PARTY SEEKS A NEW IMAGE

Donald J. Trump, New York real estate magnate and registered Republican, was recently described by the chairman of the Democratic Congressional Campaign Committee, Beryl Anthony Jr. (D-Arkansas), as "projecting the new image the Congressional Campaign Committee wanted for the Democratic Party." "He's young, dynamic, successful," Anthony noted.

Trump additionally turned down an invitation by the House Speaker Jim Wright to be the host at the 25th annual Democratic Congressional dinner in Washington next month. Late last year during a trip to speak in New Hampshire, Trump was met by banners reading "Trump for President." Most of those people greeting him were Republicans.

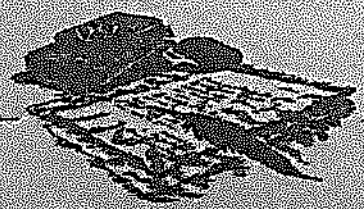
Trump: the bi-partisan choice.

THE TIMES, THEY ARE A CHANGING...

"There was a time when 20 million liberals and left-radicals across the country were saying 'Free Bobby Seale.' Now they're grown up and have their own barbecue grills and pits in their backyards"
- former Black Panther Bobby Seale, now trying to publish his barbecue recipe book

"As I look out here, all I can think of is how clean you all look."
- Liz Carpenter, feminist writer, addressing the National Women's Political Caucus reminiscing about the group's first meeting in 1971

"I always thought there were clear signs of the system coming apart. But now I'm hesitant, after 16 years of making apocalyptic statements, to make any more."
- Stephen J. Rose, 40, a leftist economist at the summer conference of the Union of Radical Political Economists



IN GOOD COMPANY

Trying to decide just how radical it's appropriate to be is an important decision for all Columbia students. To assist the community toward this end, *The Fed* offers the following summary of the candidates most favored by the National Democratic Socialists of America (poll taken 13 November 1987, 18% of the national membership participating):

Jesse Jackson:	48%
Paul Simon:	22%
Mike Dukakis:	7%

So vote early and often, and keep your company in mind.

QUANTITATIVELY SPEAKING...

Number of times Michael Dukakis has cried in public since announcing his candidacy: 2

Number of states that have voted Republican in every presidential election since 1968: 23

Percentage of black Republicans who are under 30: 49

Names in Ronald Reagan's contributor file in 1980: 200,000

Names in Pat Robertson's contributor file today: 2,500,000

Number of countries that have claimed to have discovered America: 11

Percentage of professional football players who wear a cup during games: 52

Percentage of women who wash their hands in a public restroom if someone else is present: 90

Percentage who do so if they are alone: 16

Acres of lawn in the United States: 25,000,000

Total acres in Indiana: 23,158,400

Percentage of California's almond crop exported to Japan and Europe in the last year: 81

Hours that Leave It to Beaver is on the air each week in Des Moines: 6

Vials of bleach that will be distributed to IV-drug users in San Francisco this year: 14,000

Condoms that New York City will distribute at singles bars, porn theaters, and massage parlors this year: 500,000

Price of a copy of Jim and Tammy Bakker: the authorized history of the PTL Club, in 1986: $100

Price today: $20

Items in the L.L. Bean Women's Outdoor catalogue offered in various shades of pink: 57

Takes required to film Tip O'Neill's Miller Lite commercial: 79

Columbia Hockey:

Out in the Cold?

BY BEN FROMMER

There are four major sports here in America: football, basketball, baseball, and hockey; and while Columbia can take pride in having new stadiums and large budgets for three of the four, to many it seems that the hockey team has been left out in the cold.

The Columbia hockey team, unbeknownst to many students, is not a varsity team, but a club. Relegated to practicing and playing its games at McKay arena in New Jersey, the team has trouble convincing many fans to make the trip. Their late-night practices rarely end before midnight, and then the team must take the long bus ride back.

The team is certainly not treated to the celebrity status that hockey enjoys in many other Ivy League colleges. In six of the eight schools it is a varsity sport, and at Cornell and Harvard it is a main attraction. The Metropolitan Collegiate Hockey Conference, in which the team now plays, is not a member of the NCAA. Approximately half the schools in this conference have varsity teams; half have club teams.

Many of the players feel they have been slighted because they do not enjoy varsity status. Brian Krosky, freshman goalie, explains, "No one takes us seriously because we're a club, and even though we play varsity teams we get no respect on-campus or off-campus." Prem Parameswaran, CC '90 puts it a different way, "Everyone except Columbia recognizes us as a varsity team."

The players feel that if the club can become varsity team, it will lead to increased respect and support. Perhaps better ice-time, a closer rink, and a bus to bring fans to the games.

Coach Jeff Goldfarb is not as worried as some of the players about the club status. He believes that "the only drawback of not being a varsity team is a loss of funding, and a shorter schedule." He explains, "I look at it as being a varsity team anyway. We have real practices and hard-working players, plus we're doing better every year. We are the Columbia hockey team, and the only ramifications are off the ice."

While the players talked of petitioning Athletic Director Al Paul to make the hockey a varsity sport, Coach Goldfarb does not count this as one of his goals. He simply wants to "get the team together, practice more, become more cohesive, and have a winning record."

Mr. Paul acknowledges that "at various time some students have approached him and asked him to consider the move." He said he could not for two reasons. The first is that Columbia has no hockey facility of its own. He explained, "Every school with a varsity hockey team has a facility for it, and right now Columbia has no plans to build such an arena. We presently have other more pressing athletic priorities, and we would not have a team play in a rink off campus."

The second reason is the constraint of the budget. Mr. Paul continued, "The budget does not provide the expense the hockey team would necessitate. Right now some existing varsity teams need money and we must pay attention to them first."

Another reason the Athletic Director later added was "the problem Columbia suffers with limited manpower." Since we are the smallest undergraduate Ivy League school we cannot hope to field the same number of teams as everyone else.

Then again, no Ivy college has all varsity sports. For instance Brown does not have a fencing team, and Dartmouth does not have a varsity fencing or wrestling team.

Mr. Paul said that if any clubs would change status in the near future it would be in the sports of lacrosse and squash. "Both these clubs already have facilities that could be utilized, and thus have the possibility to become teams, but there is presently no room in the budget," he said. He concluded, "if we had the budgetary means and the facility, I'd love to have a team."

Unfortunately for the players and all the hockey fans at Columbia it does not look as if the club will gain varsity status at any time in the near future. For now, all we can do is make an effort to support them and wish them luck on their season.

The Fed Interviews James McMenamin

BY NATHAN NEBEKER

James McMenamin is the current director of admissions for Columbia College. He has been in the position for seven years. Mr. McMenamin did his undergraduate work at Johns Hopkins University. From there, he worked for two years in the admissions department at Hobart College in upstate New York, after which he worked for five years at Pomona College as the Assistant Dean of Admissions. After Pomona, he worked at Brown University, also in the number two position in admissions, for three years. Following Brown, Mr. McMenamin made his move to Columbia and has been here since.

The Federalist Paper: Somewhat recently, Brown made a move to a position of higher competitiveness among colleges. Some of this seemed to happen during the time you were there. What happened and what was your role?

James McMenamin: Brown's move in the selective college arena in terms of popularity and draw really took place between 1975 and 1980. Since 1980 it has leveled off, although it has reaped certain benefits as a ripple effect, which any school which makes a move such as is happening at Columbia now, is prone to do. I was there for part of this, but no one person could take credit.

Fed: To what would you attribute Brown's increase in competitiveness?

JM: It cannot be explained as any one thing. A lot of things came together for Brown at that time. The establishment of their new curriculum, which had a minimum of requirements, meaning students only to choose a major. That happened in an era when students were looking for alternatives to requirements and helped put Brown on the map. At the same time, Brown was spending a lot of its time concentrating on only three colleges, and not so much on the rest of the university.

At the same time, Providence as a location was getting whole new life pumped into it. This, if anything, is what has continued to help. The new curriculum is no longer the same and certain people are rather dissatisfied with it now.

Also, Brown was very smart as an institution in investing a lot of attention and money into the admissions operation. The director of Brown, Jim Rogers, was really the first director of the school who went after marketing in a serious way. Not just where admissions officers visit, but harnessing an alumni body to help with that.

Fed: Was there a drive for funds commensurate with this?

JM: No, it was not even a drive for funds. The University, without much internal publicization, just saw that this was the thing to do, and they did it. In the 70's, the things they were doing were quite new for a school of its type. Now there are a lot of schools out there doing aggressive things, but Brown was the first school to do these things well and tastefully. It is no longer novel, as nothing stays new in admissions for long, but at that time, Brown was very sharp and at the cutting edge in doing a lot of the things in admissions that helps to get one's name in front of bright students.

Fed: It seems Columbia has taken an alternative course in staying very steadfast with requirements and the core curriculum. Do you see that as valuable in today's setting, or the former liberalization was popular in the 70's?

JM: I do not think that our academic philosophy is aimed at all at appealing as an admissions ploy to high school seniors. It is a pure educational philosophy about what we think a liberal education is. The climate for that now is certainly much more receptive than ever.

As of the last three years, there have been a number of reports, the Boyer Commission, the Carnegie Foundation, Education Secretary Bennet in his own inimitable way, all of these things have really supported what Columbia is doing. We have something to offer that is a tradition that a lot of people are receptive to.

By the same token, it does make us a more specific choice, because right up front, we are talking about demands. We are not talking so much about choice as are places like Brown. So someone has to be excited about the rigorous intellectual thought and classroom argument starting right from freshman year. I am sure that to some students, even really bright ones, that may seem somewhat intimidating, but that is probably fine, as we really do not want them anyway.

Fed: Columbia seems to be underrated by some considerations. For example the US News and World Report poll that came out rating Columbia as nineteenth overall, just behind Northwestern. How do you see Columbia rating in you eyes, nationally and in the Ivy League?

JM: It was pointed out by Roger Lebecka that the vast majority of schools in that top ten are schools that we dominate in head to head competition when students choose between us and other places. To me, that is the bottom line as to what talented high school seniors see you as, compared to your competition.

I think that in the poll, the College, as a point of perception among other college presidents, gets lost in the University. The identity of Columbia College by university presidents is a lot fainter than it is for high school students, who are always hearing from us talking as Columbia College.

As, certainly the study gets unreasonable publication exposure, I think the study is flawed. When a study published results on a return of about 40% percent, it has to be questioned.

Fed: Wasn't the poll structured as a sort of coach's poll, based only on opinion and not any actual statistics? I understand that the numbers of SAT's, GPA's and acceptance yield ran quite contrary to the poll.

JM: Yes, that is true. The poll, however, does not hurt us. We are having a great year. We are a school that is going to generate a lot of publicity, and some will be negative.

At the presidential level, and the way the poll is conducted, I think the College identity is lost in the large University. That does not answer questions like "why is Cornell ninth?" That makes no sense, because we take two out of three students away from Cornell when it comes time for decision.

Historically, the League has been dominated by Harvard, Yale, and Princeton. Brown made a move in the late 70's to join Dartmouth in the middle of the league. I see us as continuing a move to get in there with Brown and Dartmouth, and every year we compete to get closer.

Fed: Where would you place Columbia now in the League?

JM: I would say we are virtually there in terms of our standing of academic quality. Based on the Carnegie and American Council for Education studies, we are clearly in the top half of the League in terms of faculty prestige. In terms of draw, we are much more specific kind of place with a core curriculum in New York City. So we are not going to get 12,000 applications like some other.

In terms of head to head competition, we split evenly with Dartmouth, take more from Penn and Cornell, and are getting closer to Brown. We are virtually there in the middle of the League, and we were not there before.

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Student Council Homeless Shelter:

Misplaced Responsibility

General Editorials are passed by a majority of the Editors.

Last week, Columbia College students were asked to vote on a proposal (endorsed unanimously by the Student Council) to establish a homeless shelter in an off-campus, Columbia owned building.

While it is easy to naively support a shelter with no consideration of cost in mind, it is a much more complex issue when the trade-offs are explained. Yet, in the proposal, there was no mention of the costs of a shelter, who would bear these costs, and by what justifications these costs can be imposed upon the bearer. Furthermore, the ramifications of a shelter in regard to existing programs and future plans that the University had already laid out were not enumerated. The vote, then, cannot be an accurate measure of student interest.

In addition, the vote by the Council and the subsequent placement of the issue on the ballot represent a misplacement of Council energy as well as a failure to recognize the primary mission of an educational institution such as Columbia.

Considering that the Council does not work with ample funds, and that many activities on campus which have no shortage of student interest are underfunded, the devotion of funds towards an endeavor which has limited benefit to students is questionable. Activities and programs which merit funding from the University, either from student activity funds or elsewhere, should be those from which the students participating will derive significant educational benefit.

Educational benefit from a shelter would be, in fact, rather minimal. While there is educational value in any experience which provides variance from one's usual sphere of conduct, there are private institutions benefitting the homeless that currently operate in the neighborhood. The Presbyterian Church is available to provide students with the opportunity to help the homeless.

The question might be raised as to why this issue should only be assessed in reference to Columbia's benefit. The answer is that Columbia's primary responsibility is to her students and faculty. Columbia should only devote time, energy, and financial support toward furthering a student's life educationally, culturally, and socially, through campus-oriented activities.

A further consideration that has not been addressed is the actual need for such a shelter. On the simplest level of assessment, walking down Broadway and noticing the numerous homeless people might lead one to believe that there is insufficient shelter available for these people. The reaction is to conclude that if a shelter were opened, there would be fewer people on the street.

Regrettably, this is not so. There exists an SRO on 112th St between Broadway and Riverside which houses many of those seen on the street. Thus, many are not on the street because they are simply without a place to go, but rather to get money from those willing to donate. Furthermore, many of these people who are truly without a place to stay, remain out of currently available shelters by choice. They consider them inconvenient, dangerous, uncomfortable, cattle round-ups from which they prefer to abstain.

It is essential to note, however, that none of this should be taken as a discussion from charitable action. If an individual feels the desire to show humanity and compassion toward his or her fellow human being who is in a disadvantaged position, may nothing but kudos be donned. Charity is indeed a noble endeavor, yet the nature of charity is such that it must be entered by choice.

It is ever critical to keep in mind that this action is a voluntary one that occurs on an individual basis. When institutions are led toward charitable pursuits, it necessitates drawing on common funds for financial support. The attempt to establish something charitable using funding that is not purely one's own is far from noble. It imposes the charity on others who may not feel similarly inclined. Charity through force or coercion is not charity. Only when charity is voluntary, and on an individual or a united level, is it charity.

The highest praise should go toward those willing to devote their own time, effort, and money toward helping the homeless. These pursuits, however, cannot be permitted to infringe upon the individual rights of those who oppose such action by taking funds that would otherwise be devoted to endeavors of direct, student benefit.

M. Adel Aslani-Far dissents from this Editorial

Conservative *Apologia*

BY KIP CORWIN

One of the more unfortunate misconceptions many people have about conservatives is the notion that conservatism merely opposes, unthinkingly, any sort of policy to improve conditions in America. Although conservatives often oppose liberals' nostrums, it does not necessarily follow, as some believe, that those on the Right are merely recidivist obstructionists to progress. Rather, conservatives can actually fill the role of legitimate dissenters from the all too common prevailing shibboleths. They should be viewed as components in the frank, open dialogues upon which our democracy relies.

Sadly, the importance of this fairly elemental assumption seems to elude most of the "activist" students on the Left here at Columbia. As a consequence of the refusal to acknowledge the possibility that conservatives might have something worthwhile to contribute, the vitality of debate and discussion diminishes. By claiming to assert a monopoly on virtue, the Left confines the scope of precisely what comprises acceptable commentary and thinking on a given issue. Thus, to assert an opinion contrary to the prevailing myths is simultaneously to assume the risk of being labelled "uncaring" or "immoral."

Monopolizing virtue is thoroughly unproductive. Strangely enough, conservatives themselves have unconsciously, even passively subscribed to this bizarre notion. Shut out of serious consideration, the accusations of callousness become a fulfilled prophecy. Why should a conservative, a human being who may deplore the plight of the poor and hungry as much as anybody else, extend himself politically, only to be rudely rebuffed as uncaring? Disagreement with many of the liberal ideas taken far too much for granted ought not to constitute a lack of interest in problem.

By framing the entire context of the debate within their own terms, the Left has -- somewhat successfully -- co-opted the high ground on many issues. Instead of discussing the best means to improve education and job opportunities for the disadvantaged, for example, the debate centers almost solely around how to facilitate increases in federal handouts (in the form of welfare, subsidized housing, etc.). Since conservatives doubt the efficacy of measures such as these, the Right finds itself cast in the villian's role. Were discourse instead to explore a wider range of alternatives, both within and exterior to the inner circle of Liberals' terms, perhaps we could develop much more innovative and effective solutions to many of the very real problems American society faces.

For its part, the Reagan Administration has been only partially successful in promulgating a viable conservative vision to counter predominant liberal policies. While recognizing the need to revise the worn faith in throwing federal dollars at every problem, and subsequently reducing federal largesse, the Administration completed only half of the process. So far, it has not aggressively pursued policies that might serve as an alternative to fifty years of the New Deal, New Frontier, and Great Society, all of which have sought to increase the scope of the federal government's involvements, both in the political and economic spheres.

Much needs to be done as we contemplate the future after the end of President Reagan's administration. Here on the Columbia campus, passionate support for various candidates will supplement our already politically aware student body. Each of us--but the Left most especially--should beware, as we hear the issues debated anew once again, of the temptation to exclude from political discussion those with perspectives dissenting from the more commonly held.

Albert Gore:

The Dark Horse to Bet On

BY RICK ST. HILAIRE

Rick St. Hilaire, CC '90, is the Columbia University Coordinator for the Albert Gore, Jr. for President Committee.

Albert Gore, Jr. was raised in Carthage, Tennessee and Washington, D.C., where his father served in the United States Senate. After graduating from Harvard in 1969, Gore enlisted in the U.S. Army, serving in Vietnam. An investigative reporter for the Nashville *Tennessean* was his next line of work, yet he still found time to attend Divinity School and Law School at Vanderbilt University.

Albert Gore, Jr. became Congressman Gore in 1976, serving eight years until his election to the Senate in 1984 with more votes than any other candidate in Tennessee history. Today, Senator Gore wants to serve his country as the President of the United States.

Albert Gore's commitment to serving in government stems from his father's dedication to the people throughout his three terms in the U.S. Senate (Albert Gore, Sr. lost his seat in the Senate after eighteen years because of his opposition to the Vietnam War and to two Nixon nominees to the U.S. Supreme Court). As Albert Gore, Jr. said this past Labor Day: "I was raised to believe that government must be used as an instrument for peace, justice, and providing equal opportunity for all Americans...Our laws must be the guarantor of the rights of the average citizen."

The *Washington Monthly* rated Al Gore as "One of the six most effective members of Congress." No wonder. The Senator is widely known for his responsiveness to his constituents' concerns. For the homeless, Al Gore sponsored a bill to guarantee shelter, job training, and mental health services in order to curb this growing problem, left unattended by the current administration. For the elderly, he championed legislation to protect seniors from futile "Medigap" insurance policies and established federal treatment centers for Alzheimer's patients. For women and minorities, he supported the U.S. Civil Rights Commission and co-sponsored the Equal Rights Amendment.

Senator Gore is best known, however, as an "issue leader" in arms control. He is considered the father of a comprehensive plan to limit first-strike capabilities by both superpowers. His expertise has earned him positions on the House Intelligence Committee, the Senate Armed Services Committee, and the Senate Arms Control Observer Group, which monitors the U.S./Soviet arms talks in Geneva.

Gore's leadership on arms control began one spring day almost a decade ago. Addressing an audience of teenagers, Al Gore asked the youths how many thought a nuclear war would be fought during their lifetime. Virtually everyone's hand was raised. He then asked how may believed that anything could be done to avoid such a war. Only five hands sprang up. The hopelessness expressed by those young people deeply moved him into action. Tirelessly, he studied the intricacies of the nuclear arms race, receiving attention in 1982 when a high-level Soviet delegation asked unknowing U.S. officials to comment on a new American arms proposal--the Gore plan! The Gore plan, practically unnoticed for two months, was soon hailed by those in the White House, the Kremlin, and the Congress.

Senator Al Gore is on the forefront of tomorrow's leading issues--which are on the minds of today's Americans--namely education, the economy, and the environment (commonly called the three E's). He recognizes education to be a national priority, exclaiming: "America can compete for the future by giving our children the best schools on earth...An investment in education today will allow our country to grow tomorrow." Senator Gore co-chairs the Congressional Task Force on Illiteracy and is a leading advocate for smaller classrooms, a longer school year, and higher pay for teachers as part of his call to "create the best elementary and secondary education system in the world."

Also on the Senator's agenda is the nation's economy. As a member of the Senate Democratic Budget Task Force and co-author of the Democratic Caucus *Economic Alternatives* report, he has strongly advocated sound fiscal policy to increase America's economic growth and competitiveness. He believes that: "Central to a sound trade policy must be a general economic approach based on cutting the federal debt by keeping both military and domestic spending under control and reforming the federal budgetary process."

Co-author of the Superfund law to clean up hazardous waste, Al Gore has continually been leading the nation on environmental protection. As Chairman of the Environmental and Energy Study Conference, he has championed the fight for clean air and groundwater. Moreover, he has focused much attention to the growing problems of the greenhouse effect and the disappearance of the ozone layer, two inevitable global crises. Al Gore holds strong convictions on "the right to an environment free of contamination by polluters."

With each passing day Al Gore is gaining support from people who feel that honesty, ingenuity, and leadership should be placed back into the Oval Office; people who believe in a more peaceful world for themselves and their children; people who believe in free trade and a return to great American competitiveness.

Intelligent, compassionate, dedicated and judicious, Al Gore is a leader for tomorrow.

Robert Dole:

The Case for an Insider

BY BEN FROMMER

Ben Frommer, CC '91, is a member of the Columbia University Robert Dole for President Campaign Committee.

When choosing a candidate for President it is crucial to look back upon those who have held the position before, and realize their mistakes. Once we can analyze the reasons for the mistakes, we can then avoid having them occur again.

Our last two Presidents have been so-called Washington "outsiders". Jimmy Carter and Ronald Reagan, both former Governors, ran as outsiders bent on reforming the "corrupt" internal process. Both were elected by majority of the people who were tired of apparent Congressional squabbling and dirty inside deals. Yet when each man arrived in the White House they soon learned that it was not so easy to win when fighting with Congress.

The failures of each Presidency can be categorized as an inability to work effectively with Congress for the good of the nation.

Carter could not get the Salt II treaty approved because he could not push it through the United States Senate. He was a flawed leader because he was continually at war with his own Democratic Congress. His inability to build a national consensus led to stagnation on the domestic and foreign fronts. The deathblow due to his lack of knowledge of how to deal with the Congress came to fruition eventually to unprecedented inflation and interest rates and an inconsistent and debilitating policy to Iran and Nicaragua.

Despite many successes during his first administration, Reagan has failed to provide leadership as well. He is continually battling over every bill with the Senate and House. His rejected Supreme Court nominees and the numerous vetos that have been overridden this year only go to show that he lacks the ability to gauge how Congress will react on any issue. Over the past year the President has had less than a fifty percent success rate (the lowest for a post World War II President), and our country is seemingly at a stalemate.

Reagan arrived in Washington to save the country from inefficient bureaucracy and never seemed to learn how to deal with it. While his popularity was high he was able to effectively steamroll over Congress, but when it fell, he was rendered helpless. When the time came to compromise, he could not call on his experience or on any of his friends in Congress, because neither existed.

Regardless of what any outsider or maverick President might think, we have a multi-headed government, as the Constitution intended it to be. Only by cooperation between a President and the Congress can we hope to move forward cohesively. Only through compromise and deals can we ever present a bipartisan American foreign and domestic policy.

What we have seen from past presidents is that Governors do not know how to work with Congress. Only a Senator or Representative, with plenty of experience inside Washington, knows how to control and lead the Congress. We have had enough confrontation. Like it or not Congress is part of our government, and the President must work with, not against them, for the good of the whole country. In 1988 we need an experienced leader who knows the system and is willing to work with it.

This year the person with the most knowledge and the best ability to form a bipartisan leadership is Bob Dole. He has spent four consecutive terms as a Representative from Kansas, and is now in his fourth term as a Senator. He was the Senate majority leader for two years, and is presently the Senate minority leader. In contrast to many Presidential Candidates who have ignored their duties to their constituents in this past year Senator Dole has achieved a well over ninety-percent attendance rate in the Senate, the highest of any announced candidate.

Bob Dole likes to present himself as an able consensus builder, and his record backs this up. He played a crucial role in passing both the 1983 Social Security Reform Bill and last year's tax reform bill, the two most bipartisan laws under the Reagan administration.

When it comes to leadership no other candidate can unify the Congress and the American people. In a recent poll taken by Hinshman-Hillard Inc., Bob Dole was rated the most effective leader in the Senate by the entire Capital Hill aides. The pollsters also consider him the most respected Senator.

Many candidates suffer from simply being too extreme for the majority of Americans, often garnering higher negative ratings than positive. They carry party lines too one-sided for effective bi-partisan leadership.

The candidates suffer from a varying degree of problems. Hart, Gore, and Simon have only served one term (at best) in the Senate. They have yet to form important bonds, gain valuable experience, or learn how to lead. Haig is a general, and it is commonly believed (and rightly so) that the military, like the religious elements, should play no role in governing the country. All these men for different reasons, whether it be religion, military, character, or extreme ideology, elicit strong hatred from many Americans. In November we do not want to look forward to a choice of lesser evils and another four years of infighting.

While George Bush does not cause most Americans extreme anguish, he fails flat on another issue. As Bob Dole says, "He's got a great resume, too bad he has no record." In all his different positions Bush seemed only capable of doing nothing. He was an unreliable Representative, who failed twice to reach the Senate. His tenure as Nixon's last Chief of Staff was forgettable, as was his stay at the Central Intelligence Agency. After being Reagan's fierce and nasty opponent in the Republican Primaries of 1980, he was chosen as a running mate solely to balance the ticket. It was evident from the very start that Reagan and Bush would never form a close working relationship. While George Bush is willing and ready to point out his great resume, he finds it a bit harder to explain what he did in all those positions.

Most of the other candidates also suffer from the experience question. The only times Dukakis, Babbitt, and DuPont have been to Washington was to show their children the Smithsonian. Robertson, Jackson, and Haig have never held an elected office. As mentioned, Gore, Simon, and Hart are one-term Senators.

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McMenamin

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Fed: Columbia is then a school whose competitiveness is increasing. Do you see us as able to be even more competitive, or more that we are approaching a final standpoint?

JM: We are not at any final standpoint, and we are not resting on our laurels. We see that we can do more.

Fed: What do you see as the main inhibiters of Columbia's competitiveness?

JM: Some of these things have been determined a century beforehand. The major market of college going seniors is suburban. Suburbia tends to be suspicious of cities. We are faced with a project of introducing New York as a great place to go to college to people outside those who naturally assume so.

Columbia has not sold itself in the past. Our image is a quieter image academically both as a college and university. Great things have happened here. We are one of the ranking universities in the world. Yet in the early 80's when we did a marketing study, we found that Columbia, along with Cornell and Penn, was one of the least recognized names in the Ivy League. It is quite surprising.

More of a problem than the urban setting is then that the institutional image is much too quiet. Yale is located in a setting on balance at least, given that there is very little upside to New Haven. Their location is one that, most people would agree, is a negative. But that negative does not enter in to their popularity of Yale. The name is so widely recognized, the setting does not nudge the perception of Yale.

Fed: So you do not see the Morningside Heights neighborhood as a negative influence on Columbia's competitiveness?

JM: When we talk to people about perceptions of urban settings, it is always mentioned that some of the great institutions in the country are located in urban situations where the balance of being there is a positive. This is true of Chicago, Philadelphia, Boston, Berkeley, etc. Certainly there is more resource and many more advantages to New York than any of those other locations. Any school in such an environment also has an image project on their hands to sell their name above and apart from the city they are in.

Fed: Do you see the availability of Columbia as a setting for television and film productions as any advantage toward promulgating our image?

JM: Well, we have not had people apply to Columbia because of Ghostbusters or Altered States. Other things of a similar nature help much more. For example, the Fred Friendly series is quite an asset. Also, things like Edwin Newman in a PBS documentary on television mentioning Columbia students watching the daily televising of the politburo in the Soviet Union helps. Things like this perk up people's ears.

