

PHILOSOPHY & PUBLIC POLICY QUARTERLY

The Institute for Philosophy and Public Policy
School of Public Policy • University of Maryland

Constitutional Rights for Nonresident Aliens

Nonresident aliens benefit from basic U.S. constitutional rights — reciprocity of obligation requires as much, and recognizing their rights would not unduly interfere with U.S. action abroad.

Alec D. Walen 2

The Harms of Homeschooling

The benefits of homeschooling are now protected through legalization of the practice. Most of its harms could be prevented through its responsible regulation.

Robin L. West 7

Insider Trading: A Moral Problem

It turns out to be more difficult than one might think to identify the central moral wrong at the heart of this much publicized and vilified crime.

Alan Strudler 12

What Is Charity?

Once revered as the greatest of the classic theological virtues, charity now has something of a bad rap. Can it be rehabilitated with help from the Jewish sage Maimonides?

Judith Lichtenberg 16

Regulatory Review and Cost-Benefit Analysis

President Obama's recent memorandum calling for an overhaul of White House regulatory policies provides an opportunity to revisit our reliance on cost-benefit analysis as a fundamental regulatory principle.

Mark Sagoff 21

Is There a Moral Obligation to Limit Family Size?

Although we have an important obligation to protect the environment, people are not morally required to choose to have smaller families for environmental reasons.

Scott Wisor 26

Constitutional Rights for Nonresident Aliens

Alec D. Walen

What claim, if any, do nonresident aliens have on the U.S. for basic legal protections? Until recently, many argued that the answer was, essentially, none. Those aliens who live in territory controlled by the U.S. were long held to be entitled to some basic constitutional protections. But aliens in territory not controlled by the U.S. were thought by many to be beyond the protection of the U.S. Constitution. The Congress could grant them certain protections as a matter of statute, but what Congress grants, Congress can take away.

Then in 2008 the Supreme Court decided the case of *Boumediene v. Bush*, which held that alien detainees, held by the U.S. in Guantanamo Bay, Cuba, have a constitutional right to contest their detention by filing for a writ of habeas corpus. This case extended constitutional rights further than they had ever been extended before, but it still left open a basic question: Do the detainees in Guantanamo benefit from a right to file habeas petitions because U.S. control over Guantanamo is effectively equivalent to owning a territory, or do aliens anywhere in the world benefit from basic constitutional rights that protect them from abuse at the hands of the U.S. government?

This issue is now working its way through the lower courts. But it should not be thought of simply as a legal

protections to nonresident aliens. At the same time Benjamin Wittes, in his book *Law and the Long War*, argued that if this were so, there would be no principled basis for limiting their constitutional rights. Thus, according to Wittes, if the courts were to accept that nonresident aliens can bring habeas suits to protect their liberty, then there would be no principled reason why they should not also be able to bring suit for wrongful deaths if their family members were killed in military attacks. Since no country could prosecute a war, no matter how just, if it had to defend every military act in court, no country should have to extend habeas rights to nonresident aliens.

I argue here that nonresident aliens, in places that are clearly not U.S. territory, should benefit from constitutional rights. At the same time, I argue, contra Wittes, that not all harms inflicted by the U.S. government can give rise to a lawsuit, and that the distinction between those who should have a right to sue and those who should not can be drawn in a principled way.

Factual Background

In the recent case of *Al Maqaleh v. Gates*, federal district court Judge John D. Bates held that at least some nonresident aliens, detained in Bagram Air Base in Afghanistan, have the constitutional right to seek their freedom through a writ of habeas corpus. Through this right, they can ask the federal courts to determine whether they are being held in a way consistent with, or in violation of, federal law, including the U.S. Constitution. If their detention is unlawful, the courts can order their release.

Judge Bates based his opinion on the Supreme Court's holding in *Boumediene v. Bush*. Justice Kennedy's opinion in *Boumediene* described a number of factors that are relevant to determining whether a particular detainee benefits from the right of habeas and held that these factors imply that the detainees in Guantanamo *do* have a constitutional right to habeas. Judge Bates held that these factors imply that detainees captured and detained in a war zone *do not* have a constitutional right to habeas, but that

Nonresident aliens, in places that are clearly not U.S. territory, should benefit from constitutional rights. [But] not all harms inflicted by the U.S. government can give rise to a lawsuit.

issue. It is a legal *policy* issue, which ought ultimately to be governed not by some narrow reading of case precedent, but by considerations of what would be just.

Prior to the decision in *Boumediene*, I had argued that the question whether nonresident aliens benefit from constitutional protections was legally open, and that the moral reasons weigh in favor of extending core

detainees captured *outside* a war zone, and *shipped into* a war zone like Afghanistan, *do* have a constitutional right to habeas.

Some have argued that Bagram is the new Guantanamo—a legal black hole where the U.S. president can detain suspected terrorists free from any court supervision. Others argue that Bagram, being a war zone, is fundamentally different from Guantanamo, and that it would be completely inappropriate for detainees to have constitutional rights that a court can enforce in a war zone. The Obama administration takes the second view and is appealing this decision. It wants to be free to hold detainees in detention centers outside of the U.S. and outside of its facility in Guantanamo Bay, Cuba, without any supervision from the courts. That is, it wants to treat nonresident aliens, at least those outside Guantanamo, as having no constitutional rights that the courts can protect.

I argue here that Judge Bates got the case basically right. More specifically, I argue that nonresident aliens have basic constitutional rights that limit what can be

The core argument for extending constitutional protections to nonresident aliens appeals to the idea of mutuality of obligation: aliens cannot have duties to respect U.S. law unless the U.S. has a legal duty to respect them.

done to them by the U.S. government, that courts would normally not be in a position to enforce those rights in a war zone, but that the U.S. government cannot strip nonresident aliens of their constitutional protections by choosing to ship them *into* a war zone.

The Moral Case for Extending Constitutional Protections to Nonresident Aliens

The core argument for extending constitutional protections to nonresident aliens appeals to the idea of mutuality of obligation: aliens cannot have duties to respect U.S. law unless the U.S. has a legal duty to respect them. The United States claims the right to prosecute even nonresident aliens for crimes, including various crimes that constitute international terrorism, that affect the United States or its citizens. This implies that the U.S. holds them to have a duty to avoid committing these crimes. In return, however, the U.S. must recognize that they are entitled to the Constitution's most basic protections. These include the right to petition for a writ of habeas corpus, which implies the right not to be deprived of their liberty without due process of law.

Wittes spells out the contrasting position, which I call the membership position, as follows:

The Constitution is a social compact among the people and the states to create a national government to govern them. An American citizen is party to that compact wherever she goes in the world, and therefore retains a claim on the adjudicatory power of the courts when mistreated by her government abroad. The alien domestically is, to a lesser but still considerable degree, also party to the compact—subject to American law, entitled to many of its rights and protections, and therefore entitled as well to have its courts resolve her disputes with its sovereign. But not everyone in the world is a party to that compact.

In particular, on Wittes's view, nonresident aliens are not part of the compact and not entitled to "a claim on the adjudicatory power of the courts when mistreated by the U.S. government."

The question raised by the membership position is what is this compact, and who is really a member of it? It turns out that when one pushes on this question, there is no good reason for excluding nonresident aliens. Instead, such an exclusion expresses a simple prejudice in favor of treating outsiders as beyond the pale.

Let us start, then, with the question whether this idea of a social compact can be taken literally. The answer is clearly no, at least not if all citizens are to be members of it. Those born into U.S. citizenship often do nothing to indicate that they are part of a compact or agreement. They take no oaths of loyalty, and their mere acquiescence in the constitutional order need indicate nothing other than that they view the costs of leaving or resisting as too high. Arguably voting is a sign that one sees oneself as a citizen in the rich sense of the word: one who takes her share of responsibility for the choices made by her government. But one does not forfeit one's citizenship in the thinner, legal sense, that gives one the protections of the Constitution, by refraining from all such exercises of civic engagement.

One might take a cue from Wittes when he says that the resident alien is entitled to legal protections because she is subject to U.S. law. But, as noted above, if the condition that would allow one to benefit from constitutional rights is that one is subject to

The question raised by the membership position is what is this compact, and who is really a member of it? It turns out that when one pushes on this question, there is no good reason for excluding nonresident aliens.

prosecution by U.S. prosecutors for violations of U.S. laws, then everyone in the world benefits from constitutional rights, as everyone in the world is subject to prosecution by U.S. prosecutors enforcing laws that defend the United States and its citizens. Indeed, that is what the Military Commissions Act (MCA) of

2006 is premised on. On the one hand it attempts to strip nonresident aliens of the right to seek the protection of habeas corpus, but on the other hand it lists a range of crimes for which nonresident aliens can be prosecuted by U.S. military prosecutors. As the MCA states, the purpose of the Act is to “establish . . . procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.”

One might try to narrow, rather than broaden, the conception of membership, so that it includes only citizens. On this view, resident aliens do not have constitutional *rights*, they have something more like constitutional *privileges*; that is, they benefit from constitutional rights not as a matter of right, but as a privilege extended to them. The question then is: Why should the benefit of constitutional protections be extended to them? Two reasons come to mind. First, it would avoid the unsightly spectacle of a two-tiered system of justice within the “homeland.” Second, it would indicate a spirit of generous hospitality toward guests. Neither of these, one might think, needs to be extended to nonresident aliens. Rather, it can be left to the legislature to determine how best to handle nonresident aliens in particular contexts. If the legislature feels that the country can be magnanimous, or if comity between states demands it, then it can grant procedural protections to nonresident aliens. But if other considerations, such as security or a desire to prevent a flood of litigation, are dominant, then Congress can block access to our courts.

The problem with this move is that it undermines the idea of *constitutional* rights for resident aliens. Start with the unsightly spectacle of a two-tiered system of

Appearances matter, but are they the only source of constitutional constraints that override all countervailing considerations?

justice within the homeland. Appearances matter, but are they the source of constitutional constraints that override all countervailing considerations? If aliens were a source of a distinct threat, would appearances suffice to keep the U.S. from treating them differently? If appearances were all that weighed on the side of treating them the same, it would seem that Congress should have the power to decide that other considerations matter more. And in that case, the protections aliens benefit from should be conceived of as statutory rather than constitutional.

It might be pointed out, at this juncture, that resident aliens *do* benefit from less protection than citizens in times of war when they are seen as threats. Since the dawn of the country, the U.S. has allowed “enemy aliens” to be detained with little to no process. The Alien Enemies Act of 1798 allows the president, in times of war, or threatened war, to declare that aliens from the enemy or threatened enemy country “shall be liable to be apprehended, restrained, secured and removed, as alien enemies.” To its later shame, the U.S. Supreme Court deemed

If there is to be a reason why resident aliens must benefit from constitutional protections on a par with citizens, it has to be mutuality of obligation.

constitutional the detention of U.S. citizens of Japanese ancestry during World War II, but no great fuss has ever been made about the simultaneous detention of Japanese aliens.

Nevertheless, aliens are still held to benefit from constitutional rights quite generally. But the characteristic firmness of these rights—that they cannot be removed by simple legislative act—cannot be explained by appeal to the unsightliness of a two-tiered system of justice generally. Nor can it be explained by appeal to a spirit of hospitality. One might say that it would be too awkward to have a dual track system of justice, but it is historically common for countries to offer second-class justice to some in their midst. Awkwardness, appearances, and hospitality are all thin reeds on which to hang constitutional rights.