Why there is not more publicity about Columbia as the host and location for the Prize, I do not know. Columbia should be headlining this. They are announced from the President's Office, and televised from Low Library. Everyone who has ever won a Pulitzer Prize had it presented to them at Columbia. That we are not pushing this represents a public relations flop.

The public relations status is better now than it has ever been, but we are working on a hangover of not a lot for a long time. Columbia, being in New York and in the real world has too much of a tradition of being self-effacing.

Another example is in an obituary article in the *Times* on I.I. Rabi, who was the science advisor to Eisenhower and worked with Oppenheimer on the Manhattan Project. In twenty years, his physics department produced seven Nobel Prize winners, totally dominating the field. I bet not many people know that.

Fed: One of the first things heard about Columbia in the high-school contest is "Oh, Columbia, isn't that in Harlem?" Do you think that the ghetto association and the poverty that does exist in Morningside Heights is an inhibitor?

JM: Well, I think it may shave a small edge off of our applicant pool, but that is probably okay. When we talk about Columbia and New York in the High Schools, we do mention that 125th Street is a lot different than 116th street. In any modern city, some of the more desirable neighborhoods border on less desirable ones. It would be a mistake to see Harlem totally as a disaster area, or even as a negative, from an educational perspective.

Fed: So what is your stance on a gentrification for the neighborhood in terms of bettering Columbia's standing.

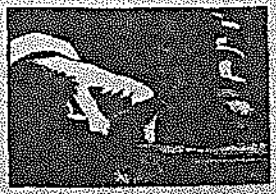
JM: I see whatever changes that are to take place as virtually complete. Columbia has taken over as many buildings as it will. We will see more buildings going co-op, as in the rest of the city, but I would say that the changes are 80-90% complete. I do not see gentrification as a significant influence any more.

Fed: Not only is the poverty an issue, but the 'bad neighborhood' image also seems to make people think that safety is an issue as well. It is my impression that the statistics for crime are not significantly higher than for other schools, but do you see this as a problem?

JM: No, the crime is not any worse statistically. What is important is that students who are entertaining the idea of coming here, but have these sorts of fears, visits the campus. They will see that these are not actual worries. Our primary point is to get them to campus and let them see for themselves, as nearly invariably a visit improves their perceptions.

If people see New York City as an insurmountable threat and are always worried about safety, they are looking at New York and Columbia in the wrong way, and should not come. We will never allay their fears enough to compensate.

This interview with Columbia College Director of Admissions James McMenamin will be continued in the next issue of The Fed.



DOLE

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Bob Dole is the only candidate with the experience, and the ability that has been tested over many years to lead our nation. He is neither a revolutionary or a reactionary, but a middle-of-the-road American. He does not concentrate on image, as has too often been the emphasis in the past, but rather on substance. He has led in the past, and he can continue to lead as President.

On January twentieth of next year he will be able to step in and fill the shoes of the President immediately. He will not have to learn the ropes and grow into the job, because he has already been working hard at it for twenty-eight years.

Bob Dole will be able to forecast Congress' reaction and plan accordingly. He will be able to call on the many alliances he has formed over the years as a Washington insider. Congress will be more willing to cooperate with one of their own.

Dole will not suffer many of Reagan's mistakes because he is a hands-on leader. He does not delegate, but takes an active role in everyday Senatorial affairs.

An united foreign and domestic policy should be our goal for the next election. Dole can bring the White House and the Capitol together to form a bipartisan program to solve our national problems. He will not divide the people because he is not an extremist. His past record of leadership and service will continue at the other end of Pennsylvania Avenue.

As the past has shown us, 1988 is the year for an insider, not another exciting, but ineffective outsider. The most qualified, experienced, and knowledgeable insider is Bob Dole.

The Academic Awards Committee of the Student Council
with
The Philolexian Society
invite nominations for the

27th Annual
MARK VAN DOREN AWARD

This award allows Columbia College students to honor that member of the Columbia faculty who best exemplifies the virtues of Mark Van Doren: *Humanity, Devotion to Truth* and *Inspiring Leadership*. Members of the faculty honored in the past eight years include:

1980 Robert L. Belknap
1981 Henry F. Graff
1982 Charles Hamilton
1983 Carol Gluck
1984 J.W. Smit
1985 Ainslie T. Embree
1986 Edward Tayler
1987 Carl Hovde

Nominations in the form of a one page essay must include the reasons for your nomination, your name, number, professor's name, his or her department, and classes that he or she is presently teaching. This must be submitted to **206 FBH** no later than **February 13** in the Council mailbox care of **Peter Harwich/Van Doren Award.**

For further information contact Peter Harwich at 663-4377

A Look at the Art Market's Volatility

BY STEPHEN F. LATER

Now that New Year's celebrations have relegated 1987--a year to be remembered for hyperbole and euphoria--to memory, troubling questions have been surfacing concerning the stability of the art market in 1988 and beyond. The patrons of the art world have maintained the stratospheric level of their *précieuse* market in the wake of Bloody Monday, recollections of the 1920s book auctions--some of whose prices have not yet been matched--furiously rush to mind. Many art consultants predict that the record prices of the past year stand to be shattered in 1988.

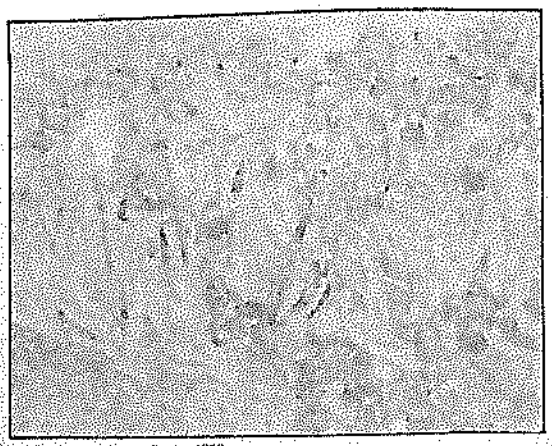
Sotheby Parke-Bernet New York's much publicized sale of van Gogh's "Irises" for $53.9m shattered the uncertainty reigning in the first major sale of the post-Crash era. The "Irises" sale assured a worried market that the pre-Crash days during which the hammer went down at $39.9m to Yasuda Insurance Co. for van Gogh's "Sunflowers" at Christie's London were not yet over. Indeed, the past year has been quite a ride for the art market.

Despite the euphoria, this market has not been without its victims. With the exception of the Getty Museum, the nation's principal museums have been priced out of the present market and have been forced to redirect their acquisition strategies towards donors and bequests.

Many were shocked by the record price paid for the "Irises" and argued that prices were no longer representing "true" value. Absurdly enough, the Yasuda Insurance Co. found "Sunflowers" particularly attractive because it had been painted in the year of the foundation of the company. Yet, the ways through which one might divine a true value for a work of art are elusive; appropriate prices are a reflection of the market and this market is being fueled by the New Society: the financial services *arrivistes*' zealous pursuit of art has had a great effect on prices. Wall Streeters have fueled much of the contemporary art market and Bloody Monday is sure to have a particularly profound effect on this segment of the market.

The Dow Jones' plunge in October led to predictions of a "flight to quality" and it seems that the market's upper levels have benefitted from investor caution. The enduring volatility of the art market has translated into a run on established, major works which constitute the market's upper reaches and stand as hedges against inflation.

This much-expected flight to quality has manifested itself in recent penetrations of new price levels for several Old Guard artists such as Picasso and Degas. Picasso's "Souvenir du Havre" fetched $7.6m, a record for any work by the Spanish master. Degas' "Laundry Maids" commanded a record $13.7m for the artist at Sotheby Parke-Bernet, London. This run on established artists has transformed the post-Bloody Monday era into virtual festival that has seen the $10m mark pierced for works of lesser stature than Mantegna's "Adoration of the Magi" or The Gospels of Henry the Lion, which respectively sold for $10.4m (£8.1m) in 1985 and $11.9m in 1983.



"Irises." Vincent van Gogh. 1889.

Federalist Paper file photo

Although the works of relative unknowns had been the target of speculative buying in recent days, it is clear that such turbulence has effected that segment. As investors seek quality works to weather a possible recession, the lower segment of the market is feeling a softening of prices.

The art market's future is a topic best left only to speculation, yet fears of an economic downturn may lead to further strengths in "established" fields, such as Old Masters, as a flight to quality overwhelms collectors. Impressionists have been driven in no small part by the Japanese; if their passion leads them from art, values in this area could see significant change. 1988 looks to be an interesting year and one might watch for an erosion of the market's lower end as prices head up for high quality works.

the

Federalist Paper

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DEPARTMENTS

Interview:
James McMenamin

In the last issue of The Federalist Paper, *the first part of an interview with Columbia College Director of Admissions James McMenamin was published. What follows is the continuation of that interview.*

BY NATHAN NEBEKER

Fed: What do you expect this year's admission statistics as far as acceptance and yield to be?

JM: We are expecting an increase between 7-8% in the total number of applicants. This will be our largest increase in three years. We had a big increase in early decision applicants, we admitted more, and we had more students deferring. We expect that we will go from admitting 27% of the pool last year to 24% this year, which will be make it the toughest year to get into Columbia.

Fed: Of the 24% to whom we expect to offer admission, how many do you expect will enroll?

JM: We will see 45-46% of that group enroll.

Fed: How does that compare with other colleges in the Ivy League?

JM: We are about the same as Cornell, slightly below Penn, Brown and Dartmouth, who are around 49-50%. Harvard has the highest in the country at about 73%. Stanford has the second highest at around 61%. Princeton gets 57%, Yale about 53%, etc.

One of the main reasons our yield is not higher is that we have a bigger early admission pool. This takes the percentages of those who are still trying to decide between Columbia and another school down.

Also, our image is very different than these big name schools. We are not as familiar a name to students in high school. Further, a lot of parents are suspicious about New York. And, there is the very high-minded message of the core curriculum that has to be digested. All of these things make us an unusual and provocative choice, but not a common one.

Fed: Continuing on the topic of

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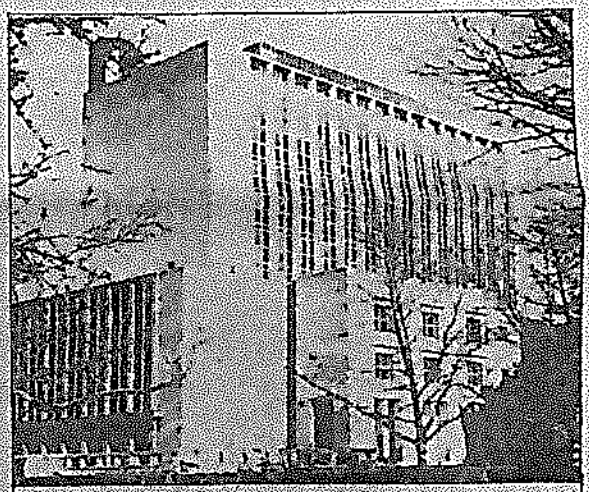

Columbia Business School: Is there a need for an undergraduate counterpart?

Undergraduate Business School?

BY AMY FERKEL

Many Columbia students aspiring to high salaries and prestigious jobs hear of the roads most traveled, but do not know which one will be the most successful or the most profitable. "After spending my first few semesters studying Plato and Aristotle, I began to worry that I would not be adequately prepared to survive in the business world with a liberal arts education," says Kevin Kirkbride, CC '90.

Kirkbride continues, "As one comes closer to choosing career options, one wonders whether or not Columbia should have business majors or an undergraduate school of business. Some students wonder if they should have even applications to the Wharton school or if they should at least study economics rather than something like history."

The Columbia Business School originally occupied Dodge Hall in 1916 and offered business courses to undergraduates as well as graduates. In 1949, Columbia College students, in demonstrations their commitment to a liberal arts education, phased out the offerings to undergraduates and the Business School became a professional school comparable to the Law, Medicine, and Journalism Schools.

Hal Rogers, a Professor of Security Analysis at the Columbia Business School, says it would be a "terrible mistake and in fact a disaster" for Columbia to reinstate either undergraduate business majors or an undergraduate business school. Rogers urges Columbia to leave business majors out of the undergraduate curriculum because the undergraduate years are the last opportunity for students to broaden their knowledge.

Rogers believes it would be futile to study subjects such as accounting, marketing, and finance at an undergraduate level. Instead, he advises students to study subjects such as history and philosophy in order to learn how to think, how did we get here and where are we going?

Sassil Guisti, who teaches Principles of Economics and an economics seminar, acknowledges that an undergraduate degree will not greatly prepare one for the business world. Yet, he says, an education like Columbia's provides a broad based education to which a student learns how to study.

There are, however, undergraduates who choose schools with an undergraduate business curriculum. Steve Abramowitz, who graduated from Wharton in 1985 and worked for the accounting firm of Touche, Ross & Company, believes it is prudent to prepare for a career in business, but acknowledges that one should not be narrow-minded. Abramowitz compares the scope of Wharton's curriculum to that of Columbia's School of Engineering and Applied Science. At Wharton, there is a core of business courses such as accounting, finance, marketing, and management sciences. However, students may also take non-

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CH, CH, CH, CHANGES...

John "A.M." Oswald, former Managing Editor of the *Columbia Daily Spectator*, recently cleaned out his office over there at *Spec*. Asha Badrinath now holds A.M.'s position, and Tracy Connor is the new Editor-in-Chief.

A.M., we understand, was recently speaking with the new holders of the much-revered *Spec* editorial positions. Asking what they planned to do with his office, he was told that a poster by Keith Haring was going up. A.M. beamed at their choice. "The famous anti-apartheid poster?" he asked. "No," they responded, "the Absolut vodka poster!"

Worse yet—they went on to inform him that the walls would also be home for a poster of Madonna, wearing a Mickey Mouse hat.

How quaint.

MAKING A CASE

A Covina high school student who complained that she was dismissed as the school's drum major because she did not sell enough candy in a fund-raising drive lost a bid for reinstatement.

Pomona Superior Court Judge Burton Bach ruled that Lisa Ortiz's request for an injunction was moot because the band won't be needing a drum major for the rest of the school year.

Ortiz, 17, said she will go forward with her lawsuit, in which she alleges that [she was] unfairly dismissed as drum major after she sold only one box of 48 chocolate bars. But with the football season ended, the only event remaining on the schedule was the 37th annual Covina Christmas Parade, and school officials said that [they] did not submit an application to parade this year.

Ortiz's attorney argued that the decision not to have the parade was a ploy to avoid having to reinstate Ortiz.

—from a news report in the *Los Angeles Times*

A night-shift maintenance man at Boston College who was fired for sleeping on the job is entitled to unemployment compensation, the Massachusetts Appeals Court ruled.

Jerry A. Wedgewood, who had been found sleeping and warned that he would be discharged if it happened again, was fired in 1985 for once again napping while on duty.

Wedgewood filed a claim for unemployment benefits, which was first denied by the Division of Employment Security, later refused by the division's board of review, and still later rejected by the Boston Municipal Court.

Yesterday's decision overrules all three denials and [cites Wedgewood's] multiple problems including a pending divorce. "In our view," the court decided, "serious personal problems causing an employee to be unusually fatigued may constitute substantial and relevant mitigating factors."

—from a news report in the *Boston Globe*

QUANTITATIVELY SPEAKING...

Number of the 142 nominations to the Supreme Court since 1789 that were not confirmed: 34

Number of the six Supreme Court nominations made by John Tyler that were not confirmed: 5

Average age of federal judges appointed by President Reagan: 49

Percentage of Americans who say that parents should not be allowed to choose the sex of their child: 69

Percentage of U.S. hospitals that have applied for patents on inventions using human tissues and cells: 50

Average price of an artificial arm (operation included): $25,000

Number of Cessna 172's (one West German youth's flight into Red Square) that can be bought for the price of one ground-launched cruise missile: 122

Percentage of the National Security Council's staff that were military officers in January 1981: 18

Percentage in November 1986: 40

Number of countries that have a lower infant mortality rate than the United States: 16

Soup kitchens in New York City in 1980: 30

Today: 360

Chances that bride of fiancée whose picture appeared in the Sunday *New York Times* in June wore pearls: 3 in 5

Letters to the editor received each day by *Pravda*: 2,000

By the *New York Times*: 400

Percentage increase, since 1986, in the number of fashion pages in *Vogue* and *Elle* featuring black models: 64

Percentage of public school students in Manhattan who are white: 9

Percentage of private school students in Manhattan who are not: 14

Number of honorary degrees awarded to Bob Hope: 52

Percentage of residential telephone numbers in Los Angeles that are unlisted: 50

Number of citizen's arrests made in Los Angeles in 1986: 4,322

Days in 1986 on which no one was murdered in New York City: 3

Number of those days that were Wednesdays: 4

Amount that two Sioux arrows used in the Battle of the Little Big Horn brought at auction: $17,000

Amount the New York Mets spend each season for tape to wrap Gary Carter: $5,000

Number of the 161 players in baseball's Hall of Fame who wore glasses while on the field: 2

Percentage of cat owners who say they confide in their cats about important matters: 57

Percentage of the members of the Texas Restaurant Association that serve chicken-fried steak: 90

Paces at which the crunch of a pickle should be audible, according to Pickle Packers International: 10

THE LAST OF THE CRASH JOKES

Q. What's the difference between a yuppie arbitrageur and a pigeon?

A. The pigeon can still make a deposit on a BMW.

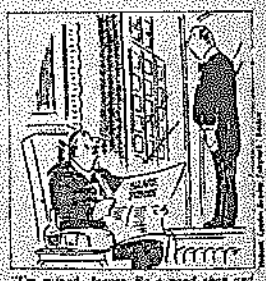
Q. How do you call a stockbroker?

A. "Waiter..."

A man comes home to his penthouse, tells his wife they've lost it all—their savings in the market, their home, car, everything. She opens a window and jumps. As she plummets earthward, the man sighs, "Thank you, Paine Webber."

It seems that most brokers agree!

This couldn't have happened if Ronald Reagan were still President.



"I'm ruined, Jeeves. Be a good chap and jump."

The Federalist Paper
of Columbia University

Veritas non Erubiscit

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A HEALTHY INTEREST

We at *The Fed* have always strived to be wise counsel and educate the campus community on AIDS and sexual harrassment.

What we didn't realize until last week—Condom Awareness Week, you know—was the power of humor these folks can muster up. In their posters, leaflets and advertisements, the "Academy of Dr. Whoopie" over at Health Services advised us to "Show a holiday lesson in sex...that always remembers." Condoms aren't always the whole story, so also practice withdrawal."

Good Grief.

McMenamin

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image, one thing that seems to characterize Columbia is the high degree of political student activism. The 1968 riots seem to have given Columbia a reputation that has been reinforced with the Apartheid issue, as well as the uprisings of last spring.

Last year there were demonstrations during the prospective student visits, which no doubt made a strong impression about Columbia on them. It would seem to have an appeal to a certain constituency, but do you think overall it either hurts or helps the College?

JM: It does turn off some students and turns others on. Some students are

surprisingly receptive to the activities. It seems to be an attraction to the dialogue and confronting of these issues rather than any specific political appeal. It cannot be said that it appeals to brighter students or less qualified students, nor can it be said that it repels conservatives and attracts liberals.

I am feeling a more pronounced conservative representation in this student body, and yet we still have vestiges of political dialogue and sensitive issues being discussed here more than most places.

When there were articles in the paper of students reacting to what was a misperception about what admissions policy was relative to athletics, by this time, people read that as "Columbia is dealing with another issue again."

Of course we are concerned with what is written about us in the papers, but we cannot point to any of our numbers that demonstrate it hurts us. The numbers say we are more popular than we have ever been.

Fed: What exactly happened with the football-admissions issue?

JM: The allegation was that there were some football players who were admitted under the requisite standards. This is a misnomer to begin with, because there is no such thing as minimum Ivy League standards. The attention that we pay to students that offer significant talent in non-academic areas, such as athletic, performing, [illegible], leadership, journalism, we all taken into account in the decision.

The source of the issue was a large article in *Columbia College Today* about football. It deals very frankly with the admissions role in relation to football. That publication is delivered to all living alumni of the College, one of whom writes for the Associated Press. He wrote a slanted and inaccurate article for AP. This article, through AP, seemed to make it to a lot of front pages. The author of this article failed to note that there is no such thing as a minimum Ivy League standards for any League school, and it failed to note that Columbia is no different in the way that it admits students.

Fed: So with these students who were perhaps not as strong as others academically, had athletic prowess that outweighed their academic shortcomings?

JM: Well, half the class is less strong academically than the other half. There was vocabulary used that was problematic. Terms like variance and relative academic strength do not indicate accurately the nature of the admissions process. The goal of admissions is to admit an entire community of people. The best admissions decisions are not always the ones that go by the numbers. There are a number of people who have come here and been very successful, who have offered us a lot of diversity, and who may have had standard measures, that is SAT and Achievement scores, that were below the median. If we screen these people carefully and look at personal strengths and not just the very easily catalogued campus abilities.

Fed: Do you get a lot of external pressure from the athletics department to admit certain students?

JM: We get pressures of all kinds, although 'pressure' is a less accurate word than lobbying efforts. These come from faculty members, departmental representatives, alumni, as well as athletics. The more competitive the school becomes, the more interested these people try to get the College interested in their cause.

Fed: Yet in the spirit of the abolition of athletic scholarships and the like, is there not an intentional disassociation of athletics from academics, and an accompanying feeling that athletic ability is not enough to justify admission to Columbia, as was allegedly the case with this incident?

JM: Anyone coming to school in the Ivy League with athletics above academics as a priority is making a big mistake. When we look at candidates who are also athletes, one of the things we want to ensure, even if it is a student who seems very well academically qualified, is that we are not admitting athletes who have their priorities backward.

Fed: On the subject of student body diversity, looking around on the campus seems to indicate that there is a great deal of international and cultural diversity. Are you pleased with the level of diversity that exists here?

JM: The perception is one of international diversity, but within the College, the numbers do not back that up. Within the graduate schools, there is an unbelievably high number of international students, as does the Engineering school. The College does not, and that is an area that I feel guilt about, as I think we need more. We are seeing some interest in corporations in funding needy foreign students to come to the College. We do have a lot of people who live abroad, but who are permanent residents or citizens. That can be misleading. What we do not have that many of, it is never more than fifteen, and might be as few as ten per year, are students who are citizens of foreign countries who also reside abroad.

Fed: In terms of national diversity, do you feel satisfied, or is the distribution weighted too heavily to the Tri-State area?

JM: At one time, the amount of students from the Tri-State area was quite high. Now it is down to around 40% or so. We are always looking for a greater national diversity. Last year we missed getting a student from all fifty states by three.

The thing is that the population is not going to be in the Northeast as much as it is now or has been in the past. So taking a long range view of where we want Columbia to be twenty years from now, we have to market toward the schools of every state in the country, especially the Sun Belt. It is in our interest to be a national institution.

We do well outside the Tri-State area. We are doing much better in schools in the Boston area and New England in general. We are also doing well in the south, and in Florida. 10% of our population is Californian. We are working on Texas and the more central Sun Belt states. We are also working in the Midwest, centered around Chicago. The Midwest is probably the softest area for us, because there is more suspicion per square inch in the Midwest about New York than anywhere else in the country, but we are undeterred.

Fed: Another consideration of diversity which has come to issue is that of racial diversity. As part of the uprisings of last spring, there were calls for racial quotas on students and the like. Do you support this type of move?

JM: Currently, Columbia's racial diversity is second in the world to

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B-School

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third of their courses outside of Wharton which include courses similar to Columbia's core.

Many students study economics because they perceive it to be closely related to business. Teresa Saputo, CC '87, who went through a training program at Manufacturer's Hanover, wanted to learn more about the economy. She was thankful of her choice when she met trainees in her program who had difficulties at first because they had never drawn a supply or demand curve.

Oliver Atler who teaches Macroeconomics at Columbia and who studied at the London School of Economics says that economics teaches analytical ways of thinking. He says that economics is one of the few social sciences that "tries to apply scientific methods in analyzing part of society"—the business and economic world.

Jeff Kalish, on the other hand, a trader at Drexel Burnham who graduated from Columbia in '85 was not an economics major. He studied history, but took introductory economics courses, accounting, and statistics. Kalish says that those classes were not necessary because "unless one is entering a specific field such as accounting or engineering, the major studied or classes taken are not a concern. Most corporations place their new employees in programs, lasting from five weeks to half a year, that teach everything that is needed to know."

So what exactly are recruiters [illegible] looking for? Pat O'Shea, a recruiter for Salomon Brothers' Sales and Trading [illegible] program says they are not looking for any particular major. He says "it could be Chinese History or Astrophysics." He jokingly says, "one or the other, but only those two." At Salomon Brothers, like many other companies, college graduates are placed in training programs to learn about how the business operates; the trainee studies the economy, the Federal Reserve Bank, Corporate Finance, and so on.

Therefore, most recruiters, O'Shea continues, are looking for potential, intellectual maturity, and an ability to think critically.

Robert Pollack, Dean of Columbia College, concurs that such qualities are the hallmarks of a liberal arts education that one gains at an institution like Columbia. He notes firmly that Columbia is not a professional school but the four years of liberal arts education it offers is excellent preparation for a future career.

Steve [illegible] summarizes, "I liked the fact that I went to an Ivy League school, met smart, diverse people and was able to enter a rewarding [illegible]."

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Columbia's Identity Crisis

General editorials are passed by a majority of the Board of Editors

Nationally, Columbia has received a great deal of negative press in the past year. Examples abound: the admissions variance issue, the *U.S. News and World Report* listing of Columbia as eighteenth among American colleges and universities; this is only to mention the most recent cases. Surely the entire racial incident last year could have been handled such that the nation would not have been left so deprived of information that it began to believe that Columbia is a discriminatory institution.

Does the public realize that Columbia is among the premier institutions of higher learning in the nation? Who, beyond the gates of our campus, knows that I.I. Rabi taught here, Milton Freedman was here, that Dwight Eisenhower was President of the University before becoming President of the United States? The list goes on; there are international figures here today—undergraduates can take a course with Zbigniew Brzezinski. Everyone who has ever received a Pulitzer Prize, received it in Low Rotunda.

As for some of our recent scandals, the admissions variance issue was dealt with in irresponsible manner. Columbia University students should have been informed of the variance system and its implications in detail by school officials; many found out about the variance from the *New York Times*. The situation had already been sensationalized before Columbia noted that other Ivy League schools were admitting student-athletes with the same academic credentials as ours and that the standards for admission were not in fact lowered as we read in the *New York Times* and elsewhere; we simply set goals for ourselves in the number of students admitted under the Academic Index—goals, not requirements. Columbia committed no wrong, changed no policy, yet in the public eye Columbia was on the defensive.

Regarding the *U.S. News and World Report* ranking, an official statement should have been released, rather than an irate letter from a dean—such a letter would not have been a consideration if a formal policy for dealing with such situations existed. Such a policy statement from the College might have compared the competitiveness of the schools placed above us, the acceptance rates to top graduate schools, the sorts of jobs graduates have accepted; factors not taken into account by the magazine in determining rankings. The *U.S. News* article had no quantitative measures of the strength of the schools it listed; Columbia should have provided that information.

There is a fundamental problem getting the word out. How we are seen in the public eye directly affects applications to the school, financial contributions to the school, and respect focused toward the school. This is the work of public relations; a department which should coordinate a consistent University policy with regard to such potentially volatile situations. There is an Office of Public Relations in Low Library. Yet when a campus newspaper attempts to obtain an interview with the Director of Public Relations, it is turned down. An ironic case in point: given a chance to offer reasons to the campus for what appears to be a genuine public relations problem, the Public Relations Office does not.

Thus we are back where we started. Because of a lack of positive information getting out to the public, indeed to the students and faculty, we are all left with the negative half-truths, knowing we are part of a fine institution but wondering if anyone else knows.

Greek Rights

BY NATHAN NEBEKER

Last week, a proposal was brought before the Student Affairs Committee to prohibit single sex fraternities on campus. This motion is an ignorant attempt to remedy a non-existent problem in an ineffective way.

At present, there exist twelve male, single sex fraternities on campus, as well as one colony. There are six co-ed fraternities and threes they may be called. Roughly fifteen percent of the undergraduate population is affiliated with a fraternity or sorority.

The point here is that presently there exists adequate choice for any student to find what he or she is seeking in the greek system. There are a number of different houses which provide for enough diversity for men and women seeking to join a greek organization. Furthermore, there exists the option to remain a non-affiliate. Thus, there is no need for change.

Furthermore, Tom Kamber and Vena Sud, the proponents of the bill, are in a fully unqualified position to make such a recommendation.