If there is to be a reason why resident aliens *must* benefit from constitutional protections on a par with citizens—a reason of justice that would explain why the Congress should not be *allowed* to treat them as it deems most prudent and convenient—it has to be mutuality of obligation. As James Madison once put it: “as they owe, on one hand, a temporary obedience [to the laws], they are entitled, in return, to their protection and advantage.” But, as noted above, mutuality of obligation, in the context of a global power enforcing its laws on any who would dare to violate them, requires global protection against abuse by that same government.

Reductio ad Absurdum Objection

Wittes acknowledges that one might think that “judicial review somehow flows from the fact of detention by American forces.” But he objects that this leads to an absurd conclusion.



*Muslim detainees line up for prayers at Guantanamo Bay, Cuba.
(Kyodo via AP Images)*

The family of a person killed in an errant missile attack has suffered a great deal more than someone merely detained, and the victim of that strike has certainly been subject to the exertion of American power no less subject to the Constitution than the person detained. Yet at least under current doctrine, neither the alien's injury nor the illegality of the government's conduct that led to the tragedy—however egregious the illegality may have been—would induce the courts to entertain a wrongful-death suit by such a family.

The logic of the argument is this: if the courts would not hear a suit based on a worse violation—presumably of the right not to be deprived of life without due process of law—then there is no reason for them to hear a suit based on a lesser violation.

One might be tempted to say that courts *should* hear lawsuits from nonresident aliens based not only on loss of liberty but also on loss of life. But Wittes raises the specter of a flood of litigation: "There are untold numbers of people abroad who might ascribe their misfortunes, real or imagined, to American governmental behavior alleged to defy legal norms." If the U.S. is not to let them all in through the courthouse door, as it were, then it ought not to open the courthouse door to nonresident aliens at all.

Wittes insists that he is not making a slippery slope argument to the effect "that allowing habeas jurisdiction will lead willy-nilly to extensive judicial supervision of war planning." He does not "doubt that the judiciary could open the door just a crack and entertain habeas claims but not others." His argument is rather that "[t]here would ... be little principled reason to make these distinctions." In other words, he thinks the only morally defensible position is one in which nonresident aliens have no court-enforceable constitutional rights.

Reply to Wittes's Objection

Wittes's argument appeals to the thought that if U.S. courts crack open the door to constitutionally grounded lawsuits, then they will have no principled basis for stopping a flood of litigation, nearly all of which they have neither the opportunity nor the obligation to address. But the threat of inappropriate litigation is no more pressing in the international arena than domestically. And the solution in both cases is the same: appropriate pleading requirements. Plaintiffs

must state a legal claim before they can bring a lawsuit, and not every harm caused by government action can ground a legitimate claim.

For example, economic regulation regularly harms people by reducing the value of their property. But one can state a claim for a taking of property only if the regulation deprives one of all productive use of it. This pleading requirement—that one claim to have been deprived of *all* productive use of one's property before making a claim for a regulatory taking—provides a reasonable balance between allowing the government the freedom to regulate and protecting individual property rights.

A similar point can be made in the context of military action. The government needs to be free to detain threatening individuals in war zones where normal law enforcement practices are not possible. That is the essence of the idea of suspending habeas in times of rebellion or invasion. Those are times when normal policing will not keep order, and in those times one has no right to go to a court to seek vindication of one's constitutional right to liberty.

Likewise, the government needs to be free to use lethal force against legitimate military targets. Given the limits of military intelligence and weapon technology, this will inevitably cause some collateral damage to innocent civilians. Causing collateral damage does

Plaintiffs must state a legal claim before they can bring a lawsuit, and not every harm caused by the government can ground a legitimate claim.

not violate the victims' right not to be deprived of life except with due process of law. That right applies paradigmatically to *punishment*, not military action. And even if there must be a derivative sense in which the right protects against the government's use of lethal force more generally, the right must be stated in such a way as to allow the government the latitude it needs for legitimate military action.

Generalizing the point, in a military context only clearly and egregiously illegal actions should give potential plaintiffs a right to sue. That means that if the U.S. has committed a war crime, say by dropping bombs on a village containing no legitimate military targets, and if the plaintiffs can make a case that this was not simply an accident in the effort to hit a legitimate military target, then there is no reason the U.S. should not allow suit for damages. But if the U.S. is pursuing proportionately large legitimate military targets, the courts should not be open to hearing lawsuits from those harmed in that effort.

The thought that the courts would be open to hearing cases from nonresident aliens who are harmed by unjustified activity that violates the internationally recognized law of war should not strike alarm bells. There is actually longstanding precedent for such cases. In 1900 the U.S. Supreme Court allowed a Cuban boat owner to sue for damages when his fishing boat was taken in the Spanish American War, in violation of longstanding international law. And in 2004, the Court held that new developments in *jus cogens*—international law considered so fundamental to a just international order that no country should be free to reject it in its domestic legal regime—could be enforced in U.S. courts

Prohibitions on war crimes are core examples of *jus cogens*, so aliens should already be able to bring the sort of tort suits that Wittes thinks would be absurd. They are not absurd, and there is no reason the U.S. Constitution should not provide a parallel ground for the same suits. Doing so would provide recognition of the moral standing of nonresident aliens, and would do no more to open the doors of the courthouse to a flood of litigation than is already the case.

Conclusion

In sum, there is no reason to think that granting habeas rights to those detainees the U.S. chooses to ship *into* a war zone would inhibit the U.S.'s ability to fight a war. Rather, this should inhibit the choice to ship detainees into a war zone. If that means that the U.S. then has to provide constitutionally adequate due process to those nonresident aliens whom it picks up outside of a war zone and then seeks to detain, so much the better. Given that the U.S. claims the right to prosecute nonresident aliens for crimes, it implicitly takes the position that nonresident aliens owe a duty of respect to U.S. law. Accordingly, it is only just and fair to insist that the U.S. must afford them due process of law in return. It must afford them basic constitutional rights not only if it actually chooses to prosecute them, but if it does anything to them that clearly threatens their basic rights, including subjecting them to long-term detention outside of a war zone, or attacking them in a way clearly prohibited by the law of war.

Alec D. Walen
Institute for Philosophy and Public Policy
University of Maryland
awalen@umd.edu

Sources: Alec Walen and Ingo Venzke, "Detention in the 'War on Terror': Constitutional Interpretation Informed by the Law of War," *ILSA Journal of International & Comparative Law* 14 (2008); Benjamin Wittes, *Law and the Long War* (Penguin Press, 2008); Glenn Greenwald, "Bagram, The Sham of Closing Guantanamo," available at <http://www.salon.com/opinion/greenwald/2009/09/15/bagram/index.html>; Brief for Respondents-Appellants, *Maqaleh v. Gates*, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir); Gerald L. Neuman, *Strangers to the Constitution* (Princeton University Press, 1996); James Madison, *Madison's Report on the Virginia Resolutions (1800)*, in 4 *Debates, Resolutions and Other Proceedings*, in

Convention, on the Adoption of the Federal Constitution 556 (J. Elliot ed., 2d ed. 1836).

Legal cases cited: *Boumediene v. Bush*, 128 S.Ct. 2229 (2008); *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. April 2, 2009); *Korematsu v. U.S.*, 323 U.S. 214 (1944) (on detention of Japanese-Americans during World War II); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that aliens benefit from the equal protection clause of the 14th Amendment); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (on takings); *Paquete Habana*, 175 U.S. 677 (1900) (Cuban boat owner suit) ; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (*jus cogens*).

The Harms of Homeschooling

Robin L. West

Over the last thirty years, "homeschooling"—teaching one's children at home rather than entrusting their education to either a public or private school—has virtually exploded: around ten thousand children were homeschooled in the early eighties; today, over *two million* children are being educated at home. There are now more children being homeschooled than are enrolled in charter and voucher schools combined. Of course, there have always been some parents, both religious and secular, who have homeschooled since the advent of public schools and compulsory attendance laws in the middle of the nineteenth century. For a hundred and fifty years, parents of special needs children, parents in isolated parts of the country who live far from any public schoolhouse, as well as a smattering of parents of circus performers, professional athletes, and child stage actors have homeschooled their children, and exemptions in the various states' compulsory attendance laws have explicitly allowed them to do so.

The explosion in homeschooling of the last quarter century, however, is a different phenomenon altogether. The majority of homeschoolers today, and by quite a margin, are devout, fundamentalist Protestants. And, of the hundreds of thousands of fundamentalist Protestant parents who in the past two decades have pulled their children from public schooling, the major-

ity have done so not because their kids have special needs, or because they live too far from a schoolhouse, but rather because they do not approve of the public schools' secularity, their liberalism, their humanism, their feminist modes of socialization, and in some cases, of the schools' very existence. Because they disapprove, they choose to educate their children at home, in accordance with their own traditions and by their own religious lights.

They do so, furthermore, with little or no oversight from public school officials, who in some states need not even be notified of the parents' intent to homeschool. Because of lax or no regulation, in most of the country parents who homeschool now have virtually unfettered authority to decide what subjects to teach, what curriculum materials to use, and how much, or how little, of each day will be devoted to education. In most (but not all) states, testing is optional, and in almost all states, the parent-teachers need not be certified or otherwise qualified to teach. In other words, in much of the country, if you want to keep your kids home from school, or just never send them in the first place, you can. If you want to teach them from nothing but the Bible, you can. If they want to skateboard all day, and you choose to let them, you can.

As late as the late 1970s, these massive withdrawals from the public schools that have become so common-

place over the past thirty years would have been illegal, everywhere, and regardless of the parents' motivations. Dating from the mid 19th century, with the advent of mandatory attendance laws, until three quarters of the way through the 20th, it was a crime to keep one's children home from school, and it did not matter in the slightest whether it was religion or some other felt conviction that was at the heart of the decision to do so. Parents who did so were criminals, and their kids were truants. Where homeschooling was allowed, for the rural out-posters, the special needs children, the circus performers and the stage kids, the homeschooling was heavily regulated: the children were tested annually, their parent-teachers or tutors had to be certified or otherwise deemed qualified by the state, courses and hours were specified, and the curricula were subject to approval and review by state authorities.

Compare that with today's legal landscape. In 2009, thousands of parents who keep their kids home and don't tell a soul are well within the bounds of the law. Their children are not truants; they're "homeschooled." Parents in many states have full authority,

Parents in many states have full authority, free of all state oversight, to determine the content of their children's education.

free of all state oversight, to determine the content of their children's education; in states with some remaining regulations, enforcement is lax or non-existent. Thus, over the course of the last thirty years, "homeschooling" has gone from illegal—meaning criminal—in all fifty states, to fully legal, and from heavily regulated, when allowed, to either completely unregulated or only lightly regulated, everywhere. That's quite a revolution, in law and education both. How did *that* happen? Why haven't more people noticed? Why don't more people care?

A Right to Homeschool?

The short answer to how it happened is simply that in the 1980s, all fifty state legislatures, in response to massive political pressure from religious parents and their lobbyists, legalized homeschooling. They either passed "homeschooling statutes" that explicitly allow the practice, or they amended their "compulsory attendance laws" so as create exemptions for parents who choose to homeschool, or they clarified existing laws such that homeschools would be classified as a species of "private schools" or "church schools" and thereby

be legal under statutes legitimating those institutions. State after state, one way or another, decriminalized homeschooling throughout the course of that decade. In the following decade—the 1990s—in response to the same set of pressures, the states followed up on legalization by steadily deregulating the practice. The result is what we face today: a widespread and thoroughly privatized educational practice that devolves full responsibility for a child's education to whatever parent wants to claim it, which is not only legal, but virtually unregulated as well.

But that short answer doesn't explain why the states did it, or put differently, why the political campaign to pressure them to do it was so spectacularly successful. Education, after all, is typically described as a core, and possibly the core, state responsibility. Why were the states so willing to turn the reins over to parents? They acted, at least in part, because of the belief, held by religious parents and proclaimed by their advocates, that a constitutional right required the states to do so. Specifically, the parents and their advocacy groups argued that religious parents had a free exercise right, grounded in the First Amendment, to educate their children as they see fit, in private, at home, in accordance with their religious beliefs, and with no oversight by or even interaction with state authorities. In the face of this adamantly asserted constitutional right, and strapped for cash in any event, the states ceded responsibility for what had previously been a core state function—the education of children—to whatever parents claimed that they preferred to educate their children themselves. The main purpose of this essay is to criticize this "right to homeschool" that the religious parents and their lawyers and lobbyists have claimed, or created, over the past couple of decades. My criticism will rest primarily on the basis of the harms such a right might inflict upon the children so educated.

Two clarifications are in order. First, courts, and particularly the federal courts, have never granted the existence of the "right to homeschool." Although the doctrine is messy and arguably on the cusp of change, the courts have with only a few exceptions upheld the constitutionality of mandatory attendance laws and regulations governing legalized homeschooling, against claims that parents have a constitutional right to homeschool that would invalidate those laws. It doesn't follow, however, from judicial recalcitrance that the right does not exist: hundreds of thousands of parents believe it exists and have acted upon it, and most important, whatever the courts might say, state legislators in all fifty states decriminalized the practice in partial reliance upon it, often explicitly making reference to the "parent's right to homeschool" in the amended legislation or regulations as they did so. Furthermore, it was the purported right to home-

school, so successfully asserted by homeschooling advocates and lobbyists in state legislative fora, that facilitated the extraordinary success of the still ongoing deregulatory campaign. It is the purported “right” to homeschool without any oversight or supervision by state educators—and not simply a right to its decriminalization—that has prompted states to withdraw so utterly from their once core duty to provide, or at least supervise, a shared minimal education for all their future citizens. Federal courts may someday acknowledge the existence of this right. Whether or not they do so, however, at this point doesn’t much matter: state law has already changed on the basis of it. Judicial recognition of this right, when and if it arrives, will be a redundancy.

Second, although I will be criticizing the right to completely deregulated homeschooling, I do not mean to deny for a moment that homeschooling itself is often—maybe usually—successful, when done responsibly. Passionately involved and loving parents, whether religious or not, can often better educate their children in small tutorials at home, than can cash-strapped, under-motivated, inadequately supported, and overwhelmed public school teachers with too many students in their classrooms. Results bear this out, as homeschool advocates repeatedly point out (and as critics virtually never deny): the homeschooled children who *are* tested, or who take college boards, whether or not religious, perhaps surprisingly, perhaps not, do very well on standardized tests, and on the average, they do better than their public school counterparts (though it must be noted that the parents and children who voluntarily subject themselves to testing are the self-selected educational elite of the homeschooling movement). My target is not the practice of homeschooling, whether religious or secular. My target, rather, is *unregulated* homeschooling—the total abdication of responsibility by the states for regulating the practice. The right to unregulated homeschooling visits quite concrete harms on the homeschooled children themselves, the mothers who are teaching them, and the often rural and isolated communities in which they are raised and taught.

The Harms of Unregulated Homeschooling

First, children who are homeschooled with no state regulation are at greater risk for unreported and unnoticed physical abuse, when they are completely isolated in homes. As the trial judge in *In re Rachel* noted, “95% of referrals for child abuse come from public school teachers or officials.” Without the window provided by either public or private schooling, a family’s privacy and sometimes its isolation will shield it from officials with a duty to report evidence of abuse. This shields the abuser from accountability—and also

shields the child from help. Homeschooling, without visits or review, removes the children from the one forum in which their abuse may be identified.

Second, there’s a public health risk. Children who attend public schools are required to have immunizations. Without the immunizations they will not be allowed to begin classes. In only a few states have legislatures written their homeschool statutes in such a way as to require that homeschooled children be immunized, and that the immunization be verified in some way. Thus, deregulated homeschooling means that homeschooled children are basically exempted from immunization requirements. They are more susceptible to the diseases against which immunization provides some protection.

Third, public and private schools provide for many children, I suspect, although I have yet to see studies of this, a safe haven in which they are both regarded and respected independently and individually. Family love is intense, and we need it to survive and thrive. It is also deeply contingent on the existence and nature of the family ties. Children are loved in a family *because* they are the children of the parents in the family. The “unconditional love” they receive is anything but unconditional: it is conditioned on the fact that they are their parents’ children. School—either public or private—ideally provides a welcome respite. A child is regarded and respected at school not because she is her parent’s child, but because she is a *student*: she is valued for traits and for a status, in other words, that are

Public and private schools provide for many children a safe haven in which they are both regarded and respected independently and individually.

independent of her status as the parent’s genetic or adoptive offspring. The ideal teacher cares about the child as an individual, a learner, an actively curious person—she doesn’t care about the child because the child is hers. The child is regarded with respect equally to all the children in the class. In these ways, the school classroom, ideally, and the relations within it, is a model of some core aspects of citizenship.

Fourth, there are political harms. Fundamentalist Protestant adults who were homeschooled over the last thirty years are *not* politically disengaged, far from it. They vote in far higher percentages than the rest of the population. They mobilize readily. The “army” in which adult homeschooled citizens are soldiers has enormous clout: homeschoolers were called “Bush’s Army” in 2000 and 2004 for good reason. Their capacity for political action is palpable and admirable, although doubly constrained: it is triggered by a call

for action by church leaders, and in substance, it is limited to political action the aim of which is to undermine, limit, or destroy state functions that interfere with family and parental rights. Nevertheless, and by their own accountings, these citizen-soldiers in the “homeschooling movement” and the various political campaigns in which they are enlisted have no clout in the army in which they serve. They are as effective as they are, and as successful as they are, because they engage in politics in the same way that soldiers participate in combat. They don’t question authority, and they can’t go AWOL. With little education, few if any job skills, and scant resources, their power either to influence the lines of authority within their own sphere, or to leave that sphere, is virtually nil.

The remaining three sorts of harms—ethical, educational, and economic—are much discussed in critical literature both on homeschooling and on child-raising in devout households, and I won’t belabor them here other than to note them. Child-raising that is relentlessly authoritarian risks instilling what developmental psychologists call “ethical servility”: a failure to mature morally beyond the recognition of duties of obedience. In the most devoutly fundamentalist households, ethical servility might not be regarded as a bad outcome; it may be the desired goal. But whether a virtue or a disability, homeschooling—where the parents have full responsibility for the extent and substance of the child’s education as well as upbringing—clearly multiplies the risk.

The educational harm is the most immediate, direct risk of unregulated homeschooling. It is also the only one in this litany of possible risks adamantly denied by homeschooling advocates. There is indeed no credible evidence that homeschoolers as a group do worse on standardized tests, but contrary to their claims, there is also no credible evidence that they do better. There is no credible evidence of accomplishment here at all. Because of the non-existence of testing requirements in much of the country—itsself an important political victory of the homeschooling movement—the studies suggesting as much suffer from severe selection bias: the elite of the homeschool world—those parents who voluntarily submit their children for testing—is tested against the total public school population. It doesn’t of course follow from the selection bias that as a group homeschooled children do *worse*. Nevertheless, it is clear from both anecdotal accounts, memoirs, and trial transcripts that some homeschoolers are suffering educational harm which would be avoided or minimized, were they either in public school or were their home-school subjected to decent regulation.

Again, in unregulated states, parents need not teach their children a thing, if they so desire. Religious parents can teach nothing but the Bible, and nothing but a literal interpretation of that, and secular anti-schooling parents can allow their children to skateboard, dance,

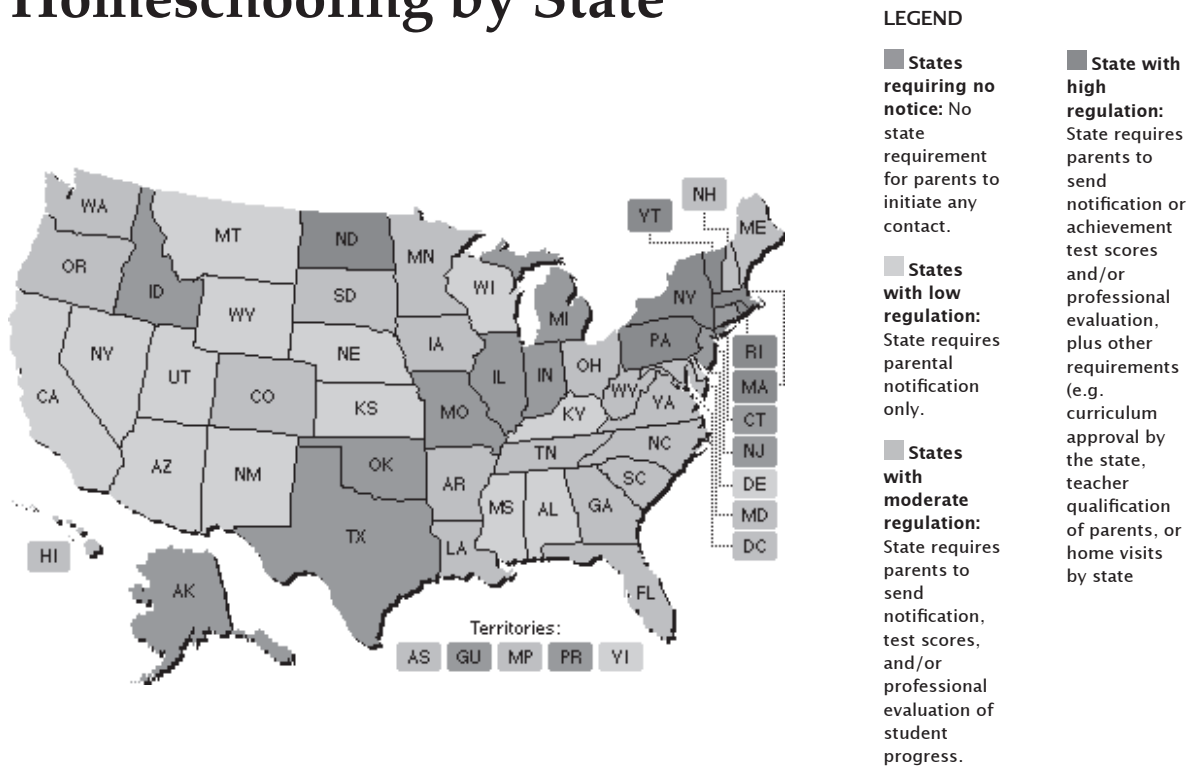
or play video games to their hearts’ content, free of any dull training in reading and arithmetic. Whether homeschooled children receive an education comparable to that provided in public schools is almost entirely a matter of parental discretion. This is not an incidental effect of the homeschooling movement; this was its entirely intended result. What is sacrificed most immediately by the radical deregulation of homeschooling is some children’s knowledge base, literacy, and numeracy. Some children are less educated than they would be, were homeschools either regulated or banned. Also sacrificed is their exposure to diverse ideas, cultures, and ways of being. Again, this is not incidental; it is the fully intended result of the deregulation movement. The children of the most devout fundamentalists are being intentionally shielded from those parts of a public school curriculum that have this broadening potential.