One is a Barnard student, attending a school which both puts almost self-defeating emphasis on the single-sex experience, as well as prohibiting any greek organizations from being chartered there. Though students at Barnard are free to join any of the available institutions, and often do, this particular student has not opted to do so.

The other is a Columbia student who is a non-affiliate, and thus also has no internal experience with fraternities.

It is not so important that these people are outsiders to the greek system, but moreso that they apparently without adequate grounds on which to attack the system.

It is important to note that Mr. Kamber did call for a forum on the issue, (while using threat of unsolicited imposition as a motivator) thus addressing his ignorance on the topic. Yet it is unclear what served as the original motivation for such a displaced act.

There does exist the Educational Amendments of 1972, which, under Title 9, prohibit sexist discrimination in Universities as private institutions which receive Federal funds.

One might think that under Title 9, it is prohibited to eliminate single sex fraternities, as they openly and admittedly discriminate on sex. However, fraternities and sororities are [illegible] this statute by over one hundred [illegible] and are equally [illegible] excluded from it. Thus any valid arguments must lie elsewhere.

There was the precedent set at Princeton when the dining clubs were forced to go coeducational. However, there are very important differences between the greek system at Columbia and the club system at Princeton.

The Princeton board plan covers students for only their freshman and sophomore year. None of the dormitory rooms are equipped with kitchens. As the clubs provide individual food services, the overwhelming option for Princeton students is to join one of the clubs in order to eat. They are all but forced to join. Since their enrollment is so integral, the school attempted to force all of the clubs to become coeducational.

Perhaps the most significant consideration is the fact that such a move would be a serious infringement on the rights of those who prefer single sex organizations.

Not all of them have made the conversion. There exist two with long single-sex traditions who are fighting to remain as such. At this point, they argue, adequate choice exists.

More important than Princeton, there is the counter-example of Amherst. There, the greek system was forced to go coeducational. Because of such disruption to many of the organizations, both informal and with their national charter, the greek system was abolished. Many organizations continue to exist on a clandestine status, but it is clear that the current situation there is much worse than if it had been left alone from the start.

It must further be considered that these organizations are not under the auspices of the University alone. They all are chapters of national organizations, and must answer to them as well. For example, ΑΔΦ, who independently opted to go coeducational, is part of a national organization which is single sex. They have been put under serious pressure from their national organization to revert to single sex.

If all fraternities or sororities were forced to go coeducational, they would potentially be disassociated from their national, and be forced to exist as an independent club. While this move happened successfully at Harvard, with social clubs rising from the ashes of greek national organizations, such as the Alpha club, which was one offshoot of the ΑΔΦ chapter there, it is doubtful that the same would happen at Columbia.

When the greek system was abolished at Harvard, it was in a different era, where the existing organizations had enough support to continue on as independents. Most

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Censorship of Student Press

EDITORS' NOTE: The Supreme Court recently decided a case--Hazelwood School District v. Kuhlmeier--*that many say will have important and potentially far-reaching implications for American education. The decision has, very clearly, sparked a great deal of controversy across the nation and here on the Columbia campus. Below,* The Fed *offers two differing opinions on the decision.*

PRO:

BY MIKE BLOCK

The importance of our right to free speech and press compels us to take strong interest in each case which might limit those rights. In *Hazelwood School District v. Kuhlmeier* many see a threat to the freedom of school newspapers to exercise their First Amendment rights.

Hazelwood East High School Principal Robert Reynolds deleted two pages of the Journalism II class paper, *Spectrum*, that contained an article about the experiences of pregnant teenagers and an article about a student's divorced parents. He withheld the articles on the grounds that the pregnancy article would infringe on the privacy of the pregnant teenagers, and that the divorced parents did not have the opportunity to respond to or approve the publication of negative statements made about them. The case centers on whether the students could publish the article regardless of school objections.

The Court of Appeals for the Eighth Circuit held in favor of the students, reversing the District Court ruling that "school officials may impose restraints on students' speech in activities that are an integral part of the school's educational function--including the publication of a school-sponsored newspaper by a journalism class--so long as their decision has a substantial and reasonable basis."

The Court of Appeals held that the paper was a public forum, a status which precludes school officials from censoring the contents of the paper. The Supreme Court subsequently reversed the Court of Appeals decision in favor of the school officials. The Supreme Court determined that *Spectrum* was not a public forum nor was it ever intended to be, and that the officials acted reasonably and with legitimate pedagogical concern in censoring the paper.

It is clear that *Spectrum* was intended to provide a laboratory example for the Journalism II students as part of the Hazelwood East curriculum, not to [illegible]. Had Principal Reynolds opened the school facilities to be used for purposes other than purely educational ones, then *Spectrum* could be regarded as a public forum.

However, "School officials did not deviate in practice from their policy that production of *Spectrum* was to be part of the educational curriculum and a regular classroom activity."

In any journalism class one must learn to write effectively about a subject

Since Spectrum was slated as a classroom activity, Reynolds had the right to edit the paper, just as a teacher who corrects the grammar of a research paper before posting it on a bulletin board.

without invading another's privacy in the process. Also, people should have an opportunity to respond to sharp criticisms so that they can offer their side of the story. In censoring the *Spectrum*, Reynolds acted as any professional editor would; he restricted the elements which demonstrated poor journalism. The testimony of Martin Duggan, a former editorial page editor of the *St. Louis Globe Democrat*, and a former college journalism instructor and newspaper adviser, supported the necessity of Reynolds' action. Duggan testified that the articles did not meet journalistic standards of fairness. Therefore Reynolds was entirely justified (from a journalistic standpoint) in editing the paper.

Reynolds' action served an educational purpose in that students would learn what is appropriate for a paper and what falls outside the boundaries of fair journalism. Since *Spectrum* was slated as a classroom activity, Reynolds had the right to edit the paper, just as a teacher who corrects the grammar of a research paper before posting it on a bulletin board.

Reynolds may have erred by informing the newspaper staff of his objections after the deletions, but in no way does this deprive him of the right, as a school official, to censor a newspaper that is school-sponsored on legitimate and reasonable pedagogical grounds. *Spectrum*, a part of the school curriculum, does not exclude itself from the supervision of any school official or inherit special rights of free speech because the subject matter of the Journalism II class includes the principle of free speech. As the Supreme Court stated, "A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity."

In broader terms the Court held that "A school need not tolerate student speech that is inconsistent with the educational mission, even though the government could not censor similar speech outside the school." This complements past decisions handed down by the Court, as in *Bethel School District No. 403 v. Fraser*, where the

continued on page [illegible]

CON:

BY ANNE C. HAYES

The school principals won this round. Public school students--and the First Amendment--lost. On January 13, the Supreme Court announced its decision in *Hazelwood School District v. Kuhlmeier*. The case abandoned legal precedent and granted new and broad rights to public school administrators at the expense of the students who are enrolled to receive an education. This is quite an education indeed.

Students in the Hazelwood School District learned that their principal had the right to delete two entire pages of the school-sponsored newspaper, *Spectrum*, because he found two of the six articles on those pages "inappropriate [and] sensitive."

Principal Reynolds had not consulted with the student editors of *Spectrum* or with the acting advisor. But he found the articles, one on pregnant students in the school, the other on divorce, unsuitable. They had to go; he did not think there was enough time for them to be rewritten nor did he think of any way to save the "suitable" articles on the pages.

Supreme Court Justice William Brennan, called this "brutal censorship." He was joined in dissent from the opinion by Justices Thurgood Marshall and Harry Blackmun.

Brennan wrote, "Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees."

The majority opinion, written by Justice Byron White, argues that school officials were entitled to regulate the contents of *Spectrum* as a part of the school's curriculum--the paper was written and edited by the Journalism II class. The opinion explains that administrators have the power to ensure that students learn what they are taught

to, to prevent other students from being exposed to material inappropriate for their level of maturity, and to guarantee that the views of the student are not erroneously attributed to the school.

A principal may therefore censor student speech, according to the majority opinion, if it is "inconsistent with the school's basic educational mission" or not "reasonably related to legitimate pedagogical concerns" or "associates the school with any position other than neutrality on matters of political controversy."

The majority opinion fails to define "basic educational mission" or "legitimate pedagogical concerns." And what exactly is political neutrality? School principals could do anything under these guidelines, and that possibility frightens the dissenters.

The dissent strongly criticizes the majority on the application of precedent. Nineteen years ago, the Supreme Court gave public school students "The Law" in *Tinker v. Des Moines Independent School District*. Decided in 1969, *Tinker* upheld the rights of three public school students to wear black armbands to school in protest of the Vietnam war.

The students had been suspended for their silent protest, but the Court ruled that neither students nor teachers "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate." Budding high school journalists have been rallying around *Tinker* since then. Now they learn that they were wrong.

The majority claims that they are not abandoning *Tinker*; the facts are different, they say. They are, however, ignoring it, and *Tinker* is not such an easily ignored case. It is founded on strong legal precedent linking the Constitution to public school students. The Court had ruled, in an important 1943 case striking down a law that compelled students to salute the flag, that the Constitution was a document for the students to use as well as to learn. "Educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle

[School administrators] also have a responsibility to act within the bounds of the Constitution. Principal Reynolds exercised the sledge-hammer approach to curriculum oversight.

the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Legal tradition allows the government to regulate private property affected with a public interest. *Hazelwood* turns that [illegible] inside out. It allows a public industry, [illegible]

PRO

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rights of students in public schools "are not automatically coextensive with the rights of adults in other settings." Simply put, this means that students producing a paper as part of a public school curriculum or activity do not enjoy the same freedoms as city editors, or even students who produce a paper outside the curriculum of the school.

Those who believe that the decision is the foundation of an Orwellian state should allay their fears. This decision includes only those school newspapers which are produced as a part of a school curriculum. The school officials at Hazelwood East concerned themselves merely with the education a handful of students in a journalism class. The officials believed, and reasonably so, that this education had gone slightly astray. The correction made by Reynolds helped fulfill an educational mission, and should not be interpreted as any type of infringement on First Amendment rights.

CON

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education, to be affected with a private interest--a principal's personal disapproval of articles in a school newspaper.

Spectrum was a regular classroom activity, and school administrators do have a right to control regular classroom activities. But they also have a responsibility to act within the bounds of the Constitution. Principal Reynolds exercised the sledgehammer approach to curriculum oversight. Exceptions do exist given the special circumstances of a school, and a students' rights are not always coextensive with those of adults. *Tinker* established that a student's exercise of First Amendment rights could only be limited if the speech would "materially and substantially interfere with the requirements of appropriate discipline in the school." Principals would have to make decisions based on forecasts of possible disruption.

The "material and substantial interference" test of the last 19 years was effective not because it forced school administrators to make forecasts, but because it forced them to not make forecasts. Forecasts were easily disputable and now open to litigation, which meant regulation by the courts. To avoid this, school administrators more frequently adopted "wait and see" policies, knowing that if the action proved disruptive, the courts would uphold them in their restriction of the action.

Principal Reynolds did not wait. The Supreme Court said he did not have to. The Court of Appeals below the Supreme Court had upheld the rights of the students. They found that if people had people sued the school about the articles, the school would have been innocent.

Principal Reynolds said that he wanted to teach the students a lesson about journalistic responsibility. So he told them--after they had seen the shortened paper--that the articles were "too sensitive" for young students and "inappropriate, personal, sensitive and unsuitable for the newspaper." This is hardly a clear lesson.

The decision allows educators to censor "potentially sensitive topics." Like not teaching Sex Education because "it could give them (students) ideas." These are students who could get pregnant, who could get sexually transmitted diseases, whose parents could get divorced. These are issues that affect them directly. And they have a right to make their views known, even to have them sponsored by the school.

It remains to be seen how the lower courts will use the decision. They could say that a school allowing students to wear green ribbons in support of a nuclear freeze implies school support of the idea. The school must remain politically neutral, the logic says, and it may, therefore, ban green ribbons. An easy trashing of *Tinker*. And a terrible trashing of the Constitution.

The lower courts may also choose to largely ignore *Hazelwood* in favor of *Tinker*. They will hopefully remember that schools exist to produce active

citizens, versed in more than just reading, writing, and arithmetic.

The purpose of the schools is to instill knowledge and therefore order and control, not the other way around. If order comes first, it can become too important in the eyes of the administration, and good teaching will be ignored in favor of strict discipline.

The lower courts will hopefully not lose sight of the real "basic educational mission"--producing competent citizens. *Hazelwood* sanctions contempt for students' thoughts, possibilities, and rights. *Tinker* could have been extended to this case. *Tinker* is good law: it works. And if it ain't broke, don't fix it.

McMenamin

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Stanford. They are at about 29% combining Hispanic, Asian, American Indian, Latin and Black students. The next in the most selective private institution category is us. We have in excess of 8% Black students, almost 7% Hispanic students, and about 11% Asian students.

Our percentages could be higher if we admitted the same number of students but had a better yield. This is especially true with the academically strong Black and Hispanic students who we admit. These students are very heavily recruited, but our yield is lower with Black and Hispanic candidates than for the entire pool, which gives you an idea of the demand for these types of students.

We have no quotas. That is not the way we conduct admissions. Rather, we look for desirable minority students and recruit them. This year, we have big increases in those pools. We would like to have more of everybody, but you are always dealing with the limits of 100%.

Fed: So Columbia does have a picture of what the ideal make-up of an admitted class would be?

JM: Not necessarily. We are always trying to outdo the previous year in these endeavors, but you face trade-offs. If we have a great year in California and New York, we are going to have fewer students from New England, the South and the Midwest. We are always striving to have a better yield with Black, Asian and Hispanic students, but we do not try to raise the numbers by softening admission standards.

We would like to do better in terms of ethnic diversity, but we have no fixed goals in mind. If we were trying to peg everything to, say, national population breakdown, we would find we are way over-represented with Asian students. But I am not going to touch that.

Fed: Given the high demand for qualified Black students, does that make it an advantage in terms of being admitted to be Black?

JM: It is an advantage to have a strong person and academic record featured in one's application. It would be a mistake and generalization to say that being Black is an advantage.

Fed: Not to imply that Columbia admits anyone based on secondary characteristics, that is, that Columbia admits any Black student simply because they are Black, but given a student who is qualified and Black as well, does that become an advantage?

JM: Yes, that can be an advantage.

Fed: On the converse, is it a disadvantage to have a cultural profile that is perhaps over-represented? That is, if one is applying as, say, a Jewish student from the New York area, would he or she be at a disadvantage?

JM: No. We do not guess on anyone's ethnicity. I do not think that there are people who apply from New York who are discriminated against because of their origin. It is an age old question: "Am I screwed because I am from Long Island in Columbia's pool, or in Brown's or Yale's pool?" The feeling of admissions officers is that if you are a strong candidate, you are going to get in regardless of where you are from.

If you fall in a grey area and look like a lot of other candidates, then subjective areas that the admissions office feels will contribute to campus vitality become important. In the areas of tie-breakers, there will be students who will appear to be more interesting.

New York itself offers an incredible range of diversity in the type of people here. It is a dangerous fallacy to measure diversity in terms of address.

Fed: What projections do you have for Columbia's future? Do you see a future portrait of the school?

JM: I am excited about Shapiro Hall, the theater and music practice room. I am looking forward to continued growth in the performing arts areas. I am a little stunned that we continue to have increases in admissions despite what the national demographics telling us it shouldn't be happening. I see the College continuing to draw well. It is possible that we will begin to level off in terms of total applications, but I see our popularity continuing to grow. I think we are going to see increases in the yield, which is, along with total applications, the most important statistic.

Fed: Right now you see us competing primarily with Brown and Dartmouth. Do you think that Columbia will be competing more so with Harvard, Yale, Stanford and Princeton, or do you see us as finding a niche lower down?

JM: We already have seen increasing overlap, that is the number of students who have been admitted to both Columbia and one or more of those others, every year. That is a good thing, but it can be a mistake to peg our existence to how we are doing with respect to those four schools. I think our market is a bit different. We stand apart from the League in the kind of diversity we have, the kind of curriculum offered, and the urban setting. I am looking for us to stand more on our own, to do well with most of the League, but not compete directly with those schools. We are not really designed for that, considering that we are a fundamentally different type of school.

Fed: What do you see for your own future?

JM: When I first came to Columbia, my initial plan was to stay here for five years. This is my seventh year now, and I have no immediate plans to leave. I am enjoying what I am doing here. We seem to be able to build the previous year, which is fun. I have no career track outside for other positions. I have turned down a number of feelers for other positions. I feel like I have reached my career best and I feel good about being at Columbia.

Greek Rights

Continued from page 4

institutions at Columbia would be forced to fold without support and identity from their national. Such a move would thus end up narrowing the available choices instead of widening them.

The question remains as to what the motivation could possibly be for the introduction of such a move. Surely, it is not a result of student dissatisfaction with the current system. It strains the imagination to consider there have been complaints of women who really wanted to join one of the more notorious all male fraternities, such as Fiji, ΣΧ, ΒΘΠ, or ΚΑΡ. The ostensibly male character of these organizations do not make membership enticing to many women.

Another argument that could perhaps be presented is that these organizations, according to some, have a reputation for sexism. It would presumably improve this situation if women were forced to join them. The membership of women in the inner ranks would presumably enlighten and liberalize the alleged sexist views of their members.

The reputation of these more male fraternities is well publicized. If some female student is not aware of the nature of one of these organizations, it takes scarcely 30 seconds in a party to discern such.

Women know what sorts of sexism they are dealing with, and how to avoid it or entice it, depending on the individual. If women were forced to join, they would more than likely face significant resentment of invasion, and not be happy members. Thus it is not the case that either there exists a problem or that the proposal is a remedy.

Perhaps the most significant consideration is the fact that such a move would be a serious infringement on the rights of those who *prefer* single sex organizations. It would destroy the confidentiality candid atmosphere, and common ground of the all-female institutions. It would also destroy that animalistic, decadent male bonding thing of an all male fraternity, which purportedly, some enjoy.

Clearly, this proposal is not a response to a presented problem, but rather the naïve postulation of outsiders in the name of inappropriate "justice". It is imperative that, by whatever means deemed appropriate, it is stopped immediately before those with power but without knowledge begin to want to assert themselves.

Drake Manuscript at Pierpont Morgan

BY STEPHEN F. LATER

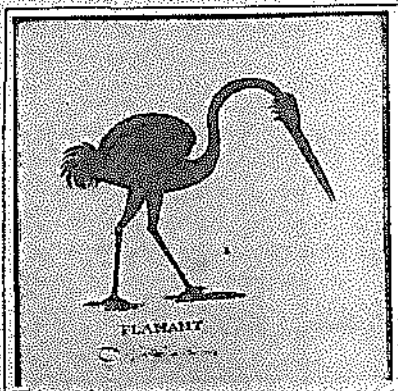
"Sir Francis Drake and the Age of Discovery" at the Pierpont Morgan Library is a rather light exhibition of books, prints, and instruments from the late sixteenth century. Central to the show, however, is the *Histoire Naturelle des Indes*, commonly referred to as the "Drake Manuscript."

The "Drake Manuscript" was created by an unknown member of the Drake contingent during the 1577-1587 Caribbean voyages. The manuscript has only recently come to light; written circa 1590, it was discovered in 1867 in London and was bequeathed to the Morgan Library in 1983 by Mrs. Clara Peck, who acquired it in 1947. This represents a unique chance to view the manuscript in its entirety as it represents a unique aspect of our heritage.

The Drake Manuscript may be perceived as a guide to the New World with the intent of promoting of English settlement. The *Histoire Naturelle des Indes* gives the viewer and scholar a rare glimpse at the New World in its late sixteenth century innocence. The work depicts native flora, fauna, and indigenous Indian population.

In essence, an early "intelligence report," the Drake Manuscript contains guidelines for subjects of Queen Elizabeth attempting to establish a settlement in an area much controlled by Spain. Of the *Histoire Naturelle des Indes*, Verlyn Klinkenborg, the show's guest curator, says that although "the drawings are often naïve...they have a rude vigor and together with their captions they form the rarest of discoveries--a new window on a new world."

"Sir Francis Drake and the Age of Discovery," running through May 1, 1988, will not exhaust one's intellectual curiosity, yet provides a pleasurable glimpse into this Land of Ours as it appeared to Drake and his crew more than 400 years ago.



"Flamant" from the *Histoire Naturelle des Indes*. This is clearly a flamingo, colored a brilliant red. The author explains that the flesh of the bird is "good eating."

Photo courtesy of the Pierpont Morgan Library.

"Hinde de Loranbec" from the *Histoire Naturelle des Indes*. The artist explains that the Indians of the Loranbec are found between Florida and Terra Nuova. They dress in skins, are warlike, and Sir Francis Drake led an attack on them in 1586.

the

Federalist Paper

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DEPARTMENTS

Fraternities Under Fire

BY BEN FROMMER

The controversy began over a week ago when University Senator Tom Kamber, CC '89, made a seemingly simple request for thirty dollars to put up posters to advertise an open forum about Columbia's fraternity system. What seemed to Kamber to be only "one of the issues that periodically arises on campus" has since escalated into trench warfare fought on the pages of Columbia's newspapers.

On February 11th, Kamber asked the Columbia College Student Council for the funds to advertise an "open forum" to discuss whether the school should force the twelve all-male fraternities (plus one colony), and three sororities on campus to become coeducational. The council members found the request trivial, and refused the funds. Kamber then went to the University Senate and received the money.

When the *Spectator* reported the story, it became a campus-wide controversy. On one side are Kamber, Veena Sud, BC '89, and others who seek a forum to debate a restructuring of the Columbia fraternity system. On the other side are the fraternities, and students who find little fault with the current system.

The main reaction from students seemed to be one of surprise. Maia Rubin, CC '91, explained, "It bewildered everyone. No one I know has ever had a problem with the fraternities, and we could not understand why they [Kamber and Sud] were even bothered." Most students, although aware of the proposal, are in the dark as to why it was proposed. It has been suggested by some that the move may be merely political on Kamber's part. He responded, "I'm not just making an issue of it, there are really some legitimate grievances here."

Kamber insisted that "his mind is not made up on the issue." He mentioned, however, the complaints many sudents have about the current fraternity system. First, he argued that the fraternity system discriminates against women in regard to housing. "There are no sorority houses on campus, and almost all of the fraternity houses are all male. The fraternities have some of the best houses on campus, and women can't live there," Kamber said.

Adam Klotz, CC '89, President of the Intra-Fraternity Council (IFC) termed Kamber's complaint on housing as "silly." "After all, three of the largest houses, Fiji, Sigma Chi, and Beta, are privately owned, and none of the houses are part of the lottery system. The fraternities offer the only all-male housing outside of suites on the Columbia campus after freshman year," Klotz responded.

Furthermore, Kamber emphatically stated that "fraternities help males gain business contacts and thus leave women out." Klotz responded, "fraternities do not exist for business contacts; that is a misconception on Kamber's part. Any contacts that do occur are merely secondary. I could understand his concern if we went to a school at which a majority of students were fraternity members, but at Columbia the number is only fifteen percent, and therefore almost all such contacts must occur outside the fraternity. Also, I can assure you fraternities do not look for people

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Equipment at the CTV studio

CTV: In the Dark

BY ADAM TOLCHINSKY

Columbia Television(CTV) is Columbia University's student-run television station. Operating on channels 16 and 17 of local cable television, CTV has the potential to reach an enormous number of students. However, many Columbia students either do not know of the station's existence or its broadcast schedule.

Presently, CTV broadcasts five weekly, half-hour shows. Of the five, two are devoted exclusively to the arts. "Columbia Today," said Budget Manager and the show's producer Shana Schiffman, BC '89, is a show about "what's going on around campus in the art scene." This show focuses primarily on student artists and often airs interviews with them. The other arts show, "Frank," includes non-Columbia artists. Additionally, CTV presents "Alternate Currents," a weekly half-hour of live music. According to Schiffman, the show ranges from "Jazz to New Music to Punk," and last year managed to present rap group Run-D.M.C.

CTV also airs a sports show, "The Front Line," which serves as a wrap-up of the week's campus sporting events. A camera crew is sent to various Columbia games. However, CTV can't broadcast live because of "inadequate equipment," according to Schiffman.

Many students believe that the Columbia community would be greatly served by live coverage of Columbia athletic events. Lee Feldman, CC '89, said, "The live broadcasting of Columbia sports would attract a great number of new viewers to CTV and would increase student involvement in the station. It would also generate increased campus support of programs that have been suffering in recent years, such as football and basketball."

"Soap on a Rope" is CTV's weekly soap opera, featuring Columbia student actors. This show appears to be generating some campus interest. As David Kanefsky, CC '87, Law '90 said, "They look like they're having fun out there. It shows great student energy and deals with concerns of today."

However, many students don't feel that CTV is accomplishing all it can do. Said Esther Rosenfeld, BC '89, "They [CTV] should cover general campus issues more comprehensively [and] should be a more prominent presence in the Columbia community." Added Jacob Nemetz, CC '89, "I would be interested in seeing a weekly news show focusing on campus issues--kind of a video *Spectator* or *Federalist Paper*."

Recently, CTV has made attempts at reaching a larger Columbia audience. Schiffman agreed that student awareness of the station may be low and says that "more postering" will take place to inform students of upcoming CTV events. Last semester, the station aired a special show on the Columbia Kingsmen, "All the Kings Men," described in publicity posters as "a lighthearted look at those guys who sing." CTV has also broadcast a live performance of The Special Guests, a band with a rather large cult following on campus.

Schiffman agreed that CTV needs "more programming," and cited the need for "more money" as a "main problem." Station Manager Celeste Ganderson, BC

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WHERE'S PETER CANELLOS WHEN WE REALLY NEED HIM?

From *Time* magazine comes the news that Rose Mofford, current Governor of Arizona (following the impeachment of Evan Meecham), is presiding illegally. It seems that a junior high school class, studying their state constitution, found that only a "male person" may occupy the office of Governor. After an appearance by one hundred students before an Arizona house committee, a referendum to amend the constitution is expected to appear on the November ballot.

OUCH!

From *Fortune* magazine comes our quotation of the month:

"The shoemaker's children don't get any shoes."

- Fred Westheimer
Assistant Vice President,
Citibank,
husband of sexologist Dr. Ruth

QUANTITATIVELY SPEAKING...

Total number of days spent by presidential candidates in Iowa since March 1985: 544

Amount the Republican Party raised in 1985 and 1986 for every $1 raised by the Democratic Party: $4.86

In the first six months of 1987: $3.60

Percentage of high school students who say the telephone was invented after 1950: 10

Percentage who cannot name the region of the country William Faulkner wrote about: 67

Percentage change in Ku Klux Klan membership since 1980: -50

Expert witnesses listed in the *Lawyer's Desk Reference* in 1970: 500

Today: 3,500

Amount lawyers spent advertising on TV in 1986: $47,000,000

Percentage of doctors who say it is not unethical to refuse care to an AIDS patient: 27

Reported cases of rectal gonorrhea in San Francisco in 1980: 5,098

In 1986: 390

Tuition for a week at the Dollars ¢ Sense management camp for teenagers in Florida: $600

Number of people who listen to the Watergate tapes at the National Archives in an average week: 12

Total number of hours the Grateful Dead has played "Dark Star" in concert: 46

Percentage decrease in the number of people arrested for the possession of marijuana in 1986: 20

Percentage change, since 1977, in per capita consumption of white bread: -30

Rank of Israel, Saudi Arabia, and the United States in per capita consumption of poultry: 1, 2, 3

Black market price of ten pounds of lean meat in Romania (in cartons of Kent cigarettes): 1

Liters of vodka drunk in the Soviet Union in 1984: 2,577,000,000

In 1986: 1,386,000,000

Wild turkeys in the United States in 1940: 20,000

Today: 2,500,000

Amount paid at auction for the hunting permit to kill one bighorn sheep in Montana in 1987: $109,000

Price of a .44 Magnum pistol issued to commemorate the Constitution's anniversary: $1,295

Price of a leather filoFax insert to hold condoms: $34

New uses for Velcro suggested each week by the public to Velcro USA: 4

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Veritas non Erubiscit

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Letters

DSA Funding Flap

To the Editors:

I am writing this letter in response to Eric A. Prager's article, "Campus Democratic Socialists: SGA Funding Questioned," dated 8 February 1988. This article was based on a conversation with Mr. Prager in which he questioned me about a brochure published by Barnard-Columbia DSA [Democratic Socialists of America].