Finally, the economic harms. The average homeschooling family may have a higher income than the average non-homeschooler, as was recently reported by *USA Today*. The radically fundamentalist “movement” family, however, is considerably poorer than the population, and it is the participants in these movements—the so-called “patriarchy movement” and its “quiverfull” branch and related groups—that are the hardcore of the homeschooling movement. The husbands and wives in these families feel themselves to be under a religious compulsion to have large families, a homebound and submissive wife and mother who is responsible for the schooling of the children, and only one breadwinner. These families are not living in romantic, rural, self-sufficient farmhouses; they are in trailer parks, 1,000-square-foot homes, houses owned by relatives, and some, on tarps in fields or parking lots. Their lack of job skills, passed from one generation to the next, depresses the community’s overall economic health and their state’s tax base.

Conclusions

Even given these potential harms, there remain good reasons to permit homeschooling, in plenty of circumstances. Parents, both religious and secular, often justifiably wish to shield their children from public schools. Public schools too often ill serve children who are at risk of bullying, or who are hurt by the overly sexualized culture of middle and high schools in many parts of the country, or who have special abilities or needs, or simply idiosyncratic learning styles or habits. Many of these children can best or even only be educated by those who know them best. The children well served by homeschooling might outnumber the children who are badly victimized by the practice. The lessons given homeschooled children by those who homeschool responsibly are also

Homeschooling by State



This map has been reproduced in its entirety with the permission of HSLDA. It was originally published at <http://www.hslda.org/laws/default.asp> Copyright 2009 HSLDA.

often of very high quality. The gains to these children may be such as simply to outweigh the lack of socialization, diversity, training for citizenship and so on, for those who do so badly. Because of the lack of notice, testing, and review of homeschoolers, it's hard to know. But the evaluative question, for practical purposes, at this point is largely moot. Homeschooling is now such an entrenched practice, recriminalization is not a viable option in any event.

However, even if we assume that the benefits of homeschooling when done well are quite substantial, and even if the harms of public school when done poorly are equally so, *nothing* follows regarding the wisdom of deregulating homeschooling. Special needs kids, vulnerable or sensitive children, parents of children who are for very good reason fearful of bullies, children and parents who rightly or wrongly are repelled by the sexual and misogynist propaganda that proliferates in middle and high school culture, parents

of kids who are preternaturally curious and gifted kids themselves, children of the over-educated and under-employed suburban mothers who simply would prefer to do this work themselves than delegate it to the state, *all* of these children and parents would not be hurt, and would likely be helped, by reasonable state regulation. Annual standardized testing is not the bane of all existence it is often made out to be, and it would give rightly proud parents and children alike a record—and evidence—of their accomplishments. It would also make clear where they had slipped, and where there is need for correction.

As the political philosopher and homeschool critic Robert Reich has persuasively argued, curricular review would give the state a way to ensure that the academic content is such as to protect the children's interest in both acquiring the necessary skills for active, autonomous, and responsible citizenship in adulthood, and in being exposed to diverse and more liberal ways

of life. Mandatory testing would give the states, and the parents, a way to ensure that the students are performing at a level consistent with their own abilities, and consistent with the abilities and performance of their public and private schooled peers. It would give the parents and the state a way to ensure that the children who should be college bound are being prepared for that path, or at least, it would ensure that the parents are aware of their children's capacity for college level work. Periodic visits would open the door to college and career counseling, of benefit to both the children and their parents. They would give the state a window into the quality of home life, and a way to monitor signs of abuse as well as immunizations. The sanction for failure to comply with minimal curriculum, content, visitation, and testing requirements would simply be enrollment in a certified private or public school. The benefits of homeschooling are now protected through legalization of the practice. Deregulation, however, serves no one's interests and harms many. Many of the most serious harms could be prevented through its responsible regulation.

Robin L. West
Georgetown University Law Center
west@law.georgetown.edu

Sources: Robert Reich, "Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling," in *Moral and Political Education*, S. Macedo and Y. Tamir, eds. (NYU Press, 2002); Kimberly A. Yuracko, "Education off the Grid: Constitutional Constraints on Home Schooling," *California Law Review* 96, no. 1 (2008); James Dwyer, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights," *California Law Review* 82 (1994); James Dwyer, "The Children We Abandon: Religious Exemption to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors," *North Carolina Law Review* 74 (1996); Kathryn Joyce, *Quiverfull: Inside the Christian Patriarchy Movement* (Beacon, 2009); Gregg Toppo, "More Higher Income Families Are Homeschooling Their Children," *USA Today*, 5/28/09; Department of Education Fact Sheet on homeschoolers (1.5 million homeschoolers, as of 2007) nces.ed.gov/pubs2009/2009030.pdf; National Home Education Research Institute (estimate of homeschoolers at over two million, as of 2009) <http://www.nheri.org>.

Case law: *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Mozert v. Hawkins County Board of Education* 827 F.2d 1058 (6th 1987); *In re Rachel*, 73 Cal. Rptr. 3d 77 (Cal. App. 4th Dist. 2008); *Jonathan L. v. Sup. Ct.*, 81 Cal. Rptr.3d 571 (Cal. App. 4th Dist. 2008).

Insider Trading: A Moral Problem

Alan Strudler

Insider trading is a crime that can have sensational results. Its perpetrators risk finding themselves behind bars for many years and vilified in popular opinion, while their firms and the people heavily invested in them risk financial ruin. Even so, doubt may be raised about our understanding of insider trading, a doubt that should prompt concern about the justice of insider trading prosecution and about the harsh moral judgments people often make of insider

traders. The doubt comes from trying to identify the moral wrong in insider trading.

Perhaps the most influential insider trading case is *SEC v. Texas Gulf Sulphur*, in which officers of Texas Gulf Sulphur learned of their company's rich ore strike in Canada and traded on this information before the news became public. These officers, who engaged in securities transactions on the basis of material, non-public information, are paradigm insider traders. It is

clear that they committed a legal wrong. We will find more challenging the matter of identifying the moral wrong in their conduct.

Harm

The argument from harm maintains that insider trading is wrong because of the social harm it causes, given that we understand "causing harm" expansively, as causing a failure to attain optimal social welfare or social good.

In a securities market there are winners and losers, people who get good prices and people who get bad prices. Other things equal, the person with the best information about what is being bought or sold stands in the best position to find bargains and get the best price. Competing against corporate insiders, who possess superior information, thus increases the risk that one loses. Ordinary traders will balk at the risk of trading against insiders, and insider trading, then, will undermine confidence in securities markets and deter investment, increasing the price a firm must pay to raise capital and hindering both a firm's development and a society's economic growth more generally, according to the argument from harm. As a society, we have good moral reason to protect ourselves against this kind of economic harm, and laws prohibiting insider trading afford the relevant protection. On this view, insider trading is wrong because it fails a cost/benefit test, depriving us of a peculiar kind of benefit, a social good whose continued existence requires the cooperation of many people in maintaining a credible securities market.

An empirical claim forms the core of the argument from harm: that insider trading will significantly deter investment. Influential research lends some support to this claim. A leading article on insider trading compares the cost of capital (the price that firms must pay to raise money in a securities market) in (mostly developing) countries both before and after they begin enforcing insider trading laws, and concludes that because this cost generally decreases after insider trading laws are enforced, social welfare improves when insider trading diminishes. Does the article show that insider trading is socially harmful?



"You have been tried and convicted of insider trading. Have you any last tips to offer before I pronounce sentence?"

(CartoonStock.com)

Its authors acknowledge that they locate no causal link between insider trading and changes in social welfare, but merely non-causal correlation. Even the best social science research, then, expresses no confidence about whether insider trading deters investment in ways that prove socially harmful. Moreover, there is good reason to wonder whether insider trading will deter investment. Securities traders are accustomed to the idea that other traders may possess advantages in information, even if it is not inside information, and hardly seem deterred by this idea. Most investors do not believe that the quality of their information is as good as Warren Buffet's, or the stock market wizards at Goldman Sachs. If the investment public is willing to trade against Warren Buffet and the wizards at Goldman Sachs, perhaps it will not be deterred by the prospect of trading against corporate insiders, either.

In addition to doubt about the harm insider trading causes, there are other reasons for skepticism about the argument from harm: credible economic arguments purport to show that insider trading, if it causes some harm, also creates benefits; perhaps these benefits are more significant than any harms that insider trading causes. Some scholars find these benefits in the idea that insider trading facilitates getting insider informa-

tion to market quickly. Arguably when market information improves, so does market performance. One may also argue that insider trading benefits the firm and hence society more generally by providing a cheap compensation device: if a firm gives its employees the valuable perquisite of a right to trade insider information, it costs the firm nothing. An entirely different but equally plausible argument that insider trading is socially beneficial focuses on the costs of law enforcement. The argument is simple. If we as a society need not pay the costs of enforcing laws against insider trading, we save money.

There are, then, arguments both that insider trading harms us and arguments that it benefits us. Which, if any, of these arguments should prevail in our decision-making about insider trading? Scholars who examine the issue say that the economic considerations for and against insider trading seem both closely balanced and to rest on speculative assumptions. We should worry, then, about accepting either the idea that insider trading is generally beneficial or that it is harmful. There exists no measure for the magnitudes of alleged harms and benefits, and nobody knows that a reliable measure will ever emerge. So we do not know how to balance the good consequences of insider trading (if they exist) against the bad (if they exist).

Deception

Courts have always seen insider trading as a kind of fraud, viz., securities fraud. Historically, wrongful deception forms the heart of fraud. Hence, we might look to the wrong in wrongful deception as the explanation of the wrong in insider trading. Recall *Texas Gulf Sulphur*. On the deception account, they deceived shareholders by buying stock from them while concealing material, non-public information relevant to the valuation of the securities. Deception can be understood as inherently wrong, apart from any harm it causes.

The deception account of insider trading has its problems. Most salient is the elusiveness of any deception that occurs in insider trading. Recall, again, the *Texas Gulf Sulphur* officers. As a matter of fact, these officers were responsible for a number of misstatements that appeared in the press and misled the trading public about their discoveries of ore, and these statements were used at trial against the officers. Yet insider trading law requires no false or misleading statement for a finding of liability. The law is clear that if corporate insiders trade on material, non-public information while silently failing to disclose the basis of their trade, their silence may ground a conviction. Even if *Texas Gulf Sulphur* officers had made no false or misleading statements about their ore find, they might nonetheless have been convicted

of insider trading. But on what grounds? If deception is at the core of insider trading, whom do silent officers deceive and how do they do it? How can silence, saying nothing, be deceptive?

Suppose that officers have a moral obligation to inform shareholders of significant firm developments before they trade on firm stock. Then before making a trade, they have an obligation to say, if true, that there has been an important strike. By their silence, they license the inference that no new strike occurred. Had the officers discharged their obligations, shareholders would have had very different beliefs — fewer relevantly false beliefs — about the firm. Perhaps that suffices to show that they deceive shareholders. We may distinguish between deception as it ordinarily occurs, which involves a discrete deceptive act, and a failure of candor, which need involve no discrete deceptive act. We may then criticize a firm's officers for their failure of candor. We may say that sometimes minimal decency requires not merely that one not conceal the truth, but instead that one reveal the truth.

In a competitive business environment, however, one need not always be entirely candid. Suppose that you work for The Walt Disney Company, which assigns you the task of purchasing land for a new theme park. You need to acquire one more plot of land to complete your assignment. On that plot sits the home of a savvy used car salesman. Should you disclose to the homeowner what Disney intends to do with his land, or even that you work for Disney? If you disclose, you risk that the homeowner, knowing how valuable the land is to Disney, will insist on an unfairly high price, and you will have no choice except to pay it. I suggest that although it would plainly be wrong for you to lie to the homeowner about what you will

If deception is at the core of insider trading, whom do silent officers deceive and how do they do it? How can silence, saying nothing, be deceptive?

do with the land, morality does not require you to be forthcoming. Honesty does not require full disclosure in a competitive business environment, even when a failure to disclose denies benefits to others. How, then, do we know how much information a firm's officers should disclose?

The judgment that the officers' stock sale is deceptive, even in our expansive interpretation of that term, makes little sense unless one also finds that they fail in some duty to disclose the truth. So the deception account leaves us with a crucial but seemingly unanswerable question: what is the moral basis for this duty to disclose?

Unfairness

The argument from unfairness contends that insider traders get an unfair advantage over people with whom they engage in securities transactions and that their trades are therefore wrong on grounds of justice. The supposed unfair advantage is in their use of insider information, which stock market competitors lack. The unfairness argument looks at the comparative position of buyer and seller of stock and declares these positions unacceptable on grounds of justice.

The unfairness argument against insider trading identifies the relevant unfairness in terms of an acute inequality of information separating buyer and seller in a securities transaction. There are certainly cases, outside the securities realm, in which an asymmetry casts doubt on the legitimacy of a sales transaction. Typically, these cases involve dishonesty. Hence, if you have a car that has a massively defective engine, or if your house has a cracked foundation, it seems wrong

The unfairness argument against insider trading identifies the relevant unfairness in terms of an acute inequality of information separating buyer and seller in a securities transaction.

not to disclose the fact to a prospective buyer. One might think that the asymmetry of information that separates insider traders and parties on the other end of a securities transaction is similarly problematic.

But not all asymmetries of information are unacceptable. Suppose that Edna, an engineering genius, studies internal combustion engines for years, and finds a deep design flaw in Toyota's favorite engine. She alone knows that soon most Toyotas in the world will cease functioning abruptly, as their engines melt, creating billions of dollars of liability for Toyota, and ruining its name and stock value. So Edna short-sells the stock. Even though there is an acute asymmetry of information between Edna and those at the other end of her securities transactions, she does nothing wrong. Not all acute asymmetries of information in securities transactions present unfairness. Why, then, should one think that an acute asymmetry arising from inside corporate information in a securities transaction is a problem?

One might try to bolster the unfairness argument by identifying the unfairness in insider trading not in terms of a simple asymmetry of information between the buyer and seller of a security, but instead in terms of an asymmetry stemming from wrongly unequal access. Put more simply, the argument is that insider trading is unfair because one party trades on information stolen from the firm. The argument relies on the

idea that inside information is owned by the firm. When Texas Gulf Sulphur officers use their inside information about an ore strike to get a bargain in Texas Gulf Sulphur stock, they use valuable information that belongs not to them, but to their firm. They steal something valuable, information that belongs to the firm, and hence to its shareholders. They have no right to use the information. When they do so, they act unfairly and hence wrongly.

The soundness of the argument depends on contingencies regarding certain contracts. Suppose that a firm's board of directors, operating in a different legal regime from the U.S., legally tells managers that as a reward for their excellent performance, it grants them the right to trade on insider information. Indeed, the firm might even warn prospective shareholders of its policy to grant employees this right. It would seem that these managers do not steal anything when they trade on inside information: the owners agree to their use of the property. Thus, this version of the unfairness argument has limited scope. It cannot show that it is always wrong, either legally or morally, for insiders to trade on material, non-public information, but only that it is wrong in the absence of bona fide agreements to allow insider trading. As it stands, the argument fails to find anything inherently wrong with insider trading.

But the argument might be strengthened by showing the impossibility of bona fide agreements to engage in insider trading. There are many examples of agreements that neither society nor the courts will accept as bona fide. No matter how lucrative, we would not recognize contracts that require a person to enter slavery, even with an apparently benign slaveholder. Less extreme, we do not accept agreements in which employees trade their most basic legal rights, for example the right to complain about mistreatment, for higher wages. Trying to understand the depth of our abhorrence for these agreements is both very challenging and very interesting. Why not just let the market work and allow people to enter into whatever contracts they wish? This much seems clear: slavery contracts, like all abusive labor contracts, make the slave unconscionably vulnerable to the choices of the slaveholder; they set up the slave for wrongful treatment; they create an exploitative relationship. An agreement for slavery can work only through society's participation as the ultimate sanction for and enforcer of the agreement. We as a society have the right to choose not to facilitate an agreement that makes a party so vulnerable to abuse, even if we think it likely that the slave would somehow come out ahead through the agreement.

There is a lesson here for insider trading. Even if we do not know that insider trading is harmful, we know that it makes people vulnerable to financial calamity.

The prospect of insider trading gives corporate insiders a reason to manipulate stock prices, creating short-term gains in corporate profits that will allow insiders to sell their own stock at a large profit but harm the firm, other shareholders, and the public in the long term. We do not know, as a matter of fact, how much market manipulation would occur under an insider trading regime, or whether its costs would be economically "outweighed" by its benefits. We do know, however, that if we as a society sanction the practice of insider trading, it will give corporate insiders new and powerful reasons to engage in market manipulation, an unacceptably exploitative practice that can devastate its victims. The problem with allowing insider trading, then, is not simply in the harm it might cause, but in the exploitative relations it fosters. We as a society have no more reason to facilitate the exploitative relations in insider trading than to facilitate exploitative labor practices, even if some people are willing to gamble that they will prosper under exploitation. Insider trading is wrong as a matter of principle.

Alan Strudler
The Wharton School, University of Pennsylvania
strudler@wharton.upenn.edu

Notes: This article is excerpted, with some changes, from Alan Strudler, "The Moral Problem in Insider Trading," *The Oxford Handbook of Business Ethics*, George G. Brenkert and Tom L. Beauchamp, eds. (in press). © Oxford University Press.

Sources: *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976; Utpal Battacharya and Hazem Daouk, "The World Price of Insider Trading," *Journal of Finance* 57 (2002); Victor Brudney, "Insiders, Outsiders and the Informational Advantages under the Federal Securities Laws," *Harvard Law Review*, vol. 93 (1979); Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991); Henry G. Manne, *Insider Trading and the Stock Market* (The Free Press, 1966); Andrew Metrick, "Insider Trading," in *The New Palgrave Dictionary of Economics*, 2nd ed., Larry Blume and Steven Durlauf, eds. (Palgrave MacMillan, 2008); Jennifer Moore, "What Is Really Unethical about Insider Trading?" *Journal of Business Ethics*, vol. 9 (1990); Seana Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29 (2000).

What Is Charity?

Judith Lichtenberg

The extent of global poverty, and of human suffering more generally, boggles the mind. And so the mind of a person not overburdened by poverty or pain can hardly fail to wonder: should I do something to better the situation of those suffering these ills? How much should I do? Is charity a duty? A virtue that is "above and beyond the call of duty"? Or is helping others perhaps something less good than it appears to be? Simply naming the phenomenon of interest is fraught. The word "charity," as well as all its synonyms and cousins—aid, assistance, help, philanthropy, rescue,

giving, humanitarianism, beneficence—is morally and politically loaded.

The word "charity" comes from the Latin *caritas*, which means love; "philanthropy" means love of humankind. Since we ordinarily think of love as a feeling or emotion, the suggestion is that Good Samaritans act "out of the goodness of their hearts." This emphasis on people's inner states—their motives, intentions, dispositions—reflects one strand in our beliefs about charity. Yet in thinking about the alleviation of poverty and suffering, it seems we are primarily concerned with actions and outcomes, rather than motives and disposi-

tions. We rightly care about both—the inner and the outer—but they raise different questions. Discussions of charity often confuse the two realms.

To many people terms like “charity,” “humanitarianism,” and “beneficence” conjure up smugness, condescension, paternalism, pity, domination, colonialism, humiliation, and self-deception. One reason is that “charity” and its ilk suggest that would-be donors are not at fault for the plight of those they would be aiding. Frequently, however, they *are* at fault: poverty, inequality, and the suffering they produce are often political conditions arising from willed human acts and arrangements. In such cases the actions and policies needed to remedy them are requirements of justice, not charity. Even if not personally at fault, the well-off may be beneficiaries of a system that harms the “less fortunate,” as we often call them. Individual

How strange that, although charity has traditionally been conceived as a virtue, it is now difficult even to use the word without creating doubt and suspicion.

guiltlessness within a blameworthy system blurs the line between charity and justice.

But there are other reasons as well for charity’s bad rap. First, for one person to aid another implies an inequality from the start: one person *has*, the other *has not*, and *needs*. The have may harbor a sense of superiority; the have-not a sense of inferiority. Second, the transfer from have to have-not that takes place in an act of assistance or charity in some ways compounds the difference between the parties: the have-not, who began with less, has now been given something by the have. To the initial inequality is added a debt of reciprocity—which, according to psychologists and anthropologists, is a powerful burden. The have expects some return (gratitude at the very least), the have-not feels beholden. How strange that, although charity has traditionally been conceived as a virtue (indeed, the greatest of the three theological virtues), it is now difficult even to use the word without creating doubt and suspicion.

Dissecting a Small Act of Charity

Imagine a college student who encounters a fellow-traveler in the airport—a well-dressed businessman (as he appears) rushing to catch a plane, who has hurt his back picking up his luggage. She volunteers to carry his suitcase to the gate. Here is a small act of charity of the kind many people perform regularly and without thinking twice. It does not involve heroic

self-sacrifice; it does not save a life. But examining conduct of this kind may illuminate some features of acts we would typically describe as charitable, and help us to see what is essential to them and what not.

Carrying his suitcase is not something the student owes the man as compensation for harm she has done him. His injury was not her fault. It was, we may suppose, nobody’s fault. He has been a victim of misfortune, not injustice. Nor is she entwined in any relationship with him—personal, professional, political, or economic—that might require her to act to protect his welfare or improve his good. Expanding on these points, I offer a preliminary working definition. An act of charity is one aimed at benefiting another, where the benefit cannot be understood either (a) as a kind of compensation or reparation for previous harm done by the donor to the recipient; or (b) as a duty deriving from a special relationship between donor and recipient.

Consider carrying the suitcase of your fellow-traveler in light of some of the questions that have been raised about charity. By hypothesis, the helper possesses something the other needs, and is in that respect better off. But suppose the man in need of assistance is, as he appears, a rich businessman, and the student occupies a lower socioeconomic status. The two will probably never meet again, so any feelings on the part of one or the other, if they persist at all, will remain private soon after their brief encounter.