During this conversation, I admitted that I had not seen the brochure and that if the statements in the brochure concerning participation in the Jackson campaign were valid, Barnard recognition would be revoked. Had Mr. Prager followed up on the issue (or called me the next day) he would have discovered that I met with DSA President, Andrea Miller, and resolved the situation. BC-DSA had nothing to do with the publication of the brochure which was done by the Youth Section of the DSA. Furthermore, Ms. Miller stated in a letter to me that "BC-DSA is not obligated to nor does it intend to endorses any political candidate."

To remedy the situation, the club's budget was frozen until new brochures were produced, the original brochures were destroyed, and a letter stating that the club is not affiliated with nor in support of any local or national political party was submitted to SGA. Ms. Miller addressed these requests immediately, the problem was resolved and BC-DSA's recognition is now restored.

Doris Herzfeld, BC '89
V.P. for Student Activities, SGA

Mr. Prager responds:

I am pleased to see that prompt action was taken by SGA to remedy a rather confused situation. Enforcement of the SGA Constitution serves to strengthen it.

Regarding follow-up, as you now know, I called you to follow up my article *prior* to receipt of your letter. The primary concern of *The Fed* has always been and will continue to be thorough and fair coverage of news.

To the Editors:

I was both surprised and angered by the 8 February 1988 article regarding the funding of the Barnard-Columbia DSA.

When I spoke to the reporter, I made it clear that if he had any understanding about the nature of DSA, BC-DSA was not in violation of SGA regulations. The most important aspect of DSA is its belief in democratic socialism (a fact that should be evident from the name). As I stated on the phone, DSA is not a "party line" organization that requires or demands its membership to participate in every educational or political arena.

The issue of the National DSA (Adult section that it was) endorsing Jackson for president is included in that. More importantly, the Youth Section of DSA does not endorse Jackson for president. And above all, BC-DSA is not obligated to nor does it intend to endorse any political candidate. Therefore, if more homework had been done on DSA, far different conclusions would have been reached than those alluded to in the article.

In addition, because the brochure was produced by the National Youth Section (not BC-DSA or a "Columbia University DSA" as is stated in the article) the brochure was designed to be as comprehensive as possible in explaining the entire scope of the Youth Section, not just BC-DSA. From the rest of the brochure, that should have been clear. On the off-chance that more clarification was needed, and for the benefit of students in and interested in BC-DSA, Columbia-specific brochures were made and the old brochures not used.

The reason that "the support of political candidates was not mentioned under the heading of the Annual Winter Conference" is that it has no reason to be. The Winter Conference is an educational outreach conference and BC-DSA does not support any political candidate. Enough said here.

It was comforting to note that I was quoted once for my half-hour conversation with the author. However, the quote was ironically out of context. The quote "the brochure is misleading" was said following a discussion about DSA as I mentioned earlier in this letter, and was made on the basis that if a person had not bothered to learn about DSA or fully read the brochure then perhaps it was misleading.

I maintained, and still maintain, that BC-DSA is involved in educational work and non-partisan single issue politics.

Sincerely,
Andrea Miller, CC '89
Representative of BC-DSA

Mr. Prager responds:

My article, "Campus Democratic Socialists: SGA Funding Questioned," implies no conclusions. It is a news piece. Here is the news:

- BC-DSA hosted a conference of the national Youth Section;
- BC-DSA received funding from Barnard for this purpose;
- the brochures for this conference define "Who We Are" in terms of (among other things) support of the Jackson campaign;
- if accurate, this would violate the SGA Constitution, resulting in a revocation of BC-DSA recognition;
- at press time the issue was not resolved between SGA and BC-DSA (this was noted in the article).

SGA found the brochures (in their original form) to constitute a problem. After having frozen the budget of BC-DSA pending resolution of the issue, SGA ordered the brochures reprinted. End of story. No conclusion offered. What conclusion might one infer? If you break the rules, you will be held accountable; if you do not break the rules, you have nothing to worry about.

Rhodes Scholarships:

Columbia Suffers a Reversal

BY K. ELIZABETH WEIR

The Rhodes Scholarship fulfills every ambitious college student's desire for recognition as an outstanding person in intellect and character. When asked what makes a successful applicant, Dean Blake Thurman, campus coordinator for the Rhodes Scholarship, replied, "excellence". Despite the potential at Columbia University, no Columbia students were elected Rhodes Scholars this year.

"Until Columbia can capture a portion of the valuable fellowships each year, the university cannot afford to be complacent," said Judith Oh, CC '90, echoing the feelings of many students.

A large number of the Rhodes Scholars for 1988 hail from Harvard and Princeton, but Columbia failed to win even one of the 32 scholarships offered to Americans every year. In spite of Columbia's rigorous liberal arts curriculum and able student body, the University consistently falls behind other Ivy League schools in the number of recipients of this prestigious scholarship.

Harvard University students won ten of the scholarships, almost one-third of all Rhodes Scholarships awarded in the past year. This impressive coup must be attributed in part to the central scholarship office, formed by Harvard to inform all students in the University of available fellowships. Because the office serves the entire student body, Harvard can garner applications from undergraduates and graduate students since students between the ages of 18 and 24 are eligible for Rhodes Scholarships.

However, Columbia continues to rely on separate campus representatives for different scholarships. Dean Thurman, the campus representative for the Rhodes Scholarship, is also the pre-law and pre-business advisor for undergraduates and thus, is unable to devote a large portion of his time to assisting Columbia students in winning

Dean Blake Thurman

scholarships. Dean Thurman, therefore, focuses his recruiting on Columbia College, while schools such as Harvard are able to cast a much wider net.

The Rhodes Office received 108 applicants from Harvard, 65 from Yale(which also uses a central fellowship office), but only 10 Columbia students applied for the Scholarship. Dean Thurman offers an interesting explanation for Columbia's low number of applicants: perhaps, Columbia students underrate themselves. With the recent low ratings by *U.S. News and World Report*, Columbia has been placed in the 'second tier' of the Ivy League and thus, students are more reluctant to compete for the more prestigious scholarships than students at the well-ranked Ivies. Because low applicant numbers mean a low number of Scholars, Columbia could compete on a more equal basis for the Rhodes Scholarship if more students applied, both from the College and from the other schools within the University.

According to the Rhodes Office, Harvard, Yale, and Princeton have each won well over 150 scholarships since the program's founding in 1908. Columbia has won only 15 scholarships. The disparity has increased in recent years as Harvard and Yale have actively solicited application using their centralized scholarship offices.

Oh stated, "Perhaps if the University formed a centralized bureau to provide information on many fellowships, Columbia could more efficiently tap the resources of its students to compete with all the members of the Ivy League."

Ivy League schools such as Harvard and Yale which have long histories of Rhodes Scholarship winners may also be favored in the selection process. Students submit applications to the Rhodes Committee in the state in which they reside or attend school. Each state committee chooses twelve applicants for interviews and then selects two people which go on to regional interviews. From each region, four Scholars are elected. The members of all Rhodes Committees are Rhodes Scholars. These committees, therefore, have a high representation of Harvard, Yale, and Princeton alumni because 571 of the 2500 Rhodes Scholars elected in the United States, graduated from these schools. The alumni bond may account for the large number of scholarships garnered by certain universities.

Yet, there are glimpses of Columbia's ability to compete with these schools on merit alone. Dean Thurman had a major success this year with the awarding of a Marshall Scholarship to Columbia student, Kevin Fedarko. This very competitive scholarship elects 30 students to study at a university in Great Britain for two years with all expenses paid by the Marshall Scholarship.

While Columbia occasionally trumps its Ivy neighbors, our successes are infrequent and far between. The low number of prestigious scholarships collected by its graduates affects not only Columbia's ranking relative to other schools, but also the morale of the students. "In the public eye, Columbia's relative position to schools like Harvard and Yale is often determined by statistics such as the number of Rhodes Scholars," says Joe Pressmire, CC '91. "Columbia cannot gain the respect it deserves if the University Administration fails to recognize the importance of improving our fellowship programs."

CTV

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'88, echoed this. "CTV [is] under the circumstances doing well, but we need more money," Ganderson said. CTV receives $7000 annually from Polity. Schiffman said that with more funding, CTV would be able replace its equipment which she characterized as "old and outdated, or stolen." Schiffman insisted that such newer equipment is necessary in order to broadcast live sports events.

Although the station conducts no on-air fundraising, as is currently done by Columbia radio station WKCR, attempts are being made to secure donations from CTV alumni, many of whom are now working in the television industry. The station hopes to have a CTV alumni dinner in the near future as a means of raising such funds.

Perhaps CTV's major obstacle is accessibility. Because many dormitories at Columbia have only a few televisions connected to receive cable, many students don't even have a chance to watch CTV. Occasionally, CTV can be viewed at The 'Plex or McIntosh, but many students still feel that it is very difficult to find a television tuned to CTV. "I'd like to see it [CTV], but I haven't been able to find it," stated Daniel Heller, CC '89.

Schiffman agreed on this point and cited the theft of "cable converters" from dormitory televisions as the root of this problem. A solution seems possible as newer, cable-ready televisions are replacing older sets in the dormitories. Schiffman did add that presently "every dorm has at least one television" capable of receiving CTV. Schiffman also expressed hope that in the near future, CTV could be aired more frequently in The 'Plex, McIntosh, and the John Jay Lodge.

There seems to be a general consensus that CTV has the potential to become an influential force in student life on campus. As Tony Castro, CC '90, put it, "Hopefully more funding and the increased availability of CTV on campus will lead to a greater interest in campus affairs. Then CTV can reap the benefits of the power of television."

Frats

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on the basis of future business success."

Kamber continued, "What kind of an atmosphere does an all-male fraternity foster that women are adversely affected. By accepting the fraternity system the University is promoting harassment, sexism, and discrimination. I wonder how adversely this effects the community." Referring to the people who oppose the forum, he said, "The system must be a really [explicative]-ty one if exposing it to the light of day gets such a response."

Klotz, responding to allegations of harassment, said, "This should be approached as a specific problem, and each incident should be treated as an individual case. Each allegation should be brought before the proper authorities and the IFC. The proposed approach, to end the fraternities existence, solves nothing."

"The fraternities at Columbia aid campus life, they don't hurt it," Klotz added. "They provide a home-away-from-home for many students. There is structure and tradition, and a place to go where you will always be surrounded by friends."

"They also provide a place for students to party for free," Klotz continued. "The dues paid by myself and my brothers buy drinks and food for students. Columbia lacks school spirit, and the fraternities are one of the few places where it still exists. For instance, without fraternities it is doubtful the intramural system could field enough teams to exist."

The street in question

Brian Ring, CC '89, President of Psi Upsilon, supported Klotz on this issue. "The fraternity provides bonds that one cannot get ordinarily. Columbia can be a cold school, and the fraternities provide a refuge. The camaraderie in fraternities just does not exist in dorms." Ring added that although "roller skating parties held in Wolman have their purpose, they don't hold students' interests in the same way fraternity parties do."

"The fraternities also help the community," Klotz stated. "In the

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Cultures Requirement:
Retroactive Application

General Editorials are passed by a majority of the Editors.

One of the first things entering students learn about Columbia College is that they are required to complete the several courses which comprise the Core Curriculum in order to graduate. By the end of sophomore year most have completed this requirement, which until very recently included the six-credit remoteness requirement.

Now, however, the College administration has retroactively replaced the remoteness requirement with a Non-Western Cultures requirement. The sudden imposition of such a requirement on previously enrolled students is unfair.

Considering the Non-Western Cultures requirement in itself, few would deny that it forces students to make more useful choices than the overly flexible remoteness requirement did. Thus, the new requirement would be a welcome addition to the Core Curriculum for new students.

However, consider today's sophomores and freshmen. Many have already completed six credits of coursework outside the academic field of their intended major which, under the old system, would have allowed them to graduate. During their upperclass years, they will be completing majors which often leave little space for anything but requirements and specified electives. Does the College not act unjustly if it suddenly tells them that their remoteness credits are now null and void?

In addition to the fact that the Administration has acted unfairly in arbitrarily making six credits virtually worthless, the new rule is underhanded in another way. Consider the recent group of states which raised their drinking ages to twenty-one. In most of these states, people who were already between the earlier legal drinking age and twenty-one were protected by a "grandfather clause" from losing their previously held rights. In fact, there is a constitutional law against such regulations as the one imposed by Columbia. Briefly, Article I, Section 9 of the document states, "No...ex post facto Law shall be passed."

Granted, Columbia is a private institution and as such is not necessarily required to follow Constitutional guidelines, but wouldn't it be nice if the administration would take a cue from our Founding Fathers? All students would benefit if they were allowed to study at Columbia in the environment of freedom which they have been raised to expect, rather than having to fulfill unfair and sudden ex post facto requirements.

Students Need Union

BY NATHAN NEBEKER

It does not take new students arriving on campus here long to sense that something integral is missing at Columbia. After even the most brief familiarization, most can tell that something is amiss, but it is difficult to tell exactly what is wrong.

Our campus is different in many ways from the traditional collegiate atmosphere, mostly due to its Manhattan context. However, it is not just a unique urban setting that characterizes the mood on Columbia's campus. It is not that we are simply different than the traditional setting. In fact, we lack some basic components of what a collegiate atmosphere should be.

More specifically, the campus here lacks a central social gathering place, or, as Mr. James Rybakoff, CC'89 puts it, is "a place to hang." In short, what is missing at Columbia is a good student union building.

Any normal campus in the country has a main common area for social gathering where food and entertainment are available. The student union plays a significant role in the campus life of other colleges. Without a student union, Columbia suffers a lack of unity and spirit.

It is not as though no one enjoys college life here. Nearly invariably, students will find a niche, establish a group of friends, involve themselves in a circle of activities to their liking, and carry on. The various cliques that developed, be they associated with a certain activity, interest in art or performance, set of Greek letters, or partiality to semi-conductor physics, all have their own unique character, yet nothing exists between them.

There is no common link between students from these various cliques. Here at Columbia, there is no *esprit du corps*, if we may speak French. The social life here exists as an amalgamation of unconnected, atomized groups, none having much interest or common ground with any other.

Certainly, Columbia would not be better off with an homogeneous mixture of students; a group that would be all unified and concise, such as at Princeton. The heterogeneity of Columbia is one of her better assets. It is a great credit to the school that there is no answer to the question of "What is the typical Columbia student like?"

The problem is not critical, and the Columbia experience can be gratifying despite it. In fact, after a certain period of acclimation, it is forgetable. However, it does detract from the potential of campus life.

It is upon initial exposure that it is most clear. Perhaps those who notice it most are transfer students. Having not just an ideal, but an actual basis for comparison, they are able to see that Columbia is incomplete.

At Columbia, a student union would do a lot to give the campus a central social basis. At present, there is no place on campus where students of all different types can go to eat and socialize.

Here we have Ferris Booth Hall, with its disjointed layout and oppressive 50's-architecture-gone-sour atmosphere. The clubs and activities rooms are reminiscent of a cell block, and the entire building rings with architect's regret and afterthought.

The Café does all it can to provide for a social and food center. However, it is always overcrowded, and because of its limited size, must enforce retentive rules regarding outside food or occupancy of a table without eating.

The John Jay dining hall is doubtlessly a social spot, but is designed primarily for eating. It is visited only for eating and not for casual social interaction. Further, it excludes those who, wisely, have opted against the board plan.

The 'Plex endeavors to provide a social center, but because it is limited primarily to the evening hours, and is small as well, fails.

When the weather is warm, we have the Low steps. Because this is limited to good weather, it is no substitute for a student union either. The steps suffer other problems as well. Because of its scenario, it has the feel of an ampitheater and stage which can require too much effort to relax. Certainly, there are those who make it their main interest to put forth this effort, but for someone who wants merely to go somewhere to relax, it does not work. Furthermore, eating there is a problem, both with the renegade bees and the litter it creates.

The most significant problem with pre-existing places on campus is that they are too small. Not so much physically, as most can comfortably accommodate those students who go to them. Rather, they do not accommodate a diversity socially. That is, the existing social spots are small and well confined, such that they become dominated by a specific social group. It "means something" to go to the Café,

for example, and that location carries a specific social character.

Given that not all types of students like to be around all other types, Columbia needs a place where anyone would want to go, without having to be associated with a certain group. Columbia needs a large student union to serve as neutral social ground.

As plans for the renovation of FBH are formulated, it should be considered how to create a space large and casual enough where food and, vice permitting, beer would be available. It would be possible to expand the Cafe, building out on the terrace and into the space upstairs, creating a bi-level, indoor /outdoor space. Or the whole building could be torn down as well.

In any case, creation of a legitimate student union is an important and effective course to pursue in order to benefit the social character of the campus as a whole.

Coed Fraternity Debate

EDITORS NOTE: *As we all know by now, the recent proposal calling into question the future of single-sex fraternities at Columbia has sparked considerable controversy. In an effort to promote greater understanding of this issue, The Federalist Paper offers two differing opinions.*

PRO:

BY NANCY MURPHY

In recent weeks, University Senator Thomas Kamber's proposal to sponsor a forum on the status of single-sex fraternities at Columbia has been maligned by supporters of the current fraternity system. Kamber has been accused of "promoting his own interests, not the interests of the community" and of "attempting to destroy the fraternity system." Such accusations demonstrate ignorance of both the values of open debate and of Kamber's duties as University Senator.

Senators are elected to express the views of their constituents, and many of us question the value of the current fraternity system.

Single-sex fraternities pose an immediate threat to all Columbia students. We have overlooked the problem in the past; now we must address it. Women who are barred from fraternities by accident of birth face tangible harm. Those who oppose discrimination based on inherited characteristics have a vital stake in the outcome of the fraternity debate.

No one threatens to abolish the fraternity system out of hand. Instead, the opportunity to exchange views and to share opinions need be feared only by those with something to hide.

Forums are, by definition, open debates. No one threatens to abolish the fraternity system out of hand. Instead, the opportunity to exchange views and to share opinions need be feared only by those with something to hide. If the fraternity system currently serves University needs, wonderful. If not, the problems must be addressed and the forces of reform considered.

Fraternities do not serve the needs of women at Columbia. Freedom of association is a fundamental right guaranteed to individuals by the Constitution. However, when used as the ideological underpinning of a male fraternity's freedom not to accept women, this constitutional right is inadequate. If a group of men--as private individuals--wish to retreat to a room, male bond, and wail about why women ought to be barred from fraternizing with them, that's ok--and it is the individual's right. When, however, such behavior occurs in an institutional setting--in this case a Columbia recognized fraternity--the rules of the game and the game itself change.

Fraternities are official organizations recognized by Columbia University. They are therefore subject to University policy which forbids discrimination "on the basis of sex in the conduct or operation of University activities" and mandates admittance "of students of any race, color, national or ethnic origin to all rights, privileges, programs and activities generally accorded or made available to students at the University."

If any other campus group attempted to limit membership based upon genetic characteristics, the University would intervene. Why are fraternities exempted from such logic? They, too, are University-affiliated. Allegiance to a national organization should not exempt fraternities from standards applied to other groups at Columbia.

Practical extension of moral judgement would mandate dominion of non-discriminatory principles over fraternities. But laws do not always reflect ethics. A loophole in Title IX of the Educational Amendments of 1972 specifically exempts fraternities--allowing them to exclude women simply by reason of pre-dating the law. Such legal finagling is hogwash. Slavery and segregation, clear evils, were long supported by law simply because they were cultural institutions and had strong interest groups supporting their continuation.

Title IX's grandfather clause represents the lobbying efforts of national fraternities and federal judges and legislators with fraternity ties. Flaws in the laws must be corrected--not accepted as absolute truths. The law is supposed to be an evolving institution responsive to social change. Columbia could represent the cutting edge of legal precedent by conforming to the spirit of equal rights rather than by blindly adhering to the letter.

Veena Sud, Barnard representative to the University Senate, draws a parallel between the current status of private men's clubs, such as the New York Athletic, and Columbia's fraternity system. The Supreme Court is currently considering the constitutionality of the clubs' barring of women. Through exclusion, women are prevented from forming the critical social, political, and business contacts enjoyed by men. Sud believes "women are equally barred from

future job contacts when they are excluded from fraternities."

Columbia women are also hurt on an immediately tangible basis. The University owns many fraternity houses. Housing in New York is expensive; rooms at Columbia are scarce. Many all-male fraternities automatically deny housing to women. In addition, the space on 113th and 114th streets could perhaps be utilized more effectively by a

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CON:

BY MICHAEL BEHRINGER AND NEIL GORSUCH

Stemming from concerns expressed by "ten or fifteen" students, Tom Kamber, Veena A.C. Sud and--perhaps--a few others in the University Senate have proposed forcing all fraternities (and sororities?) to become coeducational. This 'enlightened minority' informs us that if fraternities do not participate in their forum, if they do not vigorously defend a system in which some 700 students happily participate, if they do not "vindicate themselves" in the eyes of Mr. Kamber's "ten or fifteen" students, the "fraternity system could be completely restructured without any input from the members themselves."

This is absurd.

Drawing analogies to slavery and segregation, supporters of the coed rule say that Columbia has a moral obligation to recognize that changing our Greek system is a matter of equal rights. That being denied admittance to a KDR is somehow on the order of state law prohibiting blacks admittance to white schools and other public accommodations.

What such heavy-handed moralism misses is the fact that Columbia is a pluralistic University, that its fraternity system is equally pluralistic, with options available for everyone. There is no one at Columbia who cannot join a fraternity or initiate a new one if they wish to do so. Today, just five years after the College itself began admitting women in its first-year classes, 42% of all fraternities on campus accept women members. There are even three all-women fraternities/sororities that have emerged in those five years, with promises of more to come. Far from being a bastion of all-maledom, far from being exclusionary in principle or practice, the Columbia fraternity system in its totality has, over a very short period of time, responded well to coeducation.

We ought to remember, too, that this is *not* Princeton or Amherst--examples that supporters of the coed rule constantly cite to 'prove' that fraternity systems are as bad as segregation. At both schools social life revolved around an all-male fraternity system in which there was little opportunity for women to participate. These were the blatantly sexist fraternity systems our University Senators *wish* they could fight.

At Columbia no one would suppose that fraternity life dominates the campus; in fact a mere 15% of the undergraduate student body ever joins a Greek organization. There is no pressure and no need to join, as the proponents of the coed rule well know--not being fraternity or sorority members themselves. Further, of course, no one need be left outside the Greek system here--there are excellent and diverse options capable of accommodating everyone, unlike at Princeton or Amherst.

What such hevy-handed moralism misses is the fact that Columbia is a pluralistic university, that its fraternity system is equally pluralistic, with options available for everyone.

Our righteous reformers, incapable of mustering a stable argument against the system as a whole, are left to insist that if even a single house on campus prevents women from joining something is still wrong. They demand that every single-sex house "justify and vindicate" itself and its lifestyle to the community as a whole. This comes at a University where people are so attached to the notion of diversity and usually so reluctant to impose their values on others. In Earl Hall, organizations of every sort coexist peaceably--from the Gay and Lesbian alliance to the Catholic Campus Ministry; in CC and Lit Hum we are instructed to listen respectfully to, not lash out at, those with whom we may disagree. We do not ask the Liberal to "vindicate" himself in the eyes of a Marxist; nor do we ask the Gay and Lesbian alliance to "justify" their lifestyle to the Catholic Ministry. We have, at a University like Columbia, the right to disagree, but do we have the right to impose our notions of virtue on others?

Some clearly find the single-sex atmosphere their happiest choice at Columbia--be it on single sex floors in Carman or houses on fraternity row. They find some sense of comraderie and common experience; they do so generally in peace, even contributing substantially to community service and University development projects. Many of these people are men, but a considerable and growing number are women. (It is worth noting that in the rush to abolish "single-sex" fraternities,

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Frats

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spring there are plans to work with many different charities including Alcohol Awareness, the United Way, and Cancer Care. The IFC also addresses the communities concerns about noise with mandatory neighbor meetings." Klotz stressed the point that "the fraternity is not designed to be just a social club, there's a lot more to it."

Kamber concluded by saying that Columbia appeared to be supporting a "separate, but equal" system of fraternities that was actually not equal at all. He drew a comparison between the difficulty the United States had with accepting affirmative action, and the problem many Columbia students are having with the proposed move to coeducational frats.

Kamber's characterization drew a strong response from Emily Miles, CC '89, President of the Kappa Alpha Theta sorority. She felt that Kamber's comment was an allusion to the inferiority of sororities on campus. "Tom's comment was an insult. I am a feminist, and I consider his analysis of the situation as sexist and chauvinist. He seems to believe by this statement that simply because we are women we cannot have as good a fraternity, and only by joining with men can we bring ourselves up to their level," Miles said.

Veena Sud is also a proponent of the proposed forum. She stated that Columbia should apply Title IX, of the Educational Amendments of 1972, to the fraternities. This title prohibits support by a university to organizations that discriminate on the basis of sex. Although fraternities are specifically exempted from this statute, Sud said Columbia should enforce it nonetheless.

Sud also said "there is something wrong with an all-male group." "Since

males, especially white males, have not been discriminated against in the past I see no reason why they should band together and exclude women," she stated. The consequences of this exclusion, according to Sud is "date rape, and sexual harassment on fraternity row." When asked why she did not support an individual approach to problems, she responded, "what we have may be individual problems, but they are reinforced by the all-male exclusive system."

In regard to Sud's active role in this issue, Adam Klotz commented that he finds it "hypocritical for a Barnard student to attack another institution for being single-sex. Obviously by choosing to enroll in Barnard, she sees the merits of such an institution."

Sud responded, "The idea that Barnard is just as exclusive is absurd. Barnard and all women's groups exist to bridge the inequities of the past. After all in this country women could not vote until eighty years ago, almost one hundred and twenty years after its founding."

When asked about the proposal's effect on the sororities at Columbia, Sud admitted that she had not considered the matter. She is "confused on the sorority issue because [she] do[es] not know if sororities have bridged the inequities of the past." She felt that the importance of sororities could not be equated with that of Barnard College.

Miles responded that the proposal would spell "the end of Kappa Alpha Theta, and this would be detrimental to women. On a male-dominated campus, we joined a women's organization. What we have now is far better than what is being proposed. We exist for ourselves and not for the men on campus. KAΘ takes part in discussions on human dignity, alcohol awareness, drug awareness, bulimia disorders, and many other topics for our own benefit. I don't think Veena Sud understands that we do this."

In the end the final question is, will the resolution pass? Will Columbia's fraternities be forced to go coed? Everyone has a different answer.

Brian Ring responded, "No, because it doesn't have support among the women's or coed fraternities, or the student body." Veena Sud answered, "I hope it does. I've seen a lot of support for it, but I don't know." Adam Klotz said, "I don't think it will happen, but it will bring the issue of sexual harassment out into the open." Finally, Tom Kamber summarized, "There is a slim to decent chance of this happening. The majority of the student council is still undecided, but it is doubtful that a plurality of students will ever form behind the proposal."

CON

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defenders of the proposal have not even clarified if their notions would apply to the women's fraternities/sororities on campus.)

In sum, tampering with lifestyles, strained analogies to segregation or slavery, and denouncements of our system as being similar to those elsewhere ought to be considered more carefully than they have been these past three weeks at Columbia. We ought to ask if in fact we are anxious to let others decide for individuals what kind of lifestyle is acceptable and unacceptable on this campus. We ought to ask of the supporters of the proposal why "ten to fifteen" students ought to take precedence over 700 students and their lives. And, finally, we should ask why students at Columbia should have to endure threats to vindicate themselves in a forum or find their institutions "restructured without any input."

PRO

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high-rise tower. By incorporating dorm, club, and performing arts space, the needs of all Columbia students, rather than those of just the 15% of fraternity affiliates, could be met.

The law is supposed to be an evolving institution responsive to social change. Columbia could represent the cutting edge of legal precedent by conforming to the spirit of equal rights rather than by blindly adhering to the letter.

Two objections raised against evaluating the role of single sex fraternities are the questions of national affiliation and the Amherst experience. Would nationals expel co-ed locals? ADP has gone co-ed and still exists. Contrary to popular opinion, Dean Thurman states, "Columbia does permit independents."

Amherst abolished the fraternity system in 1984, as did Williams ten years prior. Trustees, at student request, instigated the abolition. Nationals were not involved. Greg Gisvold, an officer in the housing cluster (Deme) which replaced fraternities at Amherst, states, "social life at Amherst was static. Every weekend, the fraternities sponsored the same parties. Current clubs are much more dynamic and responsive to student needs and are thriving." Trustee action was taken, says Gisvold, "because of a ten year history of pranks not in keeping with Amherst's educational ideology." Debate over single-sex fraternities therefore had nothing to do with Amherst's action.

At any rate, open debate about admitting women does not equal abolition. Single sex fraternities seem inconsistent with Columbia's stated equal opportunity policy, in spirit if not in letter. Compelling all fraternities to admit women could be a progressive reform and should not be equated with the death of the fraternity system. Education teaches us to question assumptions and to abandon invalid premises. We must not blindly accept the status quo.

Women on campus are currently denied a choice offered to men. Although nine co-ed fraternities or sororities accept women, 12 all-male fraternities exclude. And no sorority has a house. Columbia College is still adjusting to co-education. Women's sports teams have only recently achieved varsity status, and a women's studies major will not be implemented until next year. Hopefully, fraternities will be the next dusty corner to be revitalized by enlightenment and reform.

The Met Celebrates the Rococo

BY KIRAN KUMARAN

"Fragonard" at The Metropolitan Museum of Art is truly, as advertised, a landmark exhibition. The list of works presented is comprehensive. Their presentation is academic, responsible and devoid of pretension. Katherine Baetjer, the coordinator of the exhibition in New York, should be lauded.

The work of Fragonard is particularly enjoyable in our era, at a time when democracy has matured and capitalism has ripened and we can again appreciate the more whimsical fruits of materialism. How fitting that this exhibition should be arranged in Paris and New York. Fragonard has returned.

Fragonard painted during the waning years of the French aristocracy. Fragonard together with Boucher and Watteau form the triumvirate of Rococo painting, Fragonard being the last of the great French Rococo painters. The Rococo tradition is one which has fallen in and out of fashion a number of times. Its detractors have attacked it brutally for its frivolity, declaring it to be the product of decadence.

While it would be difficult to dispute the frivolity of Fragonard's work, the application of the term decadent would seem to be the product of a painfully serious mind. It is true that he painted the aristocracy in their declining years but what he produced were pictures, not of their decline, but of their final flight. These images act as a balm for the wounds inflicted by the harsh practicality of day-to-day *reality.*

This exhibition at the Met includes several works which the viewer would not normally have an opportunity to see. Among these are The Seesaw, from his early years, and The Fête at Saint-Cloud which was called "one of the most beautiful paintings in the world" by the eminent art historian Francis Haskell. It includes, as well, a number of drawings which clearly demonstrate Fragonard's consummate skill as a technician.

It is true that he painted the aristocracy in their declining years but what he produced were pictures, not of their decline, but of their final flight. These images act as a balm for the wounds inflicted by the harsh practicality of day-to-day reality.

A fine example of Fragonard's draftsmanship is "Jeune Fille debout, vue de dos" on loan from Musée des Beaux-Arts, Orléans. It is a fairly large drawing, 37 by 45.5 cm, red chalk on paper. The viewer can see the precision of Fragonard's technique, even when he uses a medium as expressionistic as chalk, in the details of the figure and her costume. This detail of the figure, when juxtaposed with the relative starkness of the background and the expressionism of the foreground, gives the sketch's central composition an added 'punch.' This central composition, with the figure as the focal point, heightens the viewer's awareness of this figure's attitude of contemplation or 'looking.' The figure does not confront her audience, but rather, turns her back to it, encouraging the viewer to look with her, without obviously inviting him. This attitude, coupled with the fact that the object of her attention is not clear and her pose is relaxed, give the drawing an aspect of 'airiness.' The viewer's involvement in the work is suitably distant, without being removed.

Photo courtesy MMA

Jean-Honoré Fragonard, "The Grand Cascade at Tivoli." Red chalk on paper.

Every period of Fragonard's career is represented. The exhibition is organized into the following periods; the early years (1732-56); the first trip to Italy (1756-61); the temptation of an official career, trips to Holland and portraits in the style of Rembrandt (1761-65); Fragonard, between Vice and Virtue, and the "figures de fantasie" (1766-70); the decorations for Mme. du Barry and Mlle. Guimard (1770-73); second trip to Italy (1773-74); the allegories of Love; and Fragonard as illustrator (1774-91).

Their presentation is academic, responsible and devoid of pretension.

Of particular interest is the group of paintings known as the "figures de fantaisie," half-length figure studies of Fragonard's contemporaries dressed in theatrical costumes. One of these, which is rarely seen and comes from a private collection, is "Portrait of a Man (called The Actor)." Here is again a central composition with a figure as its focal point. The sensitivity with which Fragonard treats the humanity of his subject is touching. He manages to avoid exploiting the opportunities for social, political or symbolic messages which are presented by the man in costume and would belittle him and overwhelm him by placing him in far too wide a context. Fragonard chooses instead to concentrate all of his energies on his literal subject. The product of this effort is singularly affecting.

"Fragonard" at the Metropolitan will be in New York through May 8.

Do you agree with what we have to say?

Do you disagree with what we have to say?

In either case, we encourage you to write for

THE FEDERALIST PAPER

We are a student organization devoted to the scholarly and objective treatment of news and opinion. We welcome responsible submissions from all points of view.

Call x6804 or leave us a message in 206 FBH for more information.

Columbia College Student Elections

Pick up petitions for Student Council positions for the 1988-89 school year Wednesday, March 9, Thursday, March 10 and Friday March 11

from

9:30 am until 4:30 pm each day

in

206 Ferris Booth Hall

Elections will be held March 30 and 31

A manditory candidates meeting will be held Monday, March 21st at 8:00 in the EastWing of Ferris Booth Hall.

(All dates and times subject to change by the Columbia College Elections Commision)

1988 Columbia College Elections Commision

THE
FEDERALIST PAPER

A student newspaper in the tradition of Columbians Hamilton and Jay

Volume II Number 7 | Columbia University, New York City | 6 April 1988

Career Services:

Taking a Narrow View

BY K. ELIZABETH WEIR

Between 900 and 1000 graduating seniors are using the Career Services Center to locate jobs. Approximately seventy percent of the companies represented at Career Services are financial services institutions, typically offering two year financial analyst positions. According to Athena Constantine, head of Recruiting at Career Sevices, the stock market's October drop has not significantly affected job opportunities. "Certain programs have been eliminated but not the types we are competing for. Students who were swayed into the financial services market are looking at other options," she said.

According to Constantine, the recruitment office decides what companies to invite for on-campus interviews based on student feedback and a survey of the Junior class from several years ago. The high number of financial institutions reflects the tremendous demand by such companies for financial analysts as well as significant student interest in such positions. Regarding the interest on the part of students in jobs structured toward delayed graduate study, Constantine said "students feel they need practical exposure and that they will benefit more from study after work experience."

Although the service and sales industries are under-represented in the on-campus recruitment program, Ms. Constantine cited Columbia's location as a reason that some companies refuse to participate. Most students can conveniently interview with many firms downtown. She also suggested that some firms do not recruit because they receive many direct student inquiries and have few openings to fill. She maintained that career services can help those interested in fields that the recruiting program does not include, and added that "we would be surprised if anyone was looking in a field in which we could not help them although some people may have too many expectations."

Despite the assistance offered at Career Services, students are not as optimistic about the job market this year. William Woo, CC '88, said that "firms are recruiting as much as before, but they are hiring less. There are gut-wrenching fears that come May, many students may join the unemployment statistics."

Students who do not participate in recruitment, such as Regina Ehrenzweig, CC '88, must conduct their own job searches. She maintained that "recruitment cannot include everyone because students have diverse interests at Columbia. There are other good ways such as professors who have contacts and can give leads on possible jobs." She added, "it's really upsetting that many people won't even make a starting salary equivalent to the amount of money they spend in a year at college."

Although Career Services warns students against relying on campus recruiting to find a job, many students use Career Services because an independent job search takes so much time. Woo, who is using Career Services and is also conducting his own job search, commented, "students who aren't 100% interested in financial services end up participating because they feel left out if they do not use the option. The job search takes as much time as a sixth course." Peter Lukowitsch, a CC '88 economics major, stated "I relied totally on recruitment. Interviews take up so much of my time that I can't go to classes. Call backs are even worse."

Other potential problems exist as well. Almost all the companies recruiting at Columbia are based in the New York area, but students who wish to live in another region can often interview and apply for positions in a company's branch office. The recruitment program does not represent a wide geographical spectrum, but Constantine maintained "we could invite companies from around the country, but there are usually not enough students interested in these companies." She noted that many students from outside the area choose to work in New York after graduation. Woo reasoned that "to get a job

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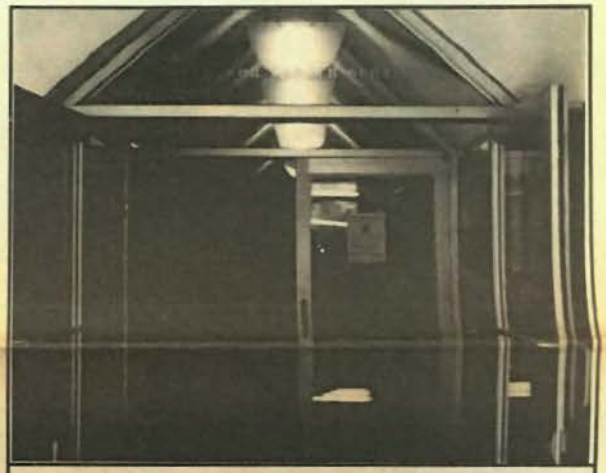

The doors that lead to the future ?

Photo: Kip Corwin

Prospects for Students on Wall Street

BY JASON SIPPEL

In the summer of 1987, everyone was riding the bull market of the century as the Dow Jones average of thirty industrial stocks, the most widely followed indicator of stock prices, toppled every century barrier on its way towards the near-3000 level. Graduating Seniors largely shunned the traditional mainstays of management consulting and corporate management in favor of financial analyst and trading positions with the major Wall Street investment banks.

But, the market corrected itself, in rather startling fashion, on Monday, October 19, plunging 508 points or 22.6%. The drop was almost twice the 12.8% fall that occurred on the "day the bubble burst" in October 1929. The sentiment on Wall Street immediately changed from one of buoyancy and excessive optimism to one of panic. As of the end of last month, an estimated 20,000 people have been laid off in the financial services industry. Numerous divisions, such as the municipal bond department of Salomon Brothers Inc., were drastically curbed or terminated. Many firms suffered crippling arbitrage-related losses and a wave of mergers followed that saw E.F. Hutton and L.F. Rothschild swallowed by Shearson Lehman Brothers and Franklin Savings Corp., respectively. The question which remains: Is Wall Street still a viable career option for today's college students?

The answer, according to many, appears to be a qualified and cautious "yes." A recent *Wall Street Journal* article determined that, "overall, recruiters and outplacement experts say the market for laid-off Wall Streeters is far from the worst they have seen." Calls to the major investment banks frequently yielded effusive declarations of optimism. According to Alexandra Pruner, Vice-President of corporate affairs at Shearson Lehman Hutton, the firm is "very positive about" the long-term future, and "Shearson is not the type of firm to hire a lot of people in boom years and then contract." Similarly, Gary Mass, Vice-President of Campus Relations at Drexel Burnham Lambert, believed that in the long-term his firm faces a "very healthy outlook," and cited "a strong first quarter" and "a lot of new business."

Few firms denied, however, that their campus hiring policies had been or were under review, or that the October crash had not significantly affected at least the short-term outlook. Mass affirmed that "certain business areas of the firm have scaled down" and that, whereas company representatives had previously visited campuses, Drexel Burnham Lambert now primarily posted notices of positions.

A source at Dean Witter felt "the glamour jobs will certainly be harder to get. Heavily hit will be certain product management groups and operations." Roy Cohen, Manager of Professional Recruiting at Merrill Lynch Capital Markets, felt that "it's inevitable that with the market downturn there is some scaling back." Athena Constantine, Director of the Center for Career Services at Columbia, affirmed that companies are "much more selective" and that "opportunities are tightening."

Mr. Michael Forman, Public Information Coordinator at the Securities

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•ARTICLES•

•DEPARTMENTS•

EDITORS' NOTE

In this issue of *The Federalist Paper* we introduce our new banner and format.

"RED ARMY WITHDRAWAL WOULD MEAN HORRIBLE BLOODBATH"

"SOVIETS MUST WIN AFGHAN WAR! Mop up the Mullahs! Extend Social Gains of the October Revolution to Afghan Peoples!"

Once again the Spartacist League has come to rescue us from our ignorance of world politics. At an upcoming conference, at a New York City public school no less, Len Meyers of the Editorial Board of *Workers' Vanguard* will speak on exactly why the Sovs should stay in 'ghanistan (their 'Nam) despite the fact that the Sovs themselves want to pull out.

Like we at *The Fed* always say, "All we are saying is give peace a chance!"

IMITATION IS THE HIGHEST FORM OF FLATTERY

On the cover of the April issue of *Newsweek* magazine's *On Campus*, the headline reads "Fraternities Under Fire." Just a short look back to our last issue of *The Fed* will reveal that our front page headline was the same. The folks at *On Campus* came up with the same headline that we had. Should we sue for copyright infringement, be proud, or hang our heads in shame? Probably hang our heads in shame—O.K. forget we mentioned it.

AND YOU THOUGHT POLITICIANS TODAY WERE OUT OF HAND

Richard Johnson (1780-1850), Vice President under Martin Van Buren, attempted to gain funding from Congress to conduct an expedition to the North Pole. He was convinced that there expeditionaries would find the secret entrance to the center of the hollow world where there existed a flourishing civilization. Congress didn't *dig* the idea.

LEFTISH LOVERS

From *Democratic Left* magazine's classified (no pun intended we presume) ad section comes the following:

MEET OTHER LEFT SINGLES through the Concerned Singles Newsletter. All areas and ages. Box 7737-D, Berkeley, CA 94797, for a free sample.

Who ever said *The Fed* doesn't offer something for everyone?

HE WHO LAUGHS LAST...

U.S. News and World Report has found that television comedians told twice as many jokes about Republican candidates as they did about Democratic candidates in the first two months of this year. The magazine has been counting jokes about political candidates on the "Tonight Show," "Late Night with David Letterman," and "Saturday Night Live" since January 1 and reported its findings in its March 14 issue.

Vice President George Bush headed up this "popularity contest" as the recipient of 52 Potshots (*U.S. News* calls this table the "Potshot Index"). Pat Robertson was the butt of 36 shots. Former Senator Gary Hart met with 23. Bob Dole received 18. Pete du Pont took 15. Thirteen found their way to Richard Gephardt. Bruce Babbitt, Jack Kemp, Paul Simon each received 8 Potshots. Al Haig took 6. Mike Dukakis was only worth 5. And Jesse Jackson's campaign was nothing to laugh about with 4.

In total, the Democrats drew 68 jokes. The Republicans took 135. Presidential politics—a laughing matter.

HOW APPROPRIATE

From our good friends at *Spec* comes the *pièce de resistance* of house ads. Finally coming clean, our counterparts on the daily now admit that there is, in point of fact, a "World According to Spec." Bearing a drawing of the grim reaper, the ad describes the contents of the paper as, among other things, "looney."

We knew it all along.

NEW—FROM THE "GET UP, STAND UP" DEPARTMENT

By this time we're sure you've heard about it. Yes, its The All New and Improved "Springtime at Columbia '88." No, not just springtime at Columbia or even Springtime '87. This is The All New and Improved "Springtime at Columbia '88."

The latest issue—the University Senate move to change the manner in which its existing rules will be enforced. "Sounds simple enough," you say—well, Heck No! In fact this issue is pressing enough to warrant the formation of an *ad hoc* committee (sure, you remember the *Ad hoc* Committee Against the Kirkpatrick Award, the "spontaneously" formed CBSC, the *Ad hoc* Committee Against JASON, etc. *ad nauseum*).

This spring it's the Columbia Coalition for Fair University Rules (CCFUR). It seems (from their Statement of Purpose) that the CCFUR has found that Dean's Discipline "does not guarantee due process" and that "the University has a history of selective and discriminatory enforcement of its rules."

We can only think of one documented case of the latter criticisms—and he wasn't speaking at your rally.

THE FEDERALIST PAPER

•Veritas non Erubiscit•

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Letters...

FRATERNITIES UNDER FIRE, CONTINUED

To the Editors:

I would like to commend *The Federalist Paper* for its increasing objectivity and professionalism regarding student issues. The information and debate on coed fraternities I found particularly fair and detached. One aspect of the issue, however, went unaddressed. Perhaps you will print my letter where *Spectator* did not.

I am a sister at Iota Epsilon Pi, the only fraternity at Columbia that sacrificed its national charter over coeducation. If the proposed change in our Greek system goes through, we would not be alone. In the vast majority of fraternities, the decision of whether to allow coeducation is made on the national level and local chapters are forced to comply. If the national decides to be all-male, then the only way for a local chapter to admit women is to leave the system.

Proponents of this change often claim that they do not want to destroy our fraternity system. But what they will accomplish, if successful, would be little short of that. At Amherst, fraternities were abolished by the school soon after coeducation was mandated. At Bowdoin, the Greek system was crippled by chapters losing their charters, going underground, or closing. When a fraternity loses its charter it loses much of its voice with the college, it loses its alumni, and it loses its contacts at other schools. This is a devastating blow. My own brothers and sisters broke off on a matter of principle, but that is far different from having the split mandated from above. Had we not chosen our own fate, our group might not have survived. Because so many national fraternities disenfranchise chapters that admit women for any reason, even University mandate, required coeducation has been a failure of one degree or another wherever it has been tried. It was an experiment first attempted in the early 1970s at a few northeastern colleges and generally abandoned for its lack of results.

I raised these points at the last forum on coeducation and proposed that a more rational pursuit of civil rights would be to go to the nationals and pan-Hellenic organizations first. My arguments were lost on a group well versed in the clauses of Title IX (including the one that permits single-sex colleges and fraternities to remain that way), but largely ignorant of the complexities inherent to the institution of fraternal societies. When confronted with the possibility of crippling our Greek system, they were prepared to sacrifice it for their cause.

It is easy to ask someone else to make sacrifices. None of the proponents of forced coeducation at that meeting were fraternity members. I asked if any of the women there wanted to pledge Fiji. None of them claimed they did. As a member of a coed fraternity, I have nothing personal at stake in this debate. I am an ardent feminist and believe in equal rights for all, but I see this movement as misdirected and potentially destructive and wish to inform the Columbia community of the reasons for my fears.

—Lise Broer, CC'90

ISSUES 3

Core Vindicated in *The Fed* Poll

A survey of Columbia, Dartmouth and Harvard students

BY ERIC A. PRAGER

Last month, students at Columbia, Dartmouth, and Harvard were polled on their basic knowledge of Western civilization—the sorts of things we learn in Lit Hum, CC, and the rest of the Core. *The Fed* conducted the poll of Columbia students.

The results are below. Columbia students, on average, answered 68% of the questions correctly. Harvard students answered 70% of the questions correctly—not a statistically significant difference. Dartmouth students answered 49% of the questions correctly.

Please note that these were not intended to be the *only* questions relevant to a balanced education—the poll did not suggest this and neither do we. They are, however, representative of an indispensable portion of the balanced education.

1. Q. According to legend, who cut the Gordian knot?
   A. Alexander the Great
   % correct Columbia 26.5 Dartmouth 10.3 Harvard **37.8**

2. Q. What is the capital of West Germany?
   A. Bonn
   % correct Columbia **87.1** Dartmouth 67.6 Harvard 85.4

3. Q. What play by Arthur Miller is set during the Salem witch trials?
   A. *The Crucible*
   % correct Columbia 17.1 Dartmouth 62.2 Harvard **78.3**

4. Q. During the destruction of Sodom and Gomorrah, who was turned into a pillar of salt?
   A. Lot's wife
   % correct Columbia **71.2** Dartmouth 64.8 Harvard 25.2

5. Q. Name three of the freedoms guaranteed in the First Amendment to the U.S. Constitution.
   A. Freedom of the press, speech, assembly, religion, and petition
   % correct Columbia 65.3 Dartmouth 52.2 Harvard **76.4**

6. Q. Who wrote *The Prince*?
   A. Machiavelli
   % correct Columbia **97.7** Dartmouth 75.6 Harvard 97.0

7. Q. Who was Andromache?
   A. The wife of Hector in the *Iliad*
   % correct Columbia **38.2** Dartmouth 11.2 Harvard 22.1

8. Q. Which of the following has the least mass: proton, neutron, or electron?
   A. Electron
   % correct Columbia 95.3 Dartmouth 88.3 Harvard **95.9**

9. Q. Who was the leader of the Free French during WWII?
   A. Charles de Gaulle
   % correct Columbia **73.5** Dartmouth 48.7 Harvard 72.7

10. Q. Which President initiated U.S. involvement in the Korean War?
    A. Harry S Truman
    % correct Columbia 61.8 Dartmouth 42.7 Harvard **65.2**

11. Q. Who wrote "Sailing to Byzantium?"
    A. William Butler Yeats
    % correct Columbia **22.9** Dartmouth 8.9 Harvard 21.4

12. Q. According to Freud, what are the three major elements of a person's psychological make-up?
    A. Id, ego, and super-ego
    % correct Columbia **85.9** Dartmouth 69.1 Harvard 84.6

13. Q. Which Islamic sect is in power in Iran?
    A. Shi'ite
    % correct Columbia 54.7 Dartmouth 37.8 Harvard **63.3**

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Career Services

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in another city is tougher. You would have to fly out and take interviews."

In addition, more and more companies in the Recruitment program are choosing to pre-screen student resumes to select particular students for interviews. Constantine expressing her initial reluctance to allow pre-screening, said "I was originally concerned about all students getting a fair share of the interviews, but selection of interview slots by computer is so random. The companies were not seeing the people they wanted to see."

Also, she pointed out that pre-screening is dangerous "if a student is unrealistic and goes after very selective companies, he may not be selected for any interviews." She added, however, that the recruitment program allows each student to offer his resume for pre-screening 50 times and each student thus has many chances for interviews. According to Lukowitsch, "it seems that most of the time, there is a core group of students chosen from pre-screening."

Woo also noted that this year, students with traditional liberal arts majors are not doing as well as economics majors. He stated "I found in my interviews that I was on the defensive as to why I am a history major. The company literature states that previous financial experience is not required but they seem to be taking those with the most experience." Lukowitsch added "maybe it (economics) is a little more valuable because firms have cut back and may not be willing to take risks."

Furthermore, according to Constantine, "recruitment works well for certain people and against others by pitting one Columbia student against another." From 26 interviews, a company may choose 4 people to invite for call backs. Weaker

competing in the general applicant pool; instead, each student is compared to other Columbia students. Similarly, Woo, expressing the major problem with depending solely on recruitment summarized, "the program is by nature very competitive. People need to be aware they must also do some things on their own."

Wall Street

continued from page 1

Industry Association, held that, while the SIA does not formally take a stand on the future of the investment banking industry, the general sentiment on Wall Street is that "the securities industry is a cyclical one. It has expanded tremendously in the past few years, maybe too quickly, and is now going through a period of contraction."

In addition, recent stories in *Business Week* and the *Wall Street Journal* have described the turmoil and internal feuding that have followed in the wake of the crash at several major Wall Street houses. The much-vaunted stellar bonuses of the bull market are now fueling in-fighting and bickering at, among others, such prestigious firms as First Boston and Salomon Brothers.

"The reward system also changed. In the days of private partnerships, people were paid with equity, which, because it was so illiquid, had the effect of binding everyone together in good times and bad. Since firms have gone public, however, compensation has become primarily a [selfish] all-cash affair," a March 21 *Business Week* article held. Similarly, a recent *Wall Street Journal* article maintained that "trampled in this bull market run were some old-fashioned virtues from quieter times, things like loyalty and corporate culture."

Certain areas of the investment banking industry, such as mergers and acquisitions and risk arbitrage, have done extremely well since the crash, while others, such as stock underwriting and trading, have lagged. As a result, several large firms have succumbed to conflicts between investment bankers and traders over compensation packages, leading to an exodus of some of Wall Street's most prominent figures. For example, last month, the First Boston mergers and acquisitions super—duo, Bruce Wasserstein and Joseph Perella, left to form their own firm.

According to a March 14 *Wall Street Journal* article, even veterans of Wall Street "are themselves squabbling over the pieces of a smaller pie...Traders at one firm rebel when an investment banker gets a promotion, and have to be appeased with identical titles...While the mergers and acquisitions business remains strong, its outsized contribution to most firms' profits indirectly fuels dissension."

Finally, there remains the specter of a crash comparable to "Black Monday." Robert Prechter, a leading "guru" of the bull markets who relies on a theory of bull and bear market cycles, is still calling for a disastrous crash that will wipe out years of gains. Contrarians and cynics point to headlines like *Business Week* 's "Merger Mania - Why it Just Won't Stop" while recalling the October 26 edition of *Fortune* (which appeared before October 19) entitled "Why Greenspan [Chairman of the Federal Reserve Bank] is Bullish." Ironically, Wall Street now finds itself

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Rule Changes

General editorials are passed by a majority of the Board of Editors.

With the recent change of rules regarding protest and demonstration, the University Senate has taken a step toward improving the climate for education at Columbia.

The rules were amended in two ways. First, blocking a building's entrance for more than a short time is a serious violation, regardless of whether it interferes with University functions or not. Second, refusing to show a CUID when asked to by security is now a serious offense also. Serious offenses are punishable by censure, suspension or expulsion. While the wording may seem harsh, a close look at the basis of the change reveals that it is well founded and wise.

Columbia is a school that has long been associated with political protest. All too often, we have had protests on campus that quickly escalate into blockades reminiscent of the 1968 takeovers. Students are remarkably happy to reject any offers of compromise or forum made by the administration and move to reenact the historic takeovers themselves. Those in favor of protesting in general see the move as a crack-down by the University against any protest. The allegations are that the administration is making a move to violate students' rights to free speech and peaceful assembly. They are seeing the rule changes as tactical moves designed to silence voices of dissent on campus.

While this fervent antagonism against the administration is nothing new, a quick look at the rule changes shows that these claims are without basis. Nowhere in the two short amendments does it say anything about peaceful gatherings, marches, or demonstrations. The only things to which it refers are blocking a building's entrance and refusing to show a CUID to a security guard.

The rules change is not a claim that there are no causes that merit a building takeover. The point is that blockading a building is a serious action, and elevates protest to a serious level. The seriousness that the University is forced to accept is now matched with seriousness that protesting students must now deal with as well.

If protesting students feel their cause justifies taking over a building, thereby disrupting classes and administrative work, they must also feel that it justifies their taking some risks themselves. Now the costs of blockades will not be borne only by the administration, security, and other students. The instigators of a blockade will now bear costs as well.

This change actually improves the basis on which a blockade will be staged. Before, students were eager to blockade, but not willing to be held accountable for their actions. They have avoided being identified by University officials, resisted arrest, and denied any harm to the University in their disciplinary hearing. This is no way to exercise civil disobedience.

The author of civil disobedience, Henry David Thoreau, was glad to go to jail for his cause. He was happy to accept the penalty for his actions. In fact, that was the point of his dissent.

The point of a blockade is to willfully break the law. Students who oppose the rule change are saying that a blockade should not be against the law. This makes it seem that the students want simply to misbehave, and not have to accept any consequences for doing so.

The rules change has actually made a building blockade more powerful. Students putting their academic careers on the line for belief in their cause force others to take their cause more seriously. Correspondingly, if students wish to block a building, they must do it while taking more responsibility for their actions.

The second change of rules improves the situation as well. Columbia identification cards are University property, and must be surrendered upon request by the University. This is not a rule that hampers students' rights and invades their privacy. It ensures the protection of students.

There is no reason why a protester who believes in his cause should be wary of showing ID to security. It is another form of taking accountability for one's actions. When someone refuses to show ID to security, it is because they are doing something they are not proud of, or have something to hide. To be unwilling to identify oneself with one's actions does not make it seem that the actions are very sincere, or should be taken seriously.

Despite the predictable objections that the rules change represents an infringement on rights to free speech, a simple reading of the changes proves otherwise. The changes do not inhibit protesting, dissent, or civil disobedience.

In fact, all that the rules do is increase accountability to students for their actions. They ensure that students who protest will act more responsibly, and will not be able to skirt the consequences of their actions. The result of this will be more sincere and less reactionary behavior by protesting students, and the guarantee that those of us who are more concerned with our education can get it more peacefully.

...And I left

BY ADAM J. LEVITT

On Wednesday night, March 23, an emergency meeting of campus activists was held. The purpose of this meeting was to discuss an effective plan of action to combat the recently strengthened University Rules of Conduct. Approximately 45 people attended the meeting, which was chaired by University Senator Tom Kamber, CC '89.