The student may feel good about what she has done. Did she help *in order* to feel good? We are not ordinarily in a position to know all of a person’s motives—in fact, we are probably never in such a position. The agent may be no better informed. The view known as psychological egoism claims that we always act only to advance our own interests or happiness—in other words, that everything we do is designed ultimately to

More plausible than that people are wholly self-interested is that they often act from a mix of motives, and that the recipient’s good, though a purpose of a charitable act, is not its only purpose.

make us feel good. This view is often maintained in a way that renders it unfalsifiable and thus empty of substantive content. More plausible than that people are wholly self-interested is that they often act from a mix of motives, and that the recipient’s good, although *a* purpose of a charitable act, is not its *only* purpose. So in carrying the man’s suitcase the student thinks of the traveler’s welfare, but she may also think of her own embarrassment if she fails to help and of the values with which she identifies—the kind of person she likes



Waiting in a breadline
(Corbis)

the person helped were lower in socioeconomic status than the helper. But predictions here are iffy. A person used to the lower-status position might not chafe at the aid; on the other hand she might be more sensitive to class and inequality. The higher-status person might be uncomfortable to be in the unusual position (as he sees it) of recipient of aid; on the other hand he might be less sensitive and mind less. At least as important as socioeconomic status is the degree to which a person's need for help reflects enduring features of her situation. Compare the following cases: (a) an able-bodied person carrying the luggage of a person with a temporarily strained back; (b) an able-bodied person carrying the luggage of a permanently disabled person; (c) a person giving money to a stranded traveler who has had his wallet stolen; (d) a rich person giving a poor person money for food. The recipient's enduring conditions in the second and fourth examples are more likely to give rise to pity on the part of donors or resentment on the part of recipients than the situations described in the first and third, which do not reflect chronic dependence.

to think of herself as being. Still, advancing his good is a primary reason for her action. In that sense her action is benevolent or beneficent—terms often used to characterize charitable acts or motives. Observing his difficulty might evoke Golden-Rule-like thoughts about how she would want to be treated if she found herself in his shoes. At the same time, because their relationship is fleeting, her act cannot be interpreted as a strategy designed to attain a reciprocal benefit.

Do the negative associations often pinned on charity attach to this act? That depends largely, if not entirely, on the psychological states of the parties themselves. Apart from the inherent situational "superiority" of the helper—she has something (the ability to carry a suitcase) that the other lacks, and needs—no chronic inequality between them exists; indeed, as I have described the example, his status dominates hers. She probably expects nothing from him except thanks. If he shows no gratitude, she may be annoyed or angry and might even regret having helped him. What about him? Gratitude, if he feels it, may be tinged with other emotions. As I have told the story, a woman aids a man, and in our culture (and most others) men generally do not like to depend on women for heavy lifting.

The attitudes of donor and recipient might differ if

Gratitude and Reciprocity

Yet all these examples share one of charity's central features. At issue is what sociologist Alvin Gouldner calls the "norm of reciprocity" and what social psychologist Robert Cialdini calls "the rule of reciprocity"—the idea that "we should try to repay, in kind, what another person has provided us." Gouldner argues that this norm is "no less universal and important an element of culture than the incest taboo." Research by a long line of anthropologists, sociologists, and psychologists confirms our everyday experience of the power of reciprocity as both a psychological fact and a moral norm. Yes, moochers, schnorrers, sponges, free riders, freeloaders, and parasites exist. (It's interesting that we have so many words for these types.) But much more common is the experience of indebtedness when a person receives gifts, favors, or aid from others. The feeling often coexists with gratitude, which is typically understood to be a positive emotion. Certainly its opposite, ingratitude, is widely, even universally, regarded as a serious character flaw, even if Hume overstated the case in insisting that "Of all crimes that human creatures are capable of committing, the most horrid and unnatural is ingratitude..."

Yet the feeling of indebtedness inherent in gratitude is distinct from it, because a person can feel indebted without feeling grateful, as when one receives something one doesn't want. And indebtedness, whether coexisting with gratitude or not, generally involves a certain discomfort or unease. Indeed, this discomfort is probably central in motivating the desire to repay what has been given.

According to Cialdini, the "web of indebtedness" that accompanies acts of giving and receiving is "a unique adaptive mechanism of human beings, allowing for the division of labor, the exchange of diverse forms of goods and different services, and the creation of interdependencies that bind individuals together into highly efficient units." Even so, feelings of indebtedness and gratitude are complex and ambiguous. As Mark Twain quipped, "If you pick up a starving dog and make him prosperous, he will not bite you. This is the principal difference between a dog and a man."

The central point is that to be the recipient of aid or charity is to experience a sense of indebtedness, and this feeling is an important source of the concern that

As Mark Twain quipped, "If you pick up a starving dog and make him prosperous, he will not bite you. This is the principal difference between a dog and a man."

charity is inevitably tinged with domination, pity, and resentment. The original example I described minimizes these possibilities, because the situation requiring help is temporary and brief, the donor's social status is inferior to the recipient's, and the relationship between the two will end almost as soon as aid has been given. But in many cases the psychological and political dangers associated with charity are never far from the surface.

Maimonides' Teachings

The medieval Jewish physician, Talmudist, and philosopher Maimonides (1135- 1204) articulated some of the moral ambiguities in charity and hinted at others in setting out his famous "eight degrees of charity." Maimonides delineates eight steps, in descending order of moral virtue, that can characterize the relationship between donor and recipient:

1. "The highest degree...is that of the person who assists a poor Jew by providing him with a gift or a loan or by accepting him into a business partnership or by helping him find employment—in a word, by putting him where he can dispense with other people's aid."

2. "A step below this stands the one who gives alms to the needy in such manner that the giver knows not to whom he gives and the recipient knows not from whom it is that he takes."
3. "One step lower is that in which the giver knows to whom he gives but the poor person knows not from whom he receives."
4. "A step lower is that in which the poor person knows from whom he is taking but the giver knows not to whom he is giving."
5. "The next degree lower is that of him who, with his own hand, bestows a gift before the poor person asks."
6. "The next degree lower is that of him who gives only after the poor person asks."
7. "The next degree lower is that of him who gives less than is fitting but gives with a gracious mien."
8. "The next degree lower is that of him who gives morosely."

In the first step of the ladder, Maimonides mentions four different ways to achieve the highest degree of charity: by gift, loan, offering a business partnership, or finding a person employment. These are each quite different and we might conclude that Maimonides' ladder should have several more steps! But Maimonides' central point is one that might be made by a contemporary critic of humanitarian aid and development assistance: aid should put the recipient in a position "where he can dispense with other people's aid" and thereby become independent. We may doubt that the four methods are equally suited to achieve that end, for Maimonidean reasons.

Generally, Maimonides focuses on ways to reduce the psychic and other costs of receiving and giving aid. Anonymity is one such means: when neither donor nor recipient know each other's identity, the possibility of smugness and condescension on the one side and humiliation and resentment on the other decreases. If only partial anonymity is possible, better for the recipient not to know the donor than vice versa—presumably because the psychic dangers of dependence on the part of the recipient outweigh the risks of condescension on the part of the donor. Giving before a person asks spares the recipient the pain of begging.

The Doer and the Deed

Giving "less than is fitting" but "with a gracious mien" is better, according to Maimonides, than giving "morosely." The comparison reveals an ambiguity about the source of charity's value.

The question concerns the relative importance, in giving, of the "how" and the "how much." Rabbi Joseph Telushkin illustrates the problem with the following example:

Suppose two people who have the exact same earnings and expenses are approached by a poor man in desperate need of food and money for his family. The first person, after listening to the man's horrible experiences, cries and then out of the goodness of his heart gives him five dollars. The second person, although concerned, does not cry, and in fact has to rush away. But because his religion commands him to give 10 percent of his income to charity, he gives the poor person a hundred dollars. Who did the better thing—the person who gave five dollars from his heart, or the one who gave a hundred dollars because his religion commanded it? We discovered that 70 percent to 90 percent of the teenagers we questioned asserted that the person who gave the five dollars from his heart did the better deed.

...When we asked these same students who they would think had done the better deed if they were the ones who needed the money, many of them were brought up short.

Maimonides' comparison of giving little graciously with giving morosely raises indirectly the more telling contrast—between giving graciously, but *less*, and giving without a heart full of loving-kindness, but *more*. About which is preferable, Judaism, according to Rabbi Telushkin, gives a clear answer. Quoting the writer and talk-show host Dennis Prager, he says:

Judaism would love you to give 10 percent of your income each year from your heart. It suspects, however, that in a large majority of cases, were we to wait for people's hearts to prompt them to give a tenth of their money away, we would be waiting a very long time. Ergo, Judaism says, Give ten percent—and if your heart catches up, terrific. In the meantime, good has been done.'

The contrast of outward behavior with inner feeling or motive expresses a dualism in the way we think about charity, and much else in ethics, that runs deep. Our interest in having people do good derives from two very different sources. One is broadly consequentialist: we approve of behavior that benefits others because of its good effects—such as relieving suffering and improving human well-being. But we also care about people's characters and dispositions. We want to know *why* a person acted as she did—whether out of a genuine desire to see another human being thrive, or from some other motive. Insofar as we are interested in judging a person's character, knowing what is "in her heart" is paramount. Insofar as we care about reducing human suffering, what matters is what she does, not why she does it.

Of course, the two concerns are almost certainly related: the judgments we make about which motives are worthy no doubt rest partly or wholly on their general connection with outcomes. Considering the historical evolution of our moral sensibilities, it's likely that we esteem those motives that tend to produce the outcomes we value. Thus, we prize unselfishness because it correlates with behavior that benefits others. Sometimes the same words are used to describe

motives and behavior, enhancing the ambiguities. Words like "love," "loving-kindness," and "beneficence," employed in discussions of charity, appear to describe inner states, but often refer to the outward manifestations of such states—the behavior we would expect to proceed from the feeling of love or benevolence. Thus the Hebrew word *hesed*, translated as "loving-kindness," is understood to mean the *exercise* or *practice* of beneficence. Similarly, the Christian teaching to "Love thy neighbor" means that one should *act* as a loving person would act. Beneficence, according to Aquinas, "simply means doing good to someone." The primacy of behavior accords with the fact that people do not have control over their feelings in the same way that they have control over their behavior. As Kant argued, "love as an inclination cannot be commanded." You can't make yourself love another, but you can, or at least you may be able to, make yourself act lovingly.

Still, even if human beings came to value certain psychological states (motives, feelings, and the like) because of their connection with outcomes in the world, we now value them intrinsically, and make judgments about people's character in terms of them. We care not only about how people act but about their dispositions: what they desire, what motivates them, how they feel. In thinking about the nature and limits of charity, it's important to keep in mind at every point whether we are evaluating the effects of actions in the world, or the inner lives of agents responsible for those actions.

Judith Lichtenberg
Department of Philosophy, Georgetown University
JL537@georgetown.edu

Sources: Alvin Gouldner, "The Norm of Reciprocity," *American Sociological Review* 25 (1960); Robert Cialdini, *Influence: Science and Practice*, 4th ed. (Allyn & Bacon, 2001); David Hume, *A Treatise of Human Nature*, Book III, Part I, Section I; Mark Twain, *Tragedy of Pudd'nhead Wilson* (Buccaneer Books, 1976; originally published 1894); Maimonides, *Mishneh Torah*, Book Seven, Chapter 10; Rabbi Joseph Telushkin, *Jewish Literacy: The Most Important Things to Know About the Jewish Religion, Its People, and Its History* (Morrow, 1991); Thomas Aquinas, *Summa Theologica*, Second Part of the Second Part, Question 31, Article 1; Immanuel Kant, *Foundations of the Metaphysics of Morals*, 2d ed., tr. Lewis White Beck (Prentice-Hall, 1997).

Regulatory Review and Cost-Benefit Analysis

Mark Sagoff

In a Memorandum issued within a few days after he assumed office, President Barack Obama called for an overhaul of the policies the White House uses to review regulations proposed by federal departments and agencies. The president acknowledged the necessity of regulatory review “to ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical ‘second opinion’ on agency actions.” Critics of previous administrations had charged that they misused the process of regulatory review to thwart agency actions. “In this time of fundamental transformation,” the president wrote, “that process — and the principles governing regulation in general—should be revisited.” Regulatory agencies have missions—but they must also consider the economic costs and consequences of what they do. This essay considers how the White House, in reviewing regulations, can direct agencies to take these costs and consequences into account while letting them do their work.