The tone of the meeting was one of outrage, distress, and intolerance. Kamber began the proceedings by reading the proposed resolutions and hypothesizing upon their intended purpose, despite the fact that the meeting was being held prior to the Senate ruling in favor of the rules changes; it was decided that the intent of the rules change was to prevent any further long term blockades of University buildings, as well as to make the withholding of one's University ID card from campus security officers a "serious offense," punishable by suspension or, if need be, expulsion.

Following Kamber's explanation and interpretation of the proposed resolutions, the floor was opened for discussion. People commented on the confiscation of protesters' ID cards, professing that confiscation is a "terroristic, fascistic move," and that it is the right of the protester involved to refuse to surrender his ID card when asked for it. Other comments expressly conveyed the view that protests involving campus blockades are correct, justified, and certainly well within the rights of all students, and that Columbia University's rules are those of "rich, white men" and should by rewritten immediately.

The response to my question was: "Yeah, you're an activist of the system." To this I responded: "I support the system, I believe in it, and I think it's right. I am an activist of the system!"

After these initial outbursts, I elected to comment. I asked the most vehement critic of the Columbia administration whether or not he was aware of the basic attitudes and ideas of the Columbia administration before he applied to the University, and if he was aware, why he then chose to attend Columbia. He responded by saying, "[Expletive deleted] you. Who are you to ask me questions?"

I then directed my attention to the discussion group as a whole, asserting that "when you protest and blockade the entrance of a University hall, you are preventing me and students like me from entering the building and attending class in the proper manner. This is an encroachment upon my rights, and it is not legal. Furthermore, it is fully within the rights of University security to ask for and confiscate an ID card. As it is written on the card, 'It [the card] is to be surrendered upon request to all University Officials whose responsibilities authorize them to seek identification. This card is...the property of Columbia University..."

The response to my dissenting views was one of shock and anger. Pierre A. Louis, a member of BSO, was driven to discuss Fifth Amendment rights and their relationship to civil disobedience, while another member of the BSO—who would respond only to the appropriated name Sojourner Truth—continued to criticize Columbia University, calling it a racist and fascist institution.

...I posed the following question: "How do you define an 'activist'?"

The Rev. William Starr, Columbia's Episcopal minister, contributed to the discussion by saying that he feels: "Education doesn't occur in the classroom, where the University administrators think it does. True education, in my opinion, occurs in groups such as the one meeting here tonight." Law School Senator Richard Froehlich, however, said that "the rules provide a semblance of control and civility on the campus."

In the midst of this discussion, a vote on the disciplinary resolutions was called. I was the only one at the meeting who voted in favor of the new resolutions and Froehlich abstained. The resolutions were resoundingly condemned.

Immediately after the vote was conducted, Pierre A. Louis again rose to his feet with a vote to expel all people with dissenting opinion. He said that a "person who presents an opposing view is an enemy of our cause and would only be a disruptive force to the remainder of our meeting." After a brief debate, Kamber said that if anyone was required to leave, he would leave as well. Before a vote on the proposal was called, the term "expel" was changed to "ask to leave," with the provision that if I did not choose to leave, the meeting would be adjourned and immediately reconvened as a closed meeting in a different location. The vote was conducted and I was voted out of the meeting.

As I rose to exit, I posed the following question: "How do you define 'activist?' When I saw a sign for the meeting today, it invited all 'activists' to attend an emergency meeting. It did not say all 'liberal activists,' it did not say 'progressive activists,' it did not even say all 'conservative activists.' It merely said all 'activists,' period. The response to my question was: "Yeah, you're an activist of the system." To this I responded: "I support the system, I believe in it, and I think it's right. I am an activist of the system!"

And I left.

Cultures Requirement

Editors' Note: *Recently the Committee on Instruction implemented a non-Western cultures requirement in place of the existing remoteness requirement. Beginning with the Class of 1990, all Columbia College students must fulfill this requirement as part of the Core Curriculum. Some students have objected to the nature and retroactive application of the requirement. Here,* The Fed *presents two sides of the story.*

PRO:

BY NANCY MURPHY

Today. 1988. We inhabit a global village. America is a world power; we are no longer an isolationist nation. We are chained to our neighbors; our fate is one. Links of economics, geopolitics, military brinkmanship, nuclear fears, mass media, and shared cultures irrevocably bind us. Peoples of the world must understand one another. We are too intertwined to do otherwise.

Columbia College administrators realize, belatedly, that Western Europeans have no monopoly upon world or Western civilization. The cultures requirement, slated to go into effect for the class of 1990, attempts to correct the Eurocentric bias of the core curriculum. The overly flexible remoteness requirement is an academic failure. The cultures requirement fills this void in the core. As Dean Rosenthal succinctly explains, "if the cultures requirement provides a better educational experience, it seems bizarre not to implement it now."

Contemporary Civilization (CC) and Literature Humanities (Lit Hum) present the thoughts of male Europeans who have influenced society. Instructors may add works by a black or woman. But all too often, female and non-European thinkers are treated as anomalies, as isolated proof that occasionally a non-Western/non-male manages to present a semi-coherent thought. Such attitudes confirm prejudicial ideas that a small cadre of intellectuals is responsible for and dominates world civilization.

The cultures requirement offers a solution to the dilemmas inherent in the core curriculum. CC and Lit Hum are designed to present Western thought and face enormous difficulty squeezing the masterpieces of western civilization into four semesters. Ignoring world thought is not acceptable. Neither is the aforementioned tokenism within the core. The cultures requirement compels everyone to take at least two mind-expanding classes. A six-point cultures requirement will allow other cultures to be addressed without trivialization. Moreover, it will not dilute the Western core.

Make no mistake. Culture in the twentieth century, as never before, is global. Picasso, perhaps the greatest twentieth century artist, rejected the moribund traditions of renaissance illusionism. He, instead, sought inspiration from the living tribal arts of Africa. Gabriel Garcia-Marquez offers greater literary value than Judith Krantz by any measure. But does non-Western modern tradition, represented by such masterpieces as *One Hundred Years of Solitude*, receive any mention in the core? The Nobel Peace Prize, too, is awarded to humanitarians such as Mother Theresa. Her struggle against Indian poverty is worthy of being studied in the tradition of practical theology.

But the cultures requirement extends beyond the intellectual. An understanding of how the United States and Northwestern Europe fit within the global matrix is crucial for all Columbia students who entertain any pretense of being politically aware. But, understanding only the European perception of world affairs is no longer enough. We must study other culture's perceptions of Europeans in order to live in today's world. Understanding becomes increasingly important as the once exploited people of the world take self-destiny in their hands. If Columbia graduates wish to live in the world arena, no choice exists but to appreciate other peoples. The cultures requirement will ensure that everyone has at least a basic grounding in the realities of our century.

The twentieth century presents concrete examples. The loss in Vietnam might have been prevented if all American high schools had a cultures requirement. The United States acted in a misguided manner because she assumed the Vietnamese shared similar capitalist/democratic biases. The United States ignored differences in Asian land use patterns, authority systems, and political traditions; differences which should have been understood before committing American men and guns to another continent. Because we mistakenly interpreted a local political conflict within the matrix of U.S./U.S.S.R. relations, we created a full-scale war.

In 1988, America runs the risk of repeating Vietnam. Past mistakes ought to be used so as to avoid future catastrophe. The cultures requirement, then, is of extreme relevance. President Reagan has sent troops to Honduras. Only if we understand Latin American traditions of culture and politics can we decide what role—if any—the United States should play. Columbia graduates are tomorrow's leaders. We must be prepared to deal with twentieth century military conflicts. Agamemnon's shield is no longer enough.

Student support for the cultures requirement is strong. The Academic Affairs and College Policy Referendum indicates that 99.5% of students find the Core effective in introducing the main currents of Western thought while only 17% found it adequate in introducing global thought. 70% of all students favored converting the

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CON:

BY BENJAMIN FROMMER AND DORSEY E. DUNN

The University Administration has once again fixed something that was not broken. To correct the "deficiencies" in the Core Curriculum, the inventors of the new non-Western cultures requirement rushed headlong into a solution that is neither fair nor reasonable.

We enrolled at Columbia College with the knowledge that we would have to fulfill what are perhaps the toughest academic requirements of any school. By accepting the offer of admission, all Columbia students have approved, or at worst acquiesced to, the Core. At least at that time all of us saw the merits of, and agreed to take CC, Lit Hum, Art Hum, Music Hum, gym, the science requirement, and the language requirement.

One has to wonder what possessed the administration to make such a hasty decision this year. After all, there has been no great student movement here at Columbia for the non-Western cultures, as there was for instance at Stanford. While the students, by enrolling, accepted the Western cultures, they have not been consulted on the new addition to the Core. As usual a unilateral decision that greatly affects students has been made without ever being submitted to a student vote.

The decision to institute the retroactive non-Western cultures requirement ignored the pleas of freshman and sophomores who have already completed the remoteness requirement. Although the administration now says a student may claim "hardship," why should we have to prove it to them? After all, they, not we, changed the rules.

Even students who have not begun to fulfill these requirements are being unfairly punished by the recent change. No freshman or sophomore accepted an offer of enrollment at Columbia knowing that he or she would have to take the additional courses, and therefore we should not be bound to an agreement we never signed. In refusing to implement a "grandfather clause" policy the administration has wronged all students regardless of whether they agree with the policy or not.

Instead of waiting for the results of the de Bary Commission's investigation into Columbia's Core, the administration has reached a "solution." Before receiving definitive word on the status of CC and Lit Hum, they have elected to add to them. This short-sighted addition will adversely affect students.

Presently, the average student takes about thirty-eight courses while at Columbia. Of these, physical education not included, thirteen are required. Presently over one-third of our schedule is decided before we even set foot in Morningside Heights.

Unlike secondary school, the college experience should certainly include experimentation in fields and with ideas that interest the student, but which may not be part of the requirements for one's major. The present core, taken in the freshman and sophomore years, establishes a foundation upon which the student can build as an upperclassman. But the new additions force the student to experiment in certain predetermined fields. The opportunity to learn about obscure topics is no longer in the students hands, but in the hands of an arbitrary board that will now determine what courses they find acceptable for the non-Western cultures requirement.

In effect, the new non-Western cultures requirement dictates what fields a student will study outside of his or her major. By determining what is to be learned, the administration is restricting our freedom to choose, and at the same time selecting an area of study that is in fact a "required experiment." In most high schools, each student must take one course in math, science, social studies, English, and a foreign language every year; in college, one should have the opportunity to choose. While the goal of the curriculum in high school is to give an overview of all topics, in college one should be able to specialize. Concentration on a particular topic allows the student to truly understand it, instead of only grasping its bare outlines.

A commonly heard counter-argument is that the non-Western cultures requirement does not add more, but simply replaces the remoteness requirement. Any freshman or sophomore who has already fulfilled the now defunct remoteness requirement will contend that it was far easier to complete than its "replacement." It was no hardship for a Political Science major with an interest in the Soviet Union to fulfill the requirement with a course in Russian, or a Computer Science major to take an economics course. But now instead of choosing from a wide variety of remote courses, they are being forced to take courses that may be of no interest to them at all.

In addition, while the remoteness requirement treated everyone equally, the cultures requirement blatantly favors those students who have an interest in non-Western fields. Under the old remoteness requirement everyone was forced to go outside their main interests to take a remote course, but this is not true anymore. Now the student interested in the Third World no longer has to look beyond his field, but merely has to pick another course acceptable for the non-Western requirements. These students thus have an unfair advantage.

While the new requirement makes life easier for East Asian studies majors, the opposite is true of one of the most difficult majors, Pre-Med. When the number of

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6 ISSUES

PRO

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remoteness requirement into non-Western focused courses.

Yet questions remain. What form should the requirement take? Who should fulfill it? The Committee on Instruction (COI) decided to begin with the class of 1990. Dean Rosenthal states, "most sophomores have not satisfied the remoteness requirement." Therefore, no extra burden is being placed on the sophomore class. Any sophomore who has fulfilled the remoteness may petition the COI to have the new requirement waived. Although the U.S. Constitution prohibits ex post facto laws, Columbia, as a private institution is legally exempt. We pay $18,000 per annum to attend this citadel of learning. It is Columbia's financial and moral obligation to educate us.

Admittedly, the working plan for the permitted courses is too fluid. But the COI has not finalized the allowed body of courses. Time exists, therefore, to fight for a worthy addition to the core. The ideology behind the core rests upon the value of a shared educational experience and on the superiority of seminars over lecture courses.

By scavenging existing classes from the social sciences and humanities, Columbia cheats the cultures requirement of any chance to succeed. Packing 501 Schermerhorn with 300 bored undergraduates serves no one's interests. A weak core will cheat students and will be an embarrassment to the university. A vague distribution requirement consisting of huge lecture courses will destroy Columbia's reputation and market niche: small core classes taught be a select cadre of instructors. If the commitment exists, the finances will follow.

Columbia has a large endowment and proven fund raising capabilities. Administrators must solicit government grants and private donations to give the cultures requirement the format it deserves. Only by creating Lit Hum style sections in which everyone studies the same material will the requirement have an honest start.

Another area of difficulty is defining "other cultures." Which ones? Non-Western cultures are trivialized by grouping them all together and defining them as "non-Western." Can a diverse body of thought be encompassed by one requirement?

These are all valid questions and are the same ones faced in deciding what to teach in CC and Lit Hum. We must fight to overcome the flaws. Answers to the questions of content and presentation must be hammered out. Students must seek representation on the DeBary Committee to revise the core.

Education breeds compassion and tolerance. Perhaps the cultures requirement will improve understanding and make the world a more congenial place to live. Columbia could stage an educational revolution by treating the cultures requirement seriously. We can only embarrass ourselves by making a half hearted effort.

Wall Street

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caught in a catch-twenty-two situation: the better the market situation, the more cause for pessimism and a second crash.

Given these difficulties, many students are again setting their sights on corporate management and may be leaving excellent opportunities in finance on Wall Street behind. Constantine was quick to point out that "for those people who are qualified and interested, the opportunities are still there." Originally anticipating a rash of cancellations of campus presentations by investment banks following October 19, Constantine pointed to the continued recruiting efforts by all major firms as cause for optimism.

Moreover, with financial analyst positions being terminal (lasting no longer than two years), Constantine felt that the high turnover rate would ensure future hiring. Cohen asserted that, despite Merrill Lynch's having reassessed some of its recruiting needs, the firm is "still recruiting aggressively," and pointed to the introduction of a new "debt and equity intern" program. Pruner at Shearson Lehman Hutton expressed her firm's commitment to future growth: "we try to keep target growth at a consistent level."

Robert Salomon, a Managing Director of Salomon Brothers, pointed to the deregulation of the financial services industry as cause for optimism. Like most deregulated industries, he claimed the effects "are reasonably predictable...[there is] greater competition and lower prices...[and this ultimately] tends to produce a stronger industry."

In addition, while representatives of most firms did concede some scaling-back in the hiring of entry-level financial analyst programs, virtually all firms expressed a conviction in the growth of retail brokerage services. A source at Dean Witter maintained that "financial analyst programs will get a little bit lighter...[but] several firms are quite committed to further growth in sales." Mass, who is responsible for the broker program at Drexel Burnham Lambert, also felt that "the prognosis is very strong" and that the firm "may increase class size."

Most firms will undoubtedly be scrutinizing applicants a little more closely, and keeping a little sharper eye on the bonuses and the bottom line. As the *Wall Street Journal* puts it, "after the stock market crash, everyone knew Wall Street wouldn't be as much fun." Nor can security, which has never been a Wall Street strong point, be expected in the near future; Constantine warned that "if students are risk-takers...they must be prepared for the consequences if it doesn't work out. If security is important, then it's not a good idea. Yet, there do still exist attractive and viable, though less glamorous, opportunities, on Wall Street."

CON

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semesters of core courses (13), is added to those needed to fulfill pre-med requirements (17), the student must take thirty pre-determined semester courses. Nine courses or fewer are left for experimentation. Now the new cultures requirement eliminates two of the nine.

Over the past twenty years the quality of our already established, nationally renowned core courses has deteriorated. As class size in Lit Hum and CC has grown, famous professors have been replaced by teaching assistants.

In order to redress the problems in the core, the University has established a commission to "review" the core courses. We have been told that they will soon determine what solution should be applied to fill the gaps in the core. Yet before reaching a verdict on either their quality, comprehensiveness, or importance, the administration has raced ahead and created another requirement. Before choosing to develop new requirements, the administration should have concentrated on solving the problems in the present required courses. Before worrying about the quantity of core courses, they should concern themselves with their quality. Instead of applying funds to something new, they should consider hiring additional professors to limit class size.

Unfortunately, class size does not seem to be a concern of those in power at Columbia. Although hundreds more will now be taking a select group of non-Western courses, the administration does not appear to be planning to hire any additional faculty. Next year instead of being able to learn about new cultures we can look forward to overflowing classes situated in large lecture halls, having no contact at all with the professors. Next spring students will have to sit in the aisles of "Introduction to the Civilization of China," as they did this year in "The Politics of Policy Making."

Non-Western culture courses will become large lectures filled with uninterested students. Professors will be forced to slow the pace of the course to accommodate those who have absolutely no desire to be there in the first place. The student who has a real interest in the course will suffer the most.

According to the Course Guide, the Western civilization courses were established so that "all College students, regardless of their particular academic and professional interests, should have an opportunity to study and reflect critically upon the major ideas, values, and institutions that have helped shape the contemporary Western world." If the administration now believes this to be inadequate, they should have carefully re-examined Lit Hum and CC and then made an even-handed decision. Instead, they have chosen an quick, unfair solution.

The Fed Poll

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14. Q. Who is currently the head of the Federal Reserve Board?
    A. Alan Greenspan
    % correct Columbia 48.8 Dartmouth 28.7 Harvard **55.8**

15. Q. Who was the Soviet premier following Stalin?
    A. Malinkov
    % correct Columbia 4.7 Dartmouth 3.2 Harvard **6.4**

16. Q. What book by Upton Sinclair led to the creation of the Food and Drug Administration?
    A. *The Jungle*
    % correct Columbia **88.8** Dartmouth 63.9 Harvard 79.4

17. Q. Who wrote "A Modest Proposal?"
    A. Jonathan Swift
    % correct Columbia **61.8** Dartmouth 28.1 Harvard 58.8

18. Q. What is another name for the "aurora borealis?"
    A. Northern lights
    % correct Columbia 81.2 Dartmouth 65.9 Harvard **86.9**

19. Q. Who wrote *Twelfth Night* ?
    A. William Shakespeare
    % correct Columbia 65.9 Dartmouth 62.2 Harvard **86.1**

20. Q. What does *quod erat demonstrandum* (Q.E.D.) mean?
    A. "Thus it is proved" or "therefore"
    % correct Columbia 52.4 Dartmouth 36.7 Harvard **69.3**

21. Q. Who wrote *The Brothers Karamazov* ?
    A. Dostoevsky
    % correct Columbia 72.9 Dartmouth 43.3 Harvard **76.0**

22. Q. Which *element* is the "basic building block" of all organic compounds?
    A. Carbon
    % correct Columbia 91.2 Dartmouth 81.4 Harvard **95.5**

23. Q. Which President's pet project was building the Panama Canal?
    A. Theodore Roosevelt
    % correct Columbia **77.1** Dartmouth 47.6 Harvard 76.8

24. Q. What is the *Torah* ?
    A. The Hebrew scripture, the first five books of the Old Testament
    % correct Columbia **90.6** Dartmouth 71.9 Harvard 85.4

25. Q. Who wrote *Don Quixote* ?
    A. Cervantes
    % correct Columbia 86.5 Dartmouth 51.3 Harvard **88.0**

26. Q. Who wrote *The Republic* ?
    A. Homer
    % correct Columbia **95.9** Dartmouth 86.8 Harvard 87.3

Do you agree with what you've read in this issue?

Do you disagree with what you've read in this issue?

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THE FEDERALIST PAPER

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GREEK WEEK

Thursday, April 14 - Monday, April 18

On-going Block Party on Fraternity Row

Thursday, 14th
Cocktails with the Deans

Friday, 15th
12-4 Greek softball
4-8 Live music on the Lawns
night Fraternity parties

Saturday, 16th
Dance marathon at the 'Plex with Live music*

Sunday, 17th
The Greeks sing in Wollman Auditorium

Monday, 18th
Movie night on Furnald Lawn

ALSO--

Friday, 22nd
Greek Olympics

Come Out and Make Some Waves!

Sponsored by the Interfraternity Council

*Proceeds benefit the United Way

Odyssey: Sculley's Story at Apple

BY MARK BURES
AND MIKE BLOCK

John Sculley. Odyssey *(New York: Harper and Row), 1987.*

As a child, John Sculley was fascinated by his tinkering with electrical toys. It was at age fourteen that he submitted a patent for the color television cathode ray tube, just two weeks after Dr. Lawrence of Lawrence-Livermore Laboratories tendered a competing patent that would lead the world into the domain of color television. Only several weeks separated him from one of the greatest successes in the history of applied science. He would later lead one of the most significant revolutions of our time as he propelled the fledgling Apple Computer company into the industry giant that it is today.

The recently published autobiography of John Sculley is entitled *Odyssey* and it reveals his rather intriguing life story from the years of the presidency of Pepsi-Cola to the assent of the helm at Apple Computer. Sculley's autobiography, however, goes beyond the scope of most others, for it not only recounts the past, but offers the reader keen insight into the future.

After spending time at McCann-Erickson, an advertising agency, Sculley's business career began in earnest when he signed on as a PepsiCo. team player in 1967. Although he was the company's first employee to arrive equipped with an MBA, he nonetheless went the same route as all new recruits: a six month training session of manual labor at supermarkets and bottling plants. Upon the completion of "basic training," he started work in the marketing division. He experienced resentment not only for his MBA, but also for the fact that he had been previously married to the stepdaughter of PepsiCo. Chairman Don Kendall. Sculley's successive achievements propelled him to the top of the corporate ladder and, in 1977, he became Pepsi-Cola's youngest President ever at the age of 37.

The first part of *Odyssey* recounts Sculley's experiences at Pepsi, a corporation of the "traditional mold": multi-tiered management system, lavish offices, and separate executive facilities. The second part, however, discusses his experiences at Apple and provides better food for thought.

Sculley was recruited by Apple's Gerry Roche in 1983 in the wake of a personal challenge from Steven Jobs. Roche made the offer: "Do you want to spend the rest of your life selling sugared water or do you want a chance to change the world?" Known as "the guy from corporate America," Sculley experienced an entirely different atmosphere at Apple—offices separated not by walls, but partitions, and quite informally dressed employees. In short, the Apple folks were not playing the standard power breakfast game.

Sculley and Jobs soon established a deep friendship and taught each other his respective end of the business. While Sculley managed the company and trained Jobs in the business aspect of Apple, Jobs offered innovative genius and vision. Jobs saw computers as having the potential to revolutionize the world with the power of unlimited direct information access: he saw the Macintosh as the vehicle for the common man to reach such a point. As time passed, however, problems arose as Jobs began to overstep his role, attempting to manage the company along with Sculley. As the company declined, the situation worsened, until the board of directors was forced to choose between the leadership of the two men. Jobs lost and left, leaving Sculley with a crippled company and a desperate situation. It was from this dismal and demoralized state that Sculley rebuilt Apple into the vigorously growing powerhouse that it is today.

Throughout *Odyssey*, Sculley scatters chapters discussing the revolutionary ideas and visions that he has divined from his experiences. The topics range from the moderately interesting lessons learned about marketing at Pepsi to fascinating notions concerning the potential of the personal computer in the Information Age. Sculley's views about the changes in corporate structures, the role of education, and the economic foundation of the United States are intriguing and often shocking. Sculley sees the possibility of a 21st century Renaissance, spurred by mass ownership of the personal computer. He believes that the United States has the potential to benefit the most from such an event, but only if resources are expanded by further tapping the potential of minorities and women in the work force—the competitive advantage impossible in Japan and other Asian nations.

In a time of economic uncertainty and fears of failure in the United States, Sculley offers a path that he believes would facilitate continued technological supremacy for the United States. It is indeed a "must read" for those interested in corporate America and the future of th world economy through the eyes of one of our nation's most successful young executives.

Library Hours:

Short Funds Yield Short Hours

BY MIKE BLOCK

As finals approach many feel the study crunch in full force—papers to write, missed notes to copy and books assigned to read in the first week of class. But the pressure of this cram can be worsened if library hours are insufficient. Although the Columbia University Libraries keep longer

hours during exam time, students have complained that the period just before exams underscores the lack of late hours at the Libraries.

The College Library is open latest of all the libraries with hours of 9 A.M. to 3 A.M. Monday through Thursday, 9 A.M. to 9 P.M. on Friday, 10 A.M. to 6 P.M. Saturday, and noon to 3 A.M. on Sunday. "They should be open longer on weekends," states Debbie Blumenthal, CC '91. Some, however, feel satisfied with the present library hours. "I don't think that there is anything wrong with the library hours," commented Jen Levine, CC '90.

Libraries cannot provide more services when the funds are not allotted to them. There is only one pie and everyone wants a larger piece.

Collection quality and number can also create tight spots. Some point to the limitations in number of College Reserve books. "Much of the required reading must be done at the Reserve Library where only two desk copies of a book are available for classes of over 50 students. Allowing only hours for an important history text is impractical and insufficient," complained Teddy Stern, CC '90.

But augmented library services require a bigger budget, as maintaining longer hours would necessitate hiring more staff and more maintenance workers. When asked about student requests for more services, an informed source in the Library system, who did not wish to be identified, explained that "the Libraries are mindful of student concerns when proposing a budget, but the Libraries cannot provide more services when the funds are not allotted to them. There is only one pie and everyone wants a larger piece, such as faculty, researchers, university employees, and so on."

"Much of the required reading must be done at the Reserve Library where only two desk copies of a book are available for classes of over 50 students. Allowing only hours for an important history text is impractical and insufficient," complained Teddy Stern, CC '90.

Another employee at the Libraries noted the practical difficulties of providing increased services. "Columbia University is not only an undergraduate institution. Because there are 26 locations with their particular clientele, it is very difficult to operate a 24-hour library. Everyone wants their library open 24 hours. Security is also a problem because there must always be someone monitoring the doors, and the more doors one has to control, the more expensive it becomes to stay open longer."

As Columbia must maintain a research level collection, in many areas a further choice has to be made once the library receives its budget. Although, as one librarian puts it, "a very significant portion is already allocated for services," library administrators must decide whether to strengthen the collection at the expense of services, or vice versa. With the weak dollar exchange rate, the prices of foreign periodicals have skyrocketed thus straining the budget and hampering the ability of library administrators to maintain the quality of the collection. Ironically, Columbia could have the greatest library system, if nobody used it.

When budget time approaches, the Libraries will be faced with many hard choices, and just how difficult those decisions will be hangs on one variable—money.

10 ISSUES

1968 Unrest

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Ad Hoc Committee thought the University was a place for education, but also a community."

In describing his motivations during the siege, a professor who placed himself between an occupied building and the police to prevent violence explained, "God would most likely tell us that we were all confused. It seemed like constant improvisation for a couple days, and we just hoped that the University and the students would not be permanently harmed. We thought we could be helpful; maybe we weren't. These were hard times. A lot of faculty members whom I admired greatly thought that I was doing very wrong things; that was very painful. Many students felt I wasn't radical enough."

When asked why he felt a need to protect the students from the consequences of their actions, Professor Westin replied, "a student is not a lamp post or a stranger passing through; there is an emotional-education bond. We [the Ad Hoc Committee] tried to show students ways to think that were better than others. I'm here to educate in the moral use of knowledge." James Kunen, however, remembers "the Ad Hoc Committee members were liberals, which was a dirty word in those days. They weren't radical enough. Professor Westin kept telling us to come out of the buildings and that we were destroying the movement by staying inside. They were trying to stem the tide."

Mark Rudd, the leader of the SDS revolt, spoke to a crowd shocked by the use on police force on campus and declared: "Columbia University is now dead."

The seven day siege ended on April 30 when the police liberated the five buildings and cleared the campus, making 692 arrests. Later that day, Mark Rudd, the leader of the SDS revolt, spoke to a crowd shocked by the use on police force on campus and declared: "Columbia University is now dead."

The University's use of police on campus drastically changed the majority sentiment. A conservative professor commented, "police action always involves some people getting hurt and possibly the appearance of abuse. The action brought moderates to the radical side and caused many to lose sympathy for the University." Professor Westin maintains that although "the SDS were a sliver of the population, there was a point at which they had majority support—after the undisciplined police action. The next day, there was an emotional recall; it was a dirty deed, not done with due process. The Ad Hoc Committee, some

A professor who placed himself between an occupied building and the police to prevent violence explained, "God wouldmost likely tell us that we were all confused."

beaten up by the police, had a splendid meeting [on April 30th]. It was a unique moment—the faculty was trying to understand where universities would go if students were to occupy buildings and police came on campus."