Regulatory Review

From the time of the Reagan administration, federal agencies, including the Environmental Protection Agency (EPA), and departments, such as the Department of Labor and the Department of Agriculture, have had to obtain the approval of the White House before proposing any major regulation. Each year, the White House through its Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) reviews about 500 rulemakings. Those it approves may become law; those it rejects it “returns” to the agency.

The Executive Order that currently governs regulatory review within OIRA requires every department and agency that proposes a regulation to “assess both the costs and the benefits of the intended regulation” and to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” This requirement may

seem innocuous; that agencies should balance the benefits and costs of a regulation appears to make common sense. Yet over the past 30 years, economists have developed a formal and technical method of defining and measuring “costs” and “benefits.” Agencies must package regulatory proposals in a way that passes a cost-benefit test in the specific and technical sense that “costs” and “benefits” are now defined and measured within the theory of microeconomics.

Within microeconomic theory, benefits are measured in terms of the amount people are willing to pay for outcomes they want. In economic parlance, “benefit” and “willingness to pay” (WTP) refer to the same thing. According to one authoritative text, “Benefits are the sums of the maximum amounts that people would be willing to pay to gain outcomes that they view as desirable.” Costs are measured in terms of the minimum amounts people demand as compensation (or are willing to accept) to allow outcomes they do not like. “Willingness to accept” (WTA) is counted as a kind of negative WTP. Economists measure the “net benefits” of a policy as the sum of the WTP (including negative WTA) of all those people it affects. Economic theory dictates, “Adopt all policies that have net positive benefits” or, more generally, “Choose the combination of policies that maximizes net benefits.”

The directive to “assess both the costs and the benefits of the intended regulation” does not invite agencies to discuss the reasons for and against a policy. No one would object to that kind of invitation. Instead, the directive is interpreted to presuppose the reason for any rulemaking, that is, to maximize net benefits. To meet the conditions OIRA sets for regulatory approval, an agency must think in terms of net WTP from the time it begins a rulemaking. To obtain OIRA approval, the agency must also show that no alternative regulation achieves a better balance between benefits and costs, as these are defined and measured within the two corners—WTP and WTA—of microeconomic theory.

Many economists believe that this scientific approach to regulation is more reliable than any political process. "In general," as one textbook advises, "politicians prefer projects that concentrate benefits on particular interest groups and camouflage costs or diffuse them widely over the population." As a prominent environmental economist has written, "It is the politician's job to compromise or seek advantage," while because economists are scientists they "produce studies that are . . . as objective as possible." There may be some truth in these remarks. Surely, agencies do sometime go overboard, for example, if they publish regulations that place enormous burdens on industry to prevent tiny risks to society. Surely the White House can legitimately provide a "second opinion" on whether a regulation is needed or is reasonable given its costs. If cost-benefit analysis (CBA) is not the right method, what is?

In his one-page Memorandum, President Obama asked for a discussion of "the principles governing regulation in general" and regulatory review in particular. What are these principles? A look at the history of regulation over the last century will help answer this question.

Regulation Before the Second World War

In the early 20th century, Progressives (as these reformers called themselves) advocated two kinds of regulation—regulation to assure economic prosperity and regulation to improve social conditions. Progressives like Louis Brandeis, who associated themselves with Woodrow Wilson's New Freedom, believed that the concentration of economic power in the hands of industrial and financial monopolies or "trusts" slowed or stymied economic growth. These reformers succeeded in enacting statutes that sought to regulate the economy, for example, by abolishing anti-competitive practices, including high tariffs, that allowed big business to stifle competition and to collude on prices. Progressives enacted economic regulations, for example, under the Clayton Antitrust Act of 1914 to open markets to competition, encourage innovation, stimulate employment, control inflation, increase consumer and investor confidence, and otherwise promote the kind of general prosperity that "lifts all boats" and supports the American Dream.

During the New Deal many regulations similarly emphasized economic growth and recovery, that is, the performance of the economy. Some of the regulatory agencies established during the Depression to help the nation along the path to prosperity, such as the Federal Deposit Insurance Corporation and the Securities and Exchange Commission, still exist today. The goals of these agencies—and of the regulations they issue—are explicitly economic, but they turn not

on microeconomic but on macroeconomic measures, that is, measures of the performance of the overall economy. The way macroeconomists assess economic performance has to do with employment, inflation, interest rates, productivity, technological progress, and the stability of the business cycle, among other indicators. These macroeconomic concepts, the

While economic regulations try to make the economy more prosperous, social regulations seek to make it more humane.

importance of which is easy to understand, have no clear connection with WTP, WTA, or the maximization of net benefits—in other words, no relation to the goals of regulation as they are construed by CBA or by microeconomists.

Progressives associated with the New Nationalism of Theodore Roosevelt concerned themselves not so much with the growth of the economy—employment, inflation, and so on—as with the state of society. They were alarmed by the terrible conditions muckraking journalists like Upton Sinclair had exposed in the nation's sweatshops, slums, and mines. Progressives enacted social regulations, such as child labor laws, workplace safety standards, and minimum wage requirements, among other humanitarian programs. These reformers concerned themselves with the plight of Americans whose boats were not lifted.

While economic regulations try to make the economy more prosperous, social regulations seek to make it more humane. To do so, social regulations sometimes limit the liberty of people to make their own bargains. Child labor laws, for example, keep parents from sending their children to work in the mines. Mining companies often preferred to hire children not only because children could be paid less but also because smaller shafts could accommodate them. At a time when people were willing to accept unconscionable working conditions, laws that required workplaces to be safer and workdays to be shorter and workers to be older might not have passed a cost-benefit test. In the laissez-faire markets of the turn of the 20th century life was cheap. In the absence of regulation it might still be cheap today.

In a famous case, *Lochner v. New York* (1905), the Supreme Court reviewed an ordinance that protected the health and safety of bakers by limiting to ten hours a day and six days a week the time they tended ovens. The Court struck down the ordinance as an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract." The bakers and their bosses willingly struck their own bar-



“And, in a move sure to attract the attention of regulators, the private sector made a bid to acquire the public sector.”

(The New Yorker)

gains, and since WTP of the bosses was greater than WTA of the bakers, the market operated efficiently. From the perspective of a cost-benefit test, this maximized net benefits no matter how many bakers got sick or died. As long as the market operated efficiently—with each person contracting freely—the

*Today, we look at the **Lochner** decision with dismay. And we think that regulation was justified if it spared the lives of bakers who might otherwise have perished in the heat of their ovens.*

results may be said to be “beneficial” and politicians may be said to “seek advantage” if they advocate reform. Today, we look at the *Lochner* decision with dismay. And we think that regulation was justified if it spared the lives of bakers who might otherwise have perished in the heat of their ovens.

As late as 1970, when Congress enacted the Occupational Safety and Health Act, it estimated that 14,000 Americans had died that year from job-related

hazards. Almost 400,000 new cases of occupational diseases were reported. These horrors resulted from free and competitive markets in which the risks were well known—they were legendary—for example to those who worked on railroads, in construction, and in the mines. Workplace safety regulation raised the consciousness of both employers and employees by putting a floor under bargaining. Bernard Kleiman, then a negotiator for the Steelworkers, argued regulation was needed to change the WTP and WTA of workers and employers. “Both sides have to be hit over the head a good deal before they develop the consciousness that permits them to move,” he said.

Regulation after the Second World War

The reformers of the 1960s and 1970s, to whom we owe a tide of environmental, health-and-safety, civil rights, and other social regulation, lived during comparatively prosperous times. The problems they addressed were less economic than social and political, having to do with segregation, racism, education, health, safety, equality of opportunity, and the environment. In the late 1960s and 1970s, outraged by the

pollution of water and air, environmentalists succeeded in enacting many far-reaching and powerful environmental statutes. The environmental movement did not base its arguments on a theory of market efficiency or on a vision of laissez-faire capitalism. Environmentalists expected the economy to prosper, of course; that is basic to everything. They wanted to build a better society, however, by emphasizing the tranquil, the natural, the beautiful, the safe, the healthful, and the very long run.

The generation of the New Frontier of John Kennedy and the Great Society of Lyndon Johnson differed in outlook and experience from the generation of the New Deal. Its political agenda differed as well. In the 1930s and 40s the government had reformed markets to salvage capitalism (then challenged by socialism) as an ideal. In the 1960s and 1970s, in contrast, Congress tried to reform society (by enacting environmental and workplace safety regulations, for example) and itself (by promoting civil and voting rights).

Insofar as economic regulation appeared on the political agenda of the 1960s and 1970s, it centered on the deregulation of industries in which the government

The trend toward economic deregulation profoundly affected the banking and financial industries; it was implicated in the meltdown of financial markets last year.

during and after the New Deal had set prices, such as the railroads, airlines, and telecommunications. The emphasis Louis Brandeis had earlier placed on restoring competition reasserted itself in the program of economic deregulation that the Ford and Carter administrations pursued actively and successfully, for example, by letting airlines compete rather than having the government determine fares. The trend toward economic deregulation profoundly affected the banking and financial industries; it was implicated in the meltdown of financial markets last year.

When Ronald Reagan took office in 1981, the speedy and successful pursuit of economic deregulation under his predecessors created high expectations among his supporters that similar results could be achieved in the area of social deregulation. The Reagan administration sought particularly to lighten the regulatory burden environmental and workplace statutes had placed on industry. David Stockman, who became Reagan's director of OMB, called in his 1980 "Dunkirk" memo for a "dramatic, substantial *rescission* of the regulatory burden" and for a "regulatory ventilation." In this spirit, President Reagan issued Executive Order 12,291, which established OIRA, mandated a formal process

for White House review of rulemaking, and required major regulations to pass a cost-benefit test. "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society," the Order stated; "Regulatory objectives shall be chosen to maximize the net benefits to society."

The call for regulatory rescission during the Reagan years was more libertarian than utilitarian. It had more to do with limiting the role of government than with improving the efficiency of markets. A widely cited article published in the *Harvard Law Review* during the Reagan years declared that the process of regulatory review Reagan ordered "imposes costly delays that are paid for through the decreased health and safety of the American public." As President Reagan employed it, CBA served as mainly a procedural device that proved friendly to industry by slowing or halting the flow of regulation.

The use of CBA by a president to impede federal programs was not new. President Carter had earlier required CBA in order to stall and eventually halt some pork barrel projects he opposed. As early as the 1930s, the River and Harbor Act created a Board of Engineers to weigh the commercial benefits of public works projects—such as dams built to provide irrigation and hydroelectric power—against their costs. Cost-benefit analysis in this sense depends on the same intuitive and pre-theoretical knowledge as would characterize a child's lemonade stand. Will the product—for example, water for irrigation and drinking and hydroelectric power—sell at a profit in view of the cost of labor, land, and materials? This intuitive sort of cost-benefit analysis envisions the government as if it were a firm engaged in profit-making activity. With respect to certain public works projects, such as bridges and dams, this analogy may be appropriate. Economists speak of the profit of a public works project as its "internal rate of return."

It is a nice question whether President Reagan wrote a cost-benefit test into his Executive Order because he viewed most federal programs pejoratively in terms of public works projects and pork barrel politics. It is more likely, however, that Reagan used CBA to add a layer of bureaucracy by which the White House could delay regulation, take *ex parte* comment on it, or simply return to the sender whatever rules it did not like. The application of CBA not just to public works projects, such as dams, but to all social and economic rulemakings, however, had an unintended effect: it turned the microeconomic theory of CBA into a talisman of government. Values, beliefs, arguments, *anything* people cared about could be assigned a WTP or WTA and transformed into a datum for economic analysis. Executive Order 12,291 (as lightly amended by President Bill Clinton) has served as an Open Sesame

to allow microeconomists into the Cave of Regulation. At last the treasures belonged to them.

Alternatives to CBA

In his Memorandum, President Obama asked for comments on transforming regulatory review including “suggestions on the role of cost-benefit analysis.” One may argue that CBA, at least if practiced intelligently, can provide a context for making the reasons for and against a regulation more transparent. Certainly, the technique may help to distinguish worthwhile public works projects from bridges to nowhere. To make sure that regulations are cost-conscious, however, OIRA and the agencies do not have to define costs as WTA and benefits as WTP or substitute an abstraction—net benefits maximization—for the goals Congress delegates to federal departments and agencies. Alternatives to CBA can succeed better in getting the agencies to look before they leap. To list a few of these alternatives:

1) *Cost-effectiveness analysis*

Cost-effectiveness analysis directs an agency to find the least costly measures to reach a given goal, even incrementally, while CBA improperly determines regulatory ends as well as means. CBA requires the decision maker to choose a particular end—net benefits maximization—while cost-effectiveness analysis compares alternative means to achieve goals set through a political process. One problem with CBA is that it tends to reinforce the status quo since it responds to “given” preferences. Cost-effectiveness analysis allows

Cost-effectiveness analysis allows society to raise its consciousness, for example, about safety, health, and the environment, while still taking costs into account.

society to raise its consciousness, for example, about safety, health, and the environment while still taking costs into account.

2) *Risk-risk analysis*

In limiting or preventing one risk, a regulation may produce another that is greater. The dangers that may result from a regulatory decision should be understood and compared with those it is intended to prevent.

3) *A presumptive floor and ceiling (benchmark) for the cost of saving a statistical life or avoiding a statistical injury*

If the goal of regulating risk were simply to avoid needless deaths or injuries, then it would make sense for agencies to spend no more to save the “next” life or prevent the “next” injury through one program than through any other. In econospeak, the marginal cost of

lives saved or injuries avoided should be equalized across programs. In spite of this, because risks differ in their moral and social qualities—some are more dreadful, involuntary, unfamiliar, etc. than others—deviations may be morally explicable or even praiseworthy. Reasons should be given to explain great deviations. As Cass Sunstein, whom the president has appointed to head OIRA, has written, “If an agency is going to spend (say) no more than \$500,000 per life saved, or more than \$20 million, it should explain itself.”

4) *Knee-of-the-curve analysis*

In many or most industries, the first reductions in pollution are the least expensive to make; eventually the cost of controlling the “next” or “incremental” unit of pollution increases. At some given state of technology, one can often find an inflection point or “knee-of-the-curve”—a point at which the cost of controlling the “next” or marginal unit of pollution increases rapidly and returns to the environment diminish rapidly per dollar spent. One morally acceptable way to allow some pollution may be continually to encourage or prod industry to improve its processes and technologies to move the knee of the curve—the point at which costs may go asymptotic—ever farther out along the pollution-control axis. To the extent the government can encourage industries, through incentives and threats, to invent environment-friendly technology it can assure environmental progress while permitting at a given stage of technology a minimum amount of pollution necessary for economic growth.

5) *Economic impact analysis*

People care about the effect of regulation on the economy—on jobs, inflation, competitiveness, and the distribution of wealth. Agencies and departments may reasonably be required to identify the macroeconomic effects of proposed regulations. Cost-benefit analysis concerns microeconomic efficiency—something that interests welfare economists—but has no clear relation to things like employment and inflation, which actually matter. It makes sense to ask how a major regulation will affect the “misery index”—e.g., involuntary unemployment and inflation. The use of CBA relies on microeconomic theory and does not reach the indicators of macroeconomic performance that people care about.

6) *Heuristic accounting*

It may well make sense that OIRA ask agencies to provide rich or thick descriptions of the reasons for and against a policy given the costs and the alternatives. These explanations will be salutary. CBA in contrast represents a highly professionalized and technical kind of analysis that presupposes only one reason for regulation—the maximization of net benefits. The measurement of WTP and WTA has become by now a quite technical—one might even say cabalistic—science. From a common sense point of view, it seems reasonable to ask agencies to carefully explain the

advantages and disadvantages of regulations in view of alternatives. The relation between advantages and disadvantages and WTP and WTA is anything but clear and intuitive.

As the president composes a new Executive Order he has asked for suggestions about, among other things, the role of cost-benefit analysis in the White House review of regulations. At first glance, it seems reasonable for the White House to ask agencies to identify the benefits and costs of a regulation. A problem arises, however, because economists understand "benefits" and "costs" as WTP and WTA rather than more generally as reasons for and against a regulation. If the president even mentions the words "costs and benefits" in his Executive Order he will be interpreted as issuing a call to all economists to get on deck as consultants to measure WTP and WTA and thus sink the regulatory ship under the weight of technical and methodological controversies and conundrums. The new Executive Order should require agencies and departments to justify proposed regulations in terms of the reasons for and against them and in view of their costs. With respect to CBA, however, silence would be golden.

Mark Sagoff
Institute for Philosophy and Public Policy
msagoff@umd.edu

Sources: Presidential Memorandum of January 30, 2009, "Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies," *Federal Register* vol. 74, no. 21 (February 3, 2009); Anthony Boardman et al., *Cost-Benefit Analysis: Concepts and Practice* (Prentice Hall, 1996); Barry C. Field, *Environmental Economics: An Introduction* (McGraw Hill, 1997); Bureau of National Affairs, *OSHA and the Unions: Bargaining on Job Safety & Health* (Bureau of National Affairs, 1973), quoting Bernard Kleiman; Alan B. Morrison, "OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation," *Harvard Law Review*, vol. 99 (1986); Cass Sunstein, *Risk and Reason: Safety, Law and the Environment* (Cambridge University Press, 2002).

Is There a Moral Obligation to Limit Family Size?

Scott Wisor

A colleague tells a story about a graduate student who was passionate about the environment. Upon learning that his brother was considering having a third child, the student threatened never to talk to the brother again if he did have the third child because of the foreseeable detrimental environmental impact of that child's life. Surely the student would be wrong to cut off communication with his sibling. But was he correct in thinking that we ought to have small families for environmental reasons? I will argue that he was wrong on both counts.

For our purposes here, I will make two relatively uncontroversial assumptions. First, environmental degradation caused by human beings currently harms a very large number of human beings and threatens substantially to decrease the well-being and life

chances of future human beings and other sentient beings. Second, among the many moral obligations that affluent individuals have, the obligation to protect the environment, prevent future environmental destruction, and when possible reverse past environmental destruction should be a high priority.

The Argument for Limiting Family Size

Bill McKibben has been a widely respected and prominent environmentalist for over three decades. He, more than any other individual, has provided a sustained defense of the argument for limiting family size for environmental reasons. In his book *Maybe One: A Case for Smaller Families*, McKibben makes the argument that individuals ought to consider having

smaller families. He writes, “but if we averaged 1.5 children per woman—if, that is, many more people decided to stop at one child, nudging the birthrate down toward the current European level—and if we simultaneously reduced immigration somewhat, then in the year 2050 our population would be about 230 million, or what it was when Ronald Reagan was elected.” While McKibben is not saying that everyone should stop at one child, he claims “that if many more of us did so, it would help. That gap of as many as 170 million Americans could be crucial, I think, in reducing our environmental damage. By itself it would not solve the problem, for our fierce appetites and our old fashioned fossil-fuel technologies also account for much of our dilemma. But it would make a difference.”

McKibben specifically sets aside a number of considerations that would prevent us from accepting the small families argument. First, he rejects the idea that we ought to impose any kind of restrictions on indi-

Individuals have a standing moral obligation not to cause environmental destruction. Affluent people living in developed countries cause excessive environmental destruction.

viduals’ choices about reproduction. Second, he focuses specifically on western populations (and perhaps on affluent western populations). Third, he rejects draconian restrictions on immigration to affluent nations although he does endorse some immigration restrictions. McKibben also recognizes that curbing population growth is only one of many steps needed to address environmental degradation.

It is not entirely clear what McKibben believes the moral status of his claim is. At a minimum he is arguing that at least some individuals who are considering having more children ought to limit the size of their families for environmental reasons.

A generalized argument for the moral obligation to limit family size for environmental reasons can be reconstructed as follows. Individuals have a standing moral obligation not to cause environmental destruction. Affluent people living in developed countries cause excessive environmental destruction. When affluent people living in developed countries have more children, they bring more people into the world who are likely to cause excessive environmental destruction. If population sizes decreased in developed, affluent countries, environmental destruction would be significantly reduced. Therefore, since having more children will likely cause more environmen-

tal destruction and having fewer children will likely reduce contributions to environmental destruction, individuals ought to limit family size for environmental reasons.

The Limits of Consumer-Driven Activism

Encouraging individuals to limit their family size is one instance of the broader category of consumer activism. In general, consumer-based activism seeks to change the world by changing individual behavior. While decisions about child bearing are certainly different from decisions about which kind of coffee to purchase, the argument for limiting family size treats the decision to have more children as a decision, in part, about consumption. But there are limits to the power of consumer-based activism. Successful environmental activism must be political in nature, changing existing institutions and creating new institutions to steward our use of global resources.

Pressuring consumers to change behavior to mitigate the impacts of their consumption on the environment does have significant benefits. Individual choices that affect the environment do matter. But only so much can be accomplished by focusing on individual responsibility for environmental reform, and for social and global justice more broadly.

First, consumers are limited in their ability to have the relevant knowledge regarding all of the environmental impacts of even a single product. Many products come from multiple sources, multiple countries, multiple corporations, and multiple divisions within a corporation, making it a monumental if not impossible task to be aware of all of the social and environmental impacts of a product. Consumer-driven activism will also fail to engage certain products that consumers don’t have access to information about, such as the steel beams used in high-rise buildings.

Successful environmental activism must be political in nature, changing existing institutions and creating new institutions to steward our use of global resources.

Second, consumer-driven activism is unreliable. Even the best intentioned, environmentally responsible consumers will sometimes make environmentally irresponsible choices even when they know and have access to environmentally responsible options. Weakness of will strikes us all; we choose the wine imported from Chile over a local option, buy a bottle of water on a hot day, or drive a car because the

weather is poor even though we could bundle up and ride a bike.

Third, many people will not choose to make the environmentally responsible choice. It's not just that some people won't *always* make the environmentally responsible choice—some people will *never* even consider making the environmentally responsible choice.

Fourth, consumer-driven activism can relieve the pressure for states and other governing institutions to

Arguing that individuals are responsible for combating environmental destruction through family planning choices mistakenly treats environmental problems as solely consumer-based problems.

take action to stop environmental degradation; if it is the consumer's sole responsibility to buy coffee at fair prices or consume less oil, then it might appear that states, corporations, and other institutions do not need to take action to ensure stable coffee prices or reduce oil consumption.

Arguing that individuals are responsible for combating environmental destruction through family planning choices mistakenly treats environmental problems as solely consumer-based problems, obscuring the political nature of environmental crises and the necessary political action needed to address these problems.

The Connection between Population Size and Environmental Destruction

There are at least three reasons that we ought to be skeptical of claims that increasing population size will *necessarily* increase environmental