The lasting effects of the Columbia uprisings are difficult to gauge. One professor remarked that the protests caused the politicization of the University because of the withdrawal of the conservative element and the later recruitment of radical students as faculty. Professor Westin commented "it was a bitter time for 5 to 7 years after; the faculty conflict was very high and there was a gulf between students and faculty. In 1969, you walk into a classroom and the students feel that you have no knowledge that can inform them. There was no sense that the faculty held any key for the future." A more positive effect of the protests was the creation of the University Senate to include students and faculty in decisions of University policy.

Not only the proud tradition of civil disobedience remains from the late sixties, as Kunen, now an editor of *People Magazine*, discovered two years ago when he returned to Morningside Heights to write an article. He noticed that the excavated gym site, abandoned in 1968, had never been filled in: "Columbia just left it there with a rusty fence around the pit; they didn't even bother to fill it in."

Stanfordization

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the liberation of the South African oppressed, maintains a dialogue with the significant—and Communist—African National Congress. The fallacy of this interlocutor's argument is the misunderstanding of the progression of ideas. Without Hegel, there would be no Communism, and hence no African National Congress. In fact, without Hegel, Karl Marx might never have written his *Manifesto*, as Marx was a professed Hegelian. Moreover, Hegel drew his dialectic argument from the vast experience of Western history and intellectual tradition. A scrutinous reading of Plato reveals insights about Communism which maintain valuable practicality today.

Western ideas, be they of Democracy, Communism, or Judeo-Christianity pervade our society. Therefore the Core should include the books which most notably influenced the dominant social concepts. This is not to say works formed outside the Western orbit are improper core material. However, they must be unusually durable and significant in a worldwide context; not just their own context. Buddhist texts, for example, must instruct us on the individual aspects of human nature. What is obviously ruled out is the reading of culturally based texts from non-Western tradition and the study of slightly represented groups within Western society.

Should we, for example, read Sappho in Lit Hum? If she merely represents a token woman's voice in Greek society and does not provide any dramatic impact of the intellectual tradition from the Greeks, her status fulfills none of our core parameters, and the answer must then be no.

If, on the other hand, it is determined that Sappho's poetry depicts a significant aspect of Greek culture-love, the experience of women, sexual relations—and enlightens our understanding of ancient sources, then Sappho passes the test of significance, and should be assimilated.

It is fruitless to read a book by a woman—or a man, for that matter—which fails to tell us anything useful or insightful about the society we are striving to comprehend simply because of the author's secondary characteristics.

The worst pitfall is to brand the University as elitist for wanting to stick with reading classic Western works. Such an attitude bespeaks a fundamental misunderstanding of the purpose behind the University's maintenance of the core—to assist students toward a better comprehension of the truth. Aristotle, Saint Augustine, Kant and many others etched into the facade of Butler Library are thinkers of the first order who should never be discarded by educational "reforms." These writers' criticism of their contemporary societies would hardly qualify them as accomplices in an elitist conspiracy to advance the cult of the West.

Columbia College's core, with CC and Lit Hum at its center, forms the foundation of each student's education. The core is

celebrated because of its longevity, and more importantly, receives accolades as a result of its success. In the world of academia, and throughout our society, it is understood that all Columbia College graduates have been given the textual basis for the understanding of our contemporary civilization. Neither longevity nor success would exist exclusive of the other. The Core is successful because it does not shift with the winds of trend or fashion. Since the Core's origins in the aftermath of World War I, the world has changed greatly. On the other hand, at its center, the Core has not. The administers of the core have not maintained their unshifting policy because they are educational dinosaurs. They have kept the great works in the core because they realize that this is not a relativistic world. Some books are simply more significant than others.

Columbia must guard against breaking with this successful policy. It is dangerous to conform to temporary pressures if it means disregarding what is so proven as steadfast.

Other universities, including Brown and Stanford, have all but eliminated their core requirements. In reading the same books that were read in the College fifty years ago, we are not mired in archaic study. Rather, we are partaking in an education which is timeless, and has every bit of relevance today as it did decades ago, and will continue to have decades from now. It is unlikely that current students of these universities, which have changed to accommodate immediate appeal, are receiving an education which will be as significant, years in the future, as that received at Columbia.

THE FEDERALIST PAPER

A student newspaper in the tradition of Columbians Hamilton and Jay

Volume II Number 8 | Columbia University, New York City | 4 May 1988

1968 Unrest:

It was 20 years ago today...

BY K. ELIZABETH WEIR

"The spring of 1968 was a time of social convulsions of baby-boomers who were concerned with the bomb, civil rights, and the war in Vietnam," reflected Dr. Alan Westin, Columbia Professor of Public Law. During the campus revolts of 1968, Professor Westin founded the Ad Hoc Faculty Committee which urged mediation instead of police action to restore the campus to order. "A lot was coming unstuck in society. The events on American campuses could not have been averted by the wisdom of university administrations," Westin said.

At noon on April 23, 1968, a radical student group, Students for a Democratic Society (SDS), held a rally at Columbia's sundial. The SDS demanded public hearings for students who violated Columbia's rule against indoor demonstrations and also demanded that the University remove itself from the Institute for Defense Analysis (IDA), a group of universities doing research for the Pentagon.

James Kunen, author of *The Strawberry Statement*, a student account of the Columbia protests, remembered the frustration of the SDS supporters: "[University President] Grayson Kirk didn't even address our points; he was like some Wizard of Oz sitting under the Low dome." After the rally, 450 supporters of the SDS and the Student Afro-American Society (SAS) occupied Hamilton Hall, and then took Dean Coleman hostage. This was done to protest the IDA issue and the commencement of construction, in Morningside Park, of Columbia's new gym, which would have had separate facilities for Columbia and the neighboring predominantly black community. The gym was to be built on public land through an agreement between Columbia and the City Department of the Parks.

During the first night of the siege, the SAS expelled the white supporters of the SDS because the SAS questioned the white students' commitment to the gym issue. The evicted white students broke into Low Library and occupied President Kirk's suite of offices. In the next few days, radical students seized Avery, Fayerweather, and Mathematics.

The enormous publicity of the events fueled the disturbances and sparked unprecedented student civil disobedience across the nation's college campuses. One Columbia professor remarked, "the media created the crisis. If it had not been reported on the news, nothing would have happened." Kunen reflected, "our picture was on the front page of the *New York Times*. After our protests, we saw [radical student movements] spread across America. I don't think I will ever again feel that level of solidarity. We felt like a wave of purification making the earth a better place."

The campus, however, was divided over the revolt; many students joined Students for a Free Campus, a group which "had grown weary of SDS's incessant demands, slashing accusations, and disruptions," according to George Keller's article for *Columbia College Today*, "Six Weeks that Shook Morningside." Many classes continued to be held and Butler Library was unusually full with students using the time to complete their term papers. Seventeen hundred students had signed a petition castigating the SDS.

President Kirk delayed using force to evict the protesters because of the fear of rioting in Harlem only weeks after Reverend King's assassination and at the urging of the Ad Hoc Committee. A Columbia professor explained Kirk's lack of effective action, "the University was not prepared to react against the valid protests of the black students over the gym issue."

The Ad Hoc Faculty Committee vowed to stand between the protesters and the police in case the University brought the police on campus, and several times, the group succeeded in delaying police action. One faculty member remembered, "these were our students and you just don't go and punish them even if they are wrong. People were legitimately afraid that the University would be completely politicized and challenged as an institution of learning. The

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"The Pit" left in Morningside Park at the proposed gym site.

Columbia Concerts - BOM Merger

BY VIRGINIA CORNISH
AND ADAM TOLCHINSKY

A proposal to merge Columbia Concerts, a campus organization designed to present concerts to students throughout the year, with the Board of Managers (BOM), a campus organization responsible for programming a wide range of events including Comedy Cabaret, Ferris Reel movies, and various lectures, had met with opposition from some students associated with Columbia Concerts and the Barnard Student Government Association (SGA). The merger had received wide support within the Columbia campus at large and from BOM.

To gain the approval of Columbia Concerts and SGA, the merger has since been modified to allow Columbia Concerts to remain autonomous within BOM and to double Columbia Concerts' funding to approximately $20,000.

Until five years ago, BOM had exclusive control of concerts at Columbia University. According to BOM Vice-Chair Ben Goldman, SEAS '88, the organization used to present a "big show every year at Baker Field." Goldman explained that because the last concert held at Baker Field was a "bad show," Columbia Concerts was formed and has since received $10,000 from the Joint Budgetary Committee (JBC). Barnard SGA has also contributed $3,000 to Concerts for shows presented on the Barnard campus.

Last year, BOM formed its own ad hoc committee because, according to Alex Gorup CC '88, Chairman of the BOM concerts committee, "[they] felt there was not enough campus interest, or [the campus] was not entirely being served." This ad hoc committee "set out to put on a large concert in Levien Gym."

The BOM concerts committee placed bids with various bands, such as Meat Loaf, to play at Columbia; however, all these bids were rejected. This generated interest in the possibility of a larger concert which many people felt might require the resources of several student organizations operating jointly.

Erica Lang, BC '90 and Chair of Columbia Concerts, believes that a large concert, "though not impossible, is improbable...because we don't have the money. [And also, because] we are in Manhattan, bands want to play downtown. If they play downtown, they usually must promise not to play anywhere else [in the city]."

Many students seem content with the work Columbia Concerts has done, but believe that the quality of concerts could be improved. Dan Langenkamp, CC '91, who enjoyed the Fishbone and the Feelies concerts, feels that "Columbia should definitely have more concerts and better bands." He believes that the major barrier to improvement is that there is "not enough funding." Leigh Sansone, BC '89, urges "increased student input in concert selection. Maybe a student poll could be used to gauge student preferences."

According to Tony Calenda, CC '88 and Chairman of JBC, the merger has many benefits. A single organization with a "bigger budget could get better groups," possibly to play at Baker Field. Additionally, the merger would "give

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• ARTICLES •

IF WE COULD ALL READ THE *ILIAD* AS THOROUGHLY AS *THE FED*

Question 26. *The Fed* poll.
A big joke? A simple typo? Do *The Fed* Editors not know who wrote the *Republic?* Worse still, do *The Fed* Editors not know who wrote the *Iliad* (or the *Odyssey*)? Could it be that the Editors don't have time to read the Core because they spend their lives *Fed*-ing? Was it a publicity stunt? Was it a test of our readers to see if you're paying attention—perhaps to see just how many of you actually read *The Fed?*

Well, you came through—we lost count after about 50 comments (not to mention some ten phone calls from, among others, a University administrator), but it seems we have a lot of diligent readers.

We're touched, truly touched. Keep reading, and thank God that you don't go to Dartmouth!

OH, WHAT A LITIGOUS SOCIETY!

Nationally, applications to law schools have increased 15% this year. At Columbia College, applications to law schools increased 55% this year. In fact, this year the same number of students at Columbia applied to New York University Law School as there were Columbia students *applying* to law school last year.

Hard to believe, isn't it?

GOODNESS GRACIOUS

The latest in NYC "news" coverage—a broadsheet, four page paper calling itself THE TRUTH has uncovered that:

AIDS Is Germ Warfare by the U.S. Government Against Gays and Blacks!

And what's more:

AIDS Virus is Man-made (Genetically Engineered) by the Central Intelligence Agency to Achieve Right-Wing Political Objectives

Well, in our on-going effort to provide something for everyone, *The Fed* is going to provide you all with the address at which you can reach these folks and join up. Just visit the:

United Front Against Racism and
Capitalism-Imperialism
10 East 16th Street, Bell #19
New York, NY 10003

or call: 929-1045

Only in New York!

MAKING OUR MARK

"Give me one more Columbia, and I don't care who the Democrats nominate for President."

- Richard M. Nixon,
as Presidential candidate
in 1968

COLUMBIA LOGIC

In case you missed it, a recent letter to the editor of that college daily (you know, the one on Amsterdam—by the post office. C'mon we're sure you've heard of it), a member of the newly-appeared Black Students Against Bantustan Education wrote:

"By stating that students who leave school because of financial difficulties do so because their parents refuse to pay for tuition, the deans display their inherent racism. It is amazing that they remain unaware of the economic stratification of people of color in the United States, and how this affects students of color at Columbia. In effect, the deans are saying that they do not wish to have students of African descent on this campus."

Read it carefully; we're not going to say a word.

"POLICE STATE RULES DON'T BELONG IN SCHOOLS!"

Or so the latest in the series of anti-rule change paraphernalia declares. On a poster claiming to describe "How Democracy Works," the statement is made that:

"Last week the University Senate pushed through approval of new rules of conduct that make protest grounds for expulsion."

Perhaps we're misguided here at *The Fed*, but we thought that the rule changes simply made the *blockade of buildings* a "serious offense" as regards disciplinary proceedings. So far as we know, anyone can still protest anything. And even if, in so doing, someone blockades a building, expulsion is not a foregone conclusion but rather something to be decided by hearing.

Perhaps someone who understands the change in rules better than we, would like to send a letter to us explaining the above quotation—or perhaps someone will stop his attempts at misinforming the student body.

Nea, we doubt it.

BE THE FIRST ON YOUR BLOCK

From the *New York Times* comes word that a company named Aristotle Industries, in Washington, has come up with the ultimate in superfluities, the gift for the proverbial man who has everything. It's a videotape of every television commercial broadcast by the eight Democratic and seven Republican contenders in the 1988 Presidential race.

The tape has some 60 ads, arranged chronologically from the Iowa caucuses to the Michigan caucuses. Available in Beta or VHS for $75.

We, at *The Fed* would jump at the opportunity to pay $75 *not* to have to see a television ad of a Presidential hopeful ever again.

MORE FROM THE HEY, HEY, HO, HO DEPT.

Workers Vanguard, the most fun 25¢ can buy, seems to have a problem with Democratic front-runner Jesse Jackson. In the text underneath a photograph of Jackson (with former Alabama Governor George Wallace) captioned, "Jackson courts George 'Segregation Forever' Wallace in Montgomery, Alabama last summer" is the following:

"Jesse will come into Atlanta [location of the Democratic National Convention this year] and sell black votes to the highest bidder. And for what? Maybe Jackson will be appointed 'Drug Czar,' get to be America's head narc. And black people will get the shaft once again. Ths deal has been floated by A.M. Rosenthal, Zionist pig emeritus editor of the *New York Times*, ex-Nixon flack William Safire and New York City mayor Ed Koch."

It seems that this would be an undesirable role for Jackson to play because:

"The drug witch-hunt is sucker bait to *disarm black people* in the face of racist terror and to *sanction cop terror*."

And by the way, the folks at *WV* asked us to remind you that "Jesse Jackson Fronts for Party of War* and Racism," and that "Jackson runs for power broker amidst Democratic field of yuppies, Dixiecrats and yahoos."

*[See photo of protester with sign reminding us that the Democrats are the party of Hiroshima, Bay of Pigs, and Vietnam]

Oh boy.

CORRECTION

In the 6 April issue of *The Fed*, Pierre A. Louis, GS '89, was identified as a member of the Black Students Organization. He is not.

THE FEDERALIST PAPER

•Veritas non Erubiscit •

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College Faculty Poised For Large Turnover

BY DORSEY DUNN

In the post-World War II era, the G.I. Bill and the increasing value of a college education in the job market produced rapid growth in the college system. In response to heavy demand, universities around the country underwent major expansion. At Columbia College, the 1960's were a period of rapid hiring and tenuring of faculty. This accelerated expansion had a drawback: the faculty growth rate upset the administrations' estimations of faculty turnover. As a result, approximately half the faculty tenured by Columbia College will retire in the next decade.

Before the period of rapid expansion, the Columbia College administration had estimated the age at which a professor would receive tenure at 35 to 40. The administration also expected 25 to 30 years of work from the tenured professor before his or her retirement. This translated to approximately 4% of the faculty retiring each year. The natural turnover, however, was disrupted by the concentrated expansion of the 1960's.

By 1970, the period of increased hiring had changed these statistics on the composition of the faculty. The average age of a tenured professor was under 50 and the majority of faculty members were gathered in a narrow band of ages between 45 and 50. As a result, the group would be retiring in a close range of years.

During the 1970's, most departments at Columbia and at most other colleges did very little tenuring of faculty. One of the primary reasons for reduced faculty expansion was the decline in demand for higher education. The college-age population leveled off in the 1970's, curbing college expansion and compounding the problem of scarce jobs for young teachers.

"[The situation] caused a lot of pain for people who were in graduate Ph.D. programs, expecting to go into college teaching jobs but couldn't find available jobs anywhere," said Roger Lehecka, Columbia College Dean of Students. He added that the difficulty of finding work applied "even for people who were very good and who, ten years earlier, would have gotten five job offers in five minutes."

The expansive actions of the administration 25 years ago are beginning to cause problems. According to Lehecka, Columbia College faces "a period roughly from now until 1995 or a little thereafter in which about half of the tenured faculty in the Arts and Sciences at Columbia will be retiring." In the next several years, Columbia will have to rapidly replenish faculty depth.

Some changes are in store for this old girl.

Lehecka views the approaching need for faculty not only as a concern, but also as an opportunity. Lehecka wishes to preserve the integrity of Columbia College and its curriculum while continuing to attract the best faculty available. A priority for the administration, according to Lehecka, is the maintenance of the quality and focus of the curriculum. "We have a situation where the turnover requires that we be aware of the fact that we're going to have many new faculty members who may not be familiar with our curriculum and may have no particular commitment to it," said Lehecka.

College administrators particularly stressed this need for faculty commitment to the curriculum. Lehecka commented, "if you have a slow and steady turnover in faculty, new people can be oriented to the curriculum, told about why it exists, what its significance is, and what it means to Columbia by people who have been here a longer time."

According to the administration, the undesirable situation would be a rapid period of hiring and an instability in the various departments, as a result of a new, unaccustomed faculty. To retain a certain stability is the "real challenge we face," said Lehecka.

In attempting to preserve the academic tradition of Columbia, the administration does not intend to strictly promote an outdated curriculum. Lehecka cited the de Bary Commission, which is currently reviewing the Core Curriculum, as a real attempt by the administration to accommodate changing needs in modern education. He implied that prospective faculty members will be more apt to support a curriculum which is valid in the present day.

Lehecka saw the need for change and renewal not simply in terms of recruitment of new faculty but in the wider context of fundamental changes need at Columbia College. Recalling his own years as a student at the College in the 1960's, Lehecka noted, "Columbia College is a very different place than it was when most of the current faculty were brought to Columbia." In the 1960's, the College was largely a commuter school; it was about 50% residential, whereas today that number is approximately 90%. More importantly, Columbia College was much less prominent as an academic institution in the 60's.

Faculty involvement in Columbia undergraduate life idea "has not been much of a tradition here," admitted Lehecka. He expressed hope of recruiting new faculty members who are interested in undergraduate life; he has an optimistic outlook for improved student-faculty relationships through such programs as faculty-in-residence.

To what the increased tendering of positions expected in the next few years will lead is a matter of speculation. Lehecka did feel that, "the future of the college is much more along the lines of other very competitive and selective residential colleges, not simply as a university college with a large commuter population." The opportunity now open to Columbia is to direct new faculty to the college in its developing stages.

Students in the Discipline Process

BY VIRGINIA W. CORNISH

In the past few years there has been a movement in the student body to involve students in the disciplinary process at Columbia College. Currently, discipline is divided into two areas: minor violations (which relate to residence hall life) and more serious violations (e.g., of dormitory regulations, academic violations and other serious infractions of individual rights). Over the past three years, the Undergraduate Dormitory Council (UDC) has worked to develop a proposal for involving students in the first of the two areas, which is currently handled by dormitory Head Residents (HR).

Recently the College Student Council has shown interest in a similar integration of students in the Dean's Discipline process, which handles more serious violations. All parties involved seem to agree that the inclusion of students in the disciplinary procedure would promote a sense of community which would make the entire procedure seem less hostile.

The majority of infractions of dormitory conduct rules are currently handled by the Head Resident of the Dorm. Eric Gelb, the Head Resident of Carman, explains that specific incidents are reported to him by the Residence Counselors (RC) on each dorm floor. He then determines the student's innocence or guilt and a penalty, if appropriate, from the RC's report and a conference which he has with the student, referring infractions which carry severe penalties to the Deans.

Dean Blank notes that student involvement at other institutions has not damaged disciplinary processes: "Students do not necessarily hurt confidentiality, and usually students do not give lighter sentences."

A group headed by Cornelia Gallo, CC '88 and last year's President of Central UDC, has drafted a proposal which creates a panel to hear discipline cases presently heard by the Head Residents. According to Gallo, the panel consists of one Head Resident, one Residence Counselor, two student members of the panel, and a non-voting Student Chair who votes in case of a tie. Members of the panel are rotated among a pool of, four head residents, four Residence Counselors, and ten students, with the constraint that students may not hear cases from their own dorm. According to the proposal there will be a rigorous selection process for members of the panel and subsequent training for those chosen.

Preliminary procedures for the panel state, "that the Head Resident and accused student will make statements to the Panel in each other's presence," and after fielding questions from the Panel, will appear individually before the Panel. Like the Head Resident, the panel will base its determination of guilt or innocence on the statement and testimony of the Residence Counselor who reported the incident, testimony from the accused student, and testimony from any relevant witnesses.

Implementation of the proposal, in Gallo's opinion, has been difficult because of the problems of agreeing on the specifics of the proposal. Gallo remarks that, "Head Residents are skeptical, protective of the dormitories, afraid their authority will be decreased. Change is not always taken easily."

Gallo believes that the Panel is needed so that students, "do not feel that the way discipline happens is omniscient." She says that, "if students regulate themselves, they will feel like more of a community."

Laurel Daniels, CC '91 and President of McBain UDC, offers a different interpretation. She talked to her UDC representatives and found many do not believe that change is needed. She notes, "John LaRocca, the Head Resident in McBain, has done a great job handling the incidents in McBain. The Head Resident is trained to be a counselor first, so the new discipline process could interfere with the intimacy between the Head Resident and the students. There is a concern for the confidentiality and expediency of the process. Perhaps the panel could be used as an appeals process."

Gallo is confident, though, that the panel will reach competent decisions in a reasonable time frame, noting that the panel will meet regularly to hear cases. Confidentiality is the biggest problem with

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Vigilante Justice

General editorials are passed by a majority of the Board of Editors.

When University Senator Tom Kamber found out that his friend College Student Council Chair Jared Goldstein had been disqualified from the Columbia College elections for allegedly breaking the elections commission's rules, he concluded action must be taken.

Fearing that College Dean of Students Roger Lehecka would allow the ballots to be counted before Goldstein could appeal his ejection, Kamber then decided that he should take matters into his own hands.

As Chuck Price, Director of Student Activities, and Mark Bures, an elections commission appointee, were taking the ballot box from John Jay to FBH after voting had concluded, the fiasco began. According to Bures, Price seemingly suspected something was amiss, and chose to take an indirect route to FBH. While the two were near the Sun Dial on College Walk, a group of several students led by Kamber confronted the pair, demanding to take custody of the ballot box.

Price himself had the ballot box, and proceeded to evade the group. Bures was wheeling a hand truck with a box of blank ballots. One member of the crowd grabbed the box of ballots off the hand truck, and proceeded to try to escape with it. Bures had to chase this fellow, and tackle two others, to reclaim the blank ballots.

During this, Price conceded to having Kamber escort him and the ballot box to its secure place in FBH. As the box was being secured, Price repeatedly asked Kamber if he thought the box was being appropriately handled.

The incident was a source of rumor and whispers, but little else. No disciplinary action has been taken against those who forcibly disrupted the established elections proceedings by attempting to steal the ballot box from University officials entrusted with it. In the case of an ordinary student, this would be disturbing; in the case of a University Senator, this is appalling.

Kamber defends his actions by saying that all he wanted to do was take the box to Furnald lounge and prevent the counting of the ballots until it could be determined that Goldstein suffered no wrong in ejection. It had not yet been determined whether Goldstein had been disqualified on legitimate charges. Kamber's reasoning was that since it is more difficult to overturn a decision than to prevent a decision from being reached, the verdict on Goldstein would have to come before the ballots should be counted.

This reasoning is not devoid of all rationality, but it comes close. For Kamber to demand verification to his personal satisfaction before he would "allow" things to proceed is selfish and wrong.

It is true that Kamber was not trying to enforce his verdict on the elections commission. However, even though there was doubt about the legitimacy of the elections, this is no justification for Kamber to take matters into his own hands. He had no right to stage an ambush of the ballot box in order to ensure a resolution would come before the ballot count.

The idea of an "enlightened" goon squad is ridiculous. To think that a group or an individual can force its version of justice on others without authority is a hardly in the best of democratic tradition. It may be appropriate in a Sylvester Stallone movie but should be unheard of at a place like Columbia.

Admittedly, the action was rather inconsequential, and in and of itself, is not a terribly serious thing. What is serious is that the University Administration has done nothing to reprimand the people involved. Something is terribly wrong when an individual is allowed to enforce his private version of justice on behalf of a friend while the Administration stands idly by.

Ideally, college is to be training for adult life, aiming to shape more conscientious and enlightened individuals. For the Administration not to make any reprimands is a failure of this ideal. If students leave here thinking that it is not only acceptable, but correct to bluntly and blindly act on their views and interpretations of a situation, Columbia is a breeding ground for the likes of Bernhard Goetz—likely not one of Senator Kamber's idols.

Each Columbia College student is presented with very sound reasoning as to what is wrong with this version of justice in the first semester of Lit Hum. When we read the *Republic*, we learn why "might is right" is Thucydidian foolishness. Perhaps Kamber should go back and review this work. It can be found in Butler under "Homer."

Back to Bork

BY KIP CORWIN

When people are suddenly vaulted out of comparatively private lives into sudden fame, the opportunity to hear them in person, to witness their grappling with the vicissitudes of newly acquired prominence, becomes exciting, to say the least. Three weeks ago, I had such an opportunity, when I heard Judge Robert Bork speak in person. The occasion was a symposium at University of Virginia Law School, to discuss the same questions of enumerated and non-enumerated rights that had aroused such furor at Bork's nomination hearings.

...the opportunity to hear them in person, to witness their grappling with the vicissitudes of newly acquired prominence, becomes exciting, to say the least.

Meeting a prominent figure, unless one does it routinely, is an instructive experience. It offers one the opportunity to ascertain first-hand the degree of sincerity and character someone has. While such assessments cannot help but remain fallible, they are nonetheless far more illuminating and instructive than images filtered through whatever biases the media might have.

In the main, Judge Bork focused on the wild frenzy of controversy that permeated his doomed confirmation hearings. He expressed frustration at the tendency of the media to portray him as a bitter or angry individual bent on stripping people of their rights. Judge Bork explained that the efforts to defeat him sprang from two overall wellsprings: one, the coalition of interest groups who opposed him—a legitimate, if vociferous lot—and two, a propaganda effort, replete with "record lows in mendacity and vulgarity" launched chiefly by Massachusetts Senator Ted Kennedy. Naturally, it was the latter sort of effort to which Judge Bork objected most. He pointed out that much of the information circulated about him was simply false. Accusations in some instances, were leveled regarding cases that he had neither decided nor written opinions for.

While there was legitimate philosophical opposition to his candidacy, that was not the crux of the issue. Rather, at stake was the long term effect on the substance of law and the judicial process and political life.

As Judge Bork perceived matters, the battle reflected a contest between competing visions for control of the legal and general culture, not, as many thought, a blind desire on the part of Bork himself to make an indelible conservative imprimatur on public policy. Intellectual qualities, not political ones should determine selection of new justices. Judge Bork insisted the logic should apply to conservative and liberal partisans alike.

One of the perfidious ramifications that might stem from last fall's events could be the bringing of undue pressure to bear upon potential nominees—and "those who imagine they are potential nominees." Those sitting on the lower courts might feel pressure to mute their ideas and written opinions, as publishing a controversial article might impede their futures.

Bork claimed that it was not he who was outside the mainstream of American legal thinking, but that it was those to the left.

The Far Left seeks power, Judge Bork said, to use their ideas as weapons against legislative bodies, whose political (*not* constitutional, which are held on a higher plane) attitudes coincide with their own but little. To be sure, conservative justices could do the very same thing—which, to Judge Bork's thinking, would be equally anathema.

Finally, Judge Bork explained his position on the theory of non-enumerated rights and the abortion issue particularly. Judge Bork maintained that groups, by claiming non-enumerated rights for themselves, thereby manage to sneak otherwise unpopular measures through the back door. In the same vein, Bork does not articulate his abortion position; rather, he sees his own preference as irrelevant in the face of the Constitution, which, under his constructionist principle, does not enunciate the rights found in *Roe v. Wade*.

Justices, warned Judge Bork, will face severe threats to judicial review if matters of personal political opinion are drawn into the confirmation process. The best example of the quandary Judge Bork faced here, once more, can be found in the abortion issue. Senator Bob Packwood (R-OR), a centrist, told Judge Bork that he would vote affirmatively if only he would promise at the

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Two Views on the Rule Changes

EDITORS' NOTE: *The University Senate has passed changes to the University Rules of Conduct regarding discipline of students who blockade buildings and discipline of students who withhold their University identification cards from University personnel.*

The Rule Changes are Designed to End Protest

BY NANCY MURPHY

A continual ulcer of dissension within the Columbia community is the balance of power between students and administrators. Administrators' responsibilities consist of ensuring smooth functioning of the university which students attend to learn.

Yet when issues of student input into policy decisions that impact the campus arise, students and administrators retreat into opposing camps. Each demands control over Columbia.

The recent changes in the Rules of University Conduct manifest the most recent skirmish. The Senate, on March 25, passed a 13 page amendment to the rules of conduct without any student input. The proposed changes were not made public until March 21. University Senator Ellen Ostrick states, "the Senate has the right to propose rules changes...which have followed extensive research." Yet the Senate's utter disregard for student input remains apalling. "research" into policy changes should involve consulting those who will be affected—students.

Despite profound future impact, students' voices went unheeded. The Senate neglected to call hearings or hold forums. Between March 21 and March 25, 1135 students signed petitions protesting the change. Close to one hundred trekked up to the medical school, where the Senate meeting was held, to engage in silent protest. Yet in a "travesty of democracy," according to Senator Tom Kamber, the Senate "railroaded through" changes.

In February, the Senate instructed the Rules Committee to prepare the changes. The Rules Committee contains two Columbia College students. While student opinion was therefore nominally represented, the honorable delegates failed to inform the community. Froehlich concedes, "there should have been more effort to communicate." Kamber states, "when 1135 students say one thing, and two say another, that's good reason to hold a hearing."

Sometimes the constitutional guarantees of freedom of speech, petition, and assembly are inadequate. Hundreds of students legally battled the rules changes with two peaceful demonstrations, petitions, speeches, and form letters—without receiving any response from administrators. Sometimes civil disobedience—breaking one law to rectify injustices in others—becomes neccessary. Black students in the 1950's conducted a sit-in at a Woolworth's lunch counter. While that may have broken minor laws, such as trespass or disturbance of the peace gains far outweighed losses. The repeal of southern Jim Crow laws and the genesis of a protest movement which culminated in the 1963-64 Civil Rights and Voting Acts clearly bear greater relevance than the right of unimpeded access to a building.

Vagueness creates further dilemma. Section 413a(8) of the changes states that a serious violation occurs when a student "continues for more than a very short period of time to physically prevent or clearly attempt to prevent passsage within or unimpeded use of a university facility, whether or not a university function is substantially disrupted."

The potential application of this clause could extend to abrogate freedom of assembly. Beyond the clear relevance to preventing blockades, administrators could apply the clause to any picket or rally which causes the slightest degree of inconvenience. So, to prevent demonstrations which have the potential to draw negative media attention to campus, Low Library has created its own 1988 version of Hitler's Enabling Act.

Racism is, by definition, a minority issue. White liberals may care passsionately about fighting racism. Yet caring is not the same as being a person of color and experiencing the smorgasbord of prejudice society ladels out. Students of color have petitioned Low Library until their hands were sore. They have written letters until the inkwells ran dry. Students of color spoke, rallied and argued until their vocal chords cracked. Yet the administration refused to divest South African stocks, stalled the African-American studies major in committee, failed to increase hiring of Black faculty, and neglected to institute the Cultures Requirement until civil

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Rule Changes Change Little

BY NATHAN NEBEKER

The recently passed amendments to the University Rules of Conduct make blocking entrance to a University building for an extended time, and the refusal to present student ID to a security guard "serious" violations of the University rules. While many students oppose these changes, they are indeed good ideas, and will improve Columbia.

Since the well-publicized uprisings of 1968, Columbia has been a school with which political protest has been associated. The tradition of blockades, marches, rallies and demonstrations has strongly continued since the initial protests. Several times during the seventies and eighties, buildings were taken over by students for various causes, and some of us here have been witness to a few such uprisings ourselves. As much as anywhere else, the tradition of the radical sixties lingers on here.

As a result of this tradition, students here at Columbia often have an "eagerness" for protest. Radical student groups seem very willing to let their political movements escalate to the level of loud demonstrations and building blockades.

At Columbia, we all too often have "protest for protest's sake." The primary function of an uprising becomes the protest itself, and not the underlying cause. Students involved in protest get so infatuated with the movement that they lose sight of their stated goals, seeking any basis to stage a march or blockade.

There is currently such a movement against the rule changes themselves, in which students claim that their right to protest is being demeaned. The complaints are being made about protesting in general without any pertinent cause in mind. This is testament that many students have the desire to protest mostly "just for kicks."

The intent of the rules is to allow protesting students to co-exist with everyone else. They allow rights of free speech to those wishing to protest, while

ensuring that rights of other students are not infringed upon.

While some may claim that a blockade does not infringe on other students' rights, it in fact does. In the most recent blockade of Hamilton Hall for example, students not involved nor interested in the protest were forced to enter classes through the Kent tunnel. Classes scheduled to meet for over an hour were curtailed to forty minutes. In addition, the noise from the chanters was disruptive to lectures.

As the rules read before the amendments, a protest that "obstructs the entrance to a University building for more than a short time, thus disrupting a University function, is a serious violation."

The effectiveness of these rules was hampered by a precedent set in 1985, as a result of the South Africa blockade. Lewis Kaden, who presided over the 1985 hearings, ruled that the blockade of Hamilton, though it lasted over four weeks, was only a simple violation of the rules.

Obviously, an ambiguity exists in the rules as they were originally written. One interpretation is that if the entrance is obstructed for more than a short time, then it disrupts a University function and is thereby a serious violation. The other is that an obstruction must both continue for more than a short time and be a disruption to a University function to be a serious violation.

Though the original intention of the rules is the first, the 1985 decision was based on the second, and consequently, no student participants were charged with a serious violation.

This precedent was followed by the proctors of the disciplinary hearings held in the wake of last spring's protests. The instigators of the protest claimed that the blockade had not infringed on other students' rights. The proctors agreed with them, stating that although the protest blocked the entrance to Hamilton for more than a short period of time, it did not interfere with a University function. As a result of this ruling, the protestors were charged with merely a simple violation of the rules.

Thus the rules change was simply designed to recover the original intent of the rules regarding protest. They are not a "crack down" by the University, nor do they represent a tightening of the reigns on student voice. They are only to clarify and recover the intent of the original rules.

Still, the students who oppose these improvements claim that the changes represent a repression of their political voice. They seem to believe that the Columbia administration is trying to silence their right to raise issues.

This is clearly unfounded. There is nothing in the amendments that affects one's right to free speech. There is nothing in the amendments regarding marching or demonstrations. Students are still free to stage whatever spectacle they wish, so long as other students are not unwillingly injured.

What the rules do, however, is make blockading a more serious thing. Blockades are costly to the University and to the students not involved. The extra

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Rules to End Protest

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disobedience—and the accompanying network cameramen—forced Columbia to listen or to be nationally branded as racist.

The rules changes, which are intended to foreclose the option of blockades circa 1985 and 1987, are morally wrong. They attempt to close a traditional channel of protest—civil disobedience—by imposing dictatorial penal-ties. Persons of color can be summarily blocked from legal forms of protest. The Senate, which encompasses workers as well as administrators, faculty, and students, denies representation to workers under grade seven. Not only does this schism deny representation based on irrelevant economic grounds—but, *de facto*, the distinction reeks of racism. Let's face facts. The janitors who clean our libraries, the clerical workers who cope with registration lines, are Black and Hispanic. They are unrepresented in Senate. And their only effective leverage of block-ading has now been denied.

Pierre Louis, a political science major and speaker at the March 30 sundial protest, argues that, "the rules are intimidation, not prevention...they impeded student action." He adds, "their purpose is incongruent with that of a university...I have genuine distrust of the power structure. It is governed by elites and is unrepresentative and illegitimate. The power structure does not work for us....it is not a question of black or white..the university has made this into a racist issue."

Currently, students who need to protest tend to be students of color. In 1988, they have more grievances than Joe from Middletown, USA, whose parents earn a six figure salary. It can be argued that the rules change is a vindicative attempt to prevent Black students from expressing their grievances.

But the world situation could change tomorrow. If Columbia students faced military service in the Honduran jungles—Hamilton Hall blockaders would be an equal mix of black and white, conservative and liberal. The rules change is only temporarily a question of race. Tomorrow the currently enfranchised white male could find himself excluded from effective protest. Louis states, "If we allow the changes to pass—the students of tomorrow will never forgive us. We will have destroyed the legacy of 1968."

Additional problems spring from enforcement procedures. The changes state, "a properly identified delegate may request individuals whom he believes to be violating these rules to identify themselves through production of their University ID cards...members of the university who do not self identify may be charged with a serious violation of these rules." In addition to resonances of police states, a number of practical questions arise. Who are the "delegates"? What constitutes "belief" that rules are being violated? Will you face expulsion if you've forgotten the ID at home?

Louis states, "If we allow the changes to pass—the students of tomorrow will never forgive us. We will have destroyed the legacy of 1968."

Last spring, the majority of protestors outside Hamilton Hall were white. The majority of students charged with violations were black. Why?

Warigia Bowman, active in last spring's protest, states, "there must be a concerted effort on the part of Senate to ensure that when rules officers ask for ID's, they must do so in a non-discriminatory manner. If not, all violations must be dismissed. And, if prosecution is [racially] selective, all charges should be dropped."

Clearly the potential for abuse based on color of skin, lenght of hair, and prediliction for tye-dyed shirts exists.

By railroading through changes without community discussion, the Senate has produced rules which violate the tenets of democracy—and which will probably backfire. By dissolving the causal link between crime and punishment Columbia may experience increasingly severe protests. If hearings officers find students guilty of blockading, they may impose either suspension or expulsion.

Froehlich states, "initially, I was concerned that the old rules were ineffective and enforcement impossible. But then I realized that although students want to make a point and are willing to pay a penalty for civil disobedience, they should not be forced to jeopardize their whole education. Making the rules really strident goes too far. It's a difficult issue. It can look like students want to protest without paying. But that's only a minority. Protest is an important form of free speech."

The old rules functioned effectively. By classifying a blockade as a "simple" violation, hearings officers had a wide range of disciplinary options. Now, however, that symbolic blockading—chaining shut doors while still permitting access to a building through other entrances—carries the same classification and penalty as occupying the president's office, the scale and severity of protest may rise. Students who care enough about oppression in South Africa to carry on a four week protest will, no doubt, feel equally strongly about battling for their own rights here on Columbia's Morningside Heights campus.

So, to prevent demonstrations which have the potential to draw negative media attention to campus, Low Library has created its own 1988 version of Hitler's Enabling Act.

Ostrick states, "If protesters are willing to sacrifice so much and to put themselves into jeopardy, that will evoke millions to back their cause." By tightening the rules, and therefore creating incentives to increase the scale of protest, Columbia will actually make civil disobedience more effective. The original decision to begin a protest will require tremendous commitment. But once that threshold has been crossed...

No Madison Avenue adman has discovered a more effective PR tool than martyrdom.

Rather than quelling student dissent and avoiding police presence on campus, the Senate will engender the opposite. The media will be drawn to campus like flies to honey. And regardless of the nature or moral righteousness of the protest, the Senate has increased the probability that Columbia will be perceived as a heavy handed tyrant.

Kamber states, "in its infinite wisdom, the Senate hopes that everyone will fall in line." But civil disobedience becomes increasingly likely—and increasingly effective—as the laws become ludicrous, and as the population becomes estranged from the rules makers, and as the punishment becomes divorced from the crime.

Additional proof of the change's hasty conception is offered by the Senate's procedure. By-laws required input of the student affaires committee; this input was not received. Despite the violation of procedure, the Board of Trustees has ushered through rules which legally, should have been annulled.

Clearly, then, the rules changes are sloppily conceived and arbitrarily imposed. In circumventing community input now—the Senate ensures vehement input in the future.

Changes Change Little

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security forces necessitate costs the University must bear.

Also, there are many students who are concerned with their class work, and are unhappy when their class time is interfered with. With tuition as expensive as it is, each class session represents a significant dollar amount (about $50 per class period). When class time is reduced or classes are cancelled due to a blockade, the total lost tuition value for each student is enormous. More importantly, the educational costs of having classes cancelled or shortened affects academically concerned students.

After this rule change, blockades will be as costly to the students involved in them as they are to the rest of the University. This will make students who wish to blockade be more responsible about it. The attitude of "hey, it's warm out, let's take over Hamilton" will no longer hold sway.

The intent is by no means to eliminate blockades altogether. It is not a statement that the University believes there are no causes serious enough to merit the takeover of a building. Rather, it is a statement that if students are to take over a building, it will have to be for a cause that is serious enough to them that they are willing to make potential sacrifices themselves.

In the case that students still want to stage a blockade, it will give the action more impact. If students are willing to jeopardize their enrollment at Columbia for their cause,

that cause will be more seriously considered.

The change also makes blockading more correct in terms of Civil Disobedience. The point of disobedient protest is not to make a lot of noise and cause a lot of trouble, then try to weasel out of the consequences. The point is to openly defy the establishment and then accept the punishments of the law. The impact comes from illustrating how the misbehavior is based on convictions of principle, and not simply deviancy. Showing that one is willing to accept punishment for belief in a cause gives the cause more serious consideration.

When the University security comes with the video camera to film the protesters, perhaps now, these students will stand proudly with their faces showing clearly, rather than trying to hide behind one another, or spray paint on the lens of the camera.

The first change in the rules is simply one of recovery. Due to a misinterpretation, a precedent has been set that runs contrary to the intention of the rules. By re-defining the rules, the Senate is reinstating the original intent, and resolving the ambiguity of the way they were originally written.

The second change, though, is one of protection prompted by an incident last spring. A freshman student in Carman had a Confederate flag in his window. A group of roughly thirty people marched past security guards and into this student's room, demanding that he take down the flag. When he attempted to call security, they forcibly disconnected his phone. Security did arrive, and began asking the group for student ID cards. Many of them were not students, and refused, as did others who were students. Thus, security had no control over the situation short of brute force.

If security is to be able to effectively protect students, they must be privy to information, such as names. To expect that this rule change will result in harassment of students by security, where students will be randomly and unreasonably stopped and demanded of their ID cards is absurd. This rule change will not create new, mysterious motivations for security to hassle students. It only gives students additional incentive to identify themselves with their actions.

Providing information to security is a necessary obligation, and no one who is comfortable with his or her actions would have any reason to refuse.

The current student dissent against these rules is tainted by paranoid allusions to totalitarianism. Claims are made that "if you refuse to show ID, you will get expelled." Or that "five minutes in front of Hamilton Hall could get you expelled."

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"Stanfordization" of the Core

BY JONATHAN SILLS

The hallowed Core of Columbia University is facing changes in its near future. There are two opposing forces that will shape its evolution. The first is the importance of a wide world view, necessitating the inclusion of non-Western texts in its agenda. The second is the risk of diluting the already sparse treatment of central, Western landmark texts, avoiding scenarios of Stanford and Brown, where the core was so expanded, it lost focus and impact. In fact at Brown, it was eventually scrapped. What texts to include and what texts to forego is an issue that is illustrated by the following parable.

Two Columbia College students were reflecting on which of Dostoevsky's works was greatest. One student made a case for *The Idiot* on the basis of its profound insight; while the other supported *The Brothers Karamozov* for its greater significance and impact. Such a distinction is at the pith of Columbia College's current debate as to the propriety of reading non-mainstream or non-Western texts in core curriculum courses. Should books be selected on the basis of intellectual quality or social force?

The usual overly simplified answer is that core texts are selected for study for both reasons. A second question must be raised to facilitate a more structured answer: What is the purpose of the core curriculum? Primarily, core courses should instruct us about ourselves. Their aim is to propose ideas on the possible spiritual, intellectual and social motivations which influence every individual.

New names, or no names on Butler?

Possessed with a rudimentary conception of our formulations and motivations as individuals, we can address a second responsibility of the core curriculum: To teach us about others, how to interact and form proper relations within our society. This imperative involves both instructing us about the world and how to live properly in it.

This two tiered test for core texts sheds light on the proper place for non-Western books. In the first category, books from other cultures have certain validity. Confucian or Buddhist writings, for example certainly detail individuals' intellectual formulations. The correct litmus test to apply here toward facilitating the inclusion of these texts is the one proposed by our first Dostoevsky student, namely to chose books on the basis of which are most intellectually insightful.

Traditional Western texts more thoroughly fulfill the second imperative of the core curriculum than those from other cultures. The simple fact that there is a philosophical progression in Western texts coupled with our inextricable link with a Eurocentric, Western history mandates this conclusion. To formulate our picture of contemporary society we must invoke the argument of our second Dostoevsky reader; books must be selected based on their social significance.

If we glance at the world today we see manifold evidences of Western ideas, including the predominant dogma of Communism. A friend once remarked that Columbia students, in deference to the South African oppressed, should put down the dated Hegel and pick up the more current Boesak. This mentality reflects a fundamental misconception as to what is significant.

Dr. Alan Boesak, a minister calling for

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8 ISSUES

Discipline

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involving students, according to Gallo; but in her opinion, based on success in other institutions, the potential for breeches of confidentiality and weak sentences seem minimal. She notes, "Statistically, nationwide, students are harsher. There is always the concern that other students know, but I think that the gravity of the situation [will keep students from revealing proceedings]."

Other infractions, which are referred to Dean's Discipline, are also heard and decided without student input. The current Dean's Discipline rests on the premise that, "Columbia College cannot pretend to list all violations, because whenever an institution tries to list, the institution is in trouble because it cannot have a comprehensive list," according to Dean Karen Blank, College Dean of Discipline.

Reports of possible wrongdoing then come, Dean Blank explains, from security guards, faculty, and fellow students. Dean Blank reviews the information provided by such individuals to determine if the evidence against the student warrants an investigation. A student who is to appear before the Deans receives a letter explaining that he will meet with "at least two members of the [Dean's] staff," and be "presented with the evidence that supports the accusation against him or her and [be] asked to respond to it." The letter goes on to say that, "the student may then offer his or her own evidence," and the Deans then determine whether or not the student is innocent and decide on a penalty if the student is guilty.

Dean Blank noted the advantages of a system which brings in students individually before members of the administration, "Historically Dean's Discipline has been very confidential, which is a good thing." The Deans chose to speak to students "individually so that they were not led on or intimidated." She feels that the present system is successful, remarking that, "Our

system is very fair. I think that students are listened to." Furthermore, since approximately one hundred cases are heard each year, the expediency of the present procedures is beneficial according to Blank.

However, she understands that "if a student comes in thinking [that the process is] adversarial," the hearing cannot be successful in the student's eyes. As many as fifteen to twenty percent of decisions made by the Deans are appealed to College Dean of Students Robert Pollock each year. Dean Blank notes that, "the real value of involving faculty and students [is] in terms of students believing [that they are] treated more fairly and acknowledging the real value and ability of students to think and be sensible members of the community."

Justin Kerber, CC '91, notes that, "Discipline under the current system amounts to being sent to the Principal's Office. There should be more student input in the disciplinary process."

Dean Blank does not think that student input would necessarily hurt disciplinary procedure. She notes that student involvement at other institutions has not damaged disciplinary processes: "Students

do not necessarily hurt confidentiality, and usually students do not give lighter sentences." However, she does feel that certain measures would have to be taken to ensure that expediency was maintained. She suggests a combination which relegates standard cases with lighter penalties to the Deans.

The Student Council is currently working in conjunction with the faculty and Deans to generate a modification of Dean's Discipline which involves students and faculty. According to Jared Goldstein, CC' 89 and chair of the College Student Council, members of the Council have been pushing for student involvement for about one year, but when they "first brought [student involvement in Dean's Discipline] up, Dean Pollock just said no way." However, he says, "after delicate negotiations with Dean Leheckha, students were allowed to be involved in the evaluation of discipline."

An official Dean's committee composed of Deans, faculty, and students is being formed to evaluate current disciplinary procedures and suggest changes. Goldstein notes that, "we've had this system since about 1912, and Columbia College was a much different school back then. This is the first time that discipline has been examined, especially by students. Student complaints have not had a channel for change until now."

Three students will been selected by the Academic Affairs Committee of the request of the Student Council. The Academic Affairs Committee, "is going to advertise and then do interviews," according to Goldstein.

Goldstein recognizes some advantages in the present system: "One is confidentiality; what you say in those hearings will not come out." On the other hand, he does not share the Deans' concern over the potential loss of efficiency because, "we could arrange a small committee and rotate the members so that too much time is not taken from the students."

In fact, Goldstein feels that student input will be beneficial. He states, "Discipline in any college is very much a community effort; in any society, the power to discipline is very significant." He believes that including only deans "is neglecting at least two-thirds of the college community." A community spirit has the potential to make, "Dean's Discipline less intimidating." Furthermore, he thinks that with a sense of community, "punishments can become more creative. Maybe students can do community service [if found guilty]."

Chances for student involvement are high in Goldstein's opinion. "I am optimistic we will have [student involvement], once we hash out confidentiality, academic strain and expediency," he notes. Goldstein feels that changes in the discipline procedure "are like going coed. If [the College is] committed to having students work on discipline, [it] can."

Paulette Light, CC '90 and Vice-President of Central UDC summarizes: "I think that we should try to get as much student input and student participation as we can; hopefully, student involvement will establish a cohesive bond so that all students are responsible for each other."

Merger

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Concerts priority spacing [to hold concerts], which is very important because with the bands we can afford, they [the bands] find out on short notice whether or not they can come." Another advantage would be increased publicity for concerts. "BOM is very good in publicity, and Concerts has been weak in that," said Calenda.

Lang did not originally support the merger of the two organizations. Initially concerned by "the force by which it was shoved down our throats," she felt that Concerts was already a successful organization and didn't see a need to change its structure. In addition, BOM's earlier difficulties led her to fear that Concerts could be hurt if BOM experienced problems in the future. Recently, however, Lang has supported the merger. She was impressed by "BOM's willingness to change to fit Concerts," and noted that Columbia Concerts will "maintain its own board."

Barnard SGA also had reservations concerning the logistics of the original proposal. Lisa Kolker, BC '88 and President of SGA, was originally wary of the proposal because "Barnard has an organization similar to BOM: McAc. Barnard constitutionally could not fund two different groups [for the same purpose]."

Since McAc currently does not have a concerts organization, however, the overlap was not a problem, according to Kolker. She wanted to insure that if Concerts was made a part of BOM, Barnard students could continue to be involved because "many Barnard students are presently participating in Columbia Concerts." Reassured by Lang that the merger would not jeopardize Barnard interests, Kolker supported the merger.

"Columbia Concerts has the potential to play a powerful role in the social life at Columbia," summarized Ethan Melone, CC '89. "The merger should benefit concerts at Columbia. If in the past money has been a major obstacle in attracting bigger bands to Columbia, the increased funding Columbia Concerts should alleviate that part of the problem."

Bork

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hearings not to overturn *Roe*. Yet, were Judge Bork to do so, Senator Packwood would still be unable to vote favorably. A ny nominee who would make an overtly political promise regarding future Supreme Court decisions is certainly ineligible

After hearing Bork in person, I think that the nature of the "Block Bork" campaign and the vituperative attitudes it generated were very regrettable. Whether one loathes or admires Judge Bork's jurisprudence, after I saw and heard him in person, there is no doubt in my mind that he is a decent, intelligent, and witty individual who deserved much more respect and consideration. If any lesson can be gleaned from all this, it should be that, as citizens, we should be forever on our guard against ill-willed "lows in mendacity and vulgarity"—from any source—in our political life.

Little Change

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These are simply fantastic impossibilities.

In any disciplinary process, it is the deans who are the prosecutors. These are not people who are out to expel students. They devote a large amount of their time to serve the interests and educational needs of students. There is no evidence that deans act vindictively or selectively against students, but rather with the interest of students, all students in mind.

Perhaps the current dissent regarding this rules change will flower into a springtime building takeover. And would that not be the height of irony?

These protest-happy students should overcome their adolescent animosity toward figures of authority at the University. If they stopped looking at the deans as natural enemies, and realized the sacrifices and effort the deans put forth for their interests, their experience here would be much more gratifying.

If the rules change is taken as intended, we will see more responsible protesting, with demonstration reaching a level of seriousness that infringes on other students' rights only when the protesters are willing to risk their academic careers on their cause.

Still, we can expect those who cling to protest *per se* to continue to search for injustices, to make demands and to stage uprisings. Perhaps the current dissent regarding this rules change will flower into a springtime building takeover. And would that not be the height of irony?

Artistic Tradition of the Yogini Cult

BY KIRAN KUMARAN

Deheja, Vidya. *Yogini Cult and Temples: a Tantric Tradition*

Vidya Deheja's latest release, *Yogini Cult and Temples: a Tantric Tradition* examines the shrines of a little-known Indian cult, the Yoginis. Covering all aspects of the cult, Deheja approaches her subject from a variety of angles. Her book is clearly the product of extensive research and it is extremely thorough, including a large number of wonderful illustrations, maps, photographs and diagrams, which are not only helpful for the readers' understanding, but are pleasing to the eye as well.

The origins of Yogini worship lie in ancient rituals devoted to local village goddesses. Tantrism organized these goddesses into a group, the most common number of which is sixty-four. These goddesses were believed to bestow magical powers upon their worshippers, and due to the power and popularity of the cult, it was eventually incorporated into the orthodox Indian religious tradition. The Yoginis were often identified with the Great Goddess of Brahmanical tradition, Devi, as either manifestations of her power or as her attendants.

Yoginis were usually represented in their temples as sensuous women with hourglass figures, adorned with numerous ornaments, and wearing shirts which were worn low and held in place by jeweled girdles. The Yogini, however, were not limited to this type of representation and many figures have animal heads; some take even more grotesque form and clearly seem to be involved with graveyard rituals.

The Yoginis were often identified with the Great Goddess of Brahmanical tradition, Devi, as either manifestations of her power or as her attendants.

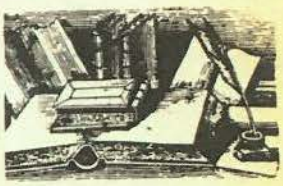
The rituals involved in Yogini worship were varied and various. Some worshipped these goddesses through abstracted symbols, drawn on paper or cloth, and abstained from engaging in the elaborate rituals which developed later. The Yoginis inspired great fear and were held in awe due to the nature of their ritual acts, some of which included animal sacrifice, cannibalism, and ritual copulation. The great fear that they commanded has kept information about them limited; to a believer, the curse of a Yogini was considered far worse than death or damnation.

It is the decline of the Yogini cult, however, that was rather slow and quite difficult to pinpoint. Muslim domination was a prominent factor in the diminished import and strength of the movement, yet although the cult itself appears to have been wiped out by the 18th or 19th century, its beliefs and practices have continued in variant forms to this day.

The village goddesses from which the Yogini developed are still worshipped, and the Yogini goddesses are still depicted in works of art. Such Yogini practices as ritual slaughter still occur, even if they do so under the guise of the Brahmanical tradition. This reluctance to abandon the cult clearly speaks for the power which it commands in the Indian mind.

Although the cult itself appears to have been wiped out by the 18th or 19th century, its beliefs and practices have continued in variant forms to this day.

Unlike most books on Tantric art or practice, Deheja's book sweeps away the mystical cobwebs of opacity which tend to render these already mysterious cults completely incomprehensible. Rather, she approaches her subject with a clear mind and delineates her path of inquiry and form of analysis for the reader. Deheja's exploration of this mysterious cult is indeed truly fascinating.



CITY LIGHTS

Galleries:

Borgenicht: a Jack Bush retrospective of paintings and works on paper from 1930-1976.

Coe Kerr: Fanny Brennan's miniature paintings of surrealistic landscapes.

Hirschl & Adler Modern: Joan Snyder's paintings with the theme of children.

Knoedler: Pat Steir's new paintings from the "Waterfall Series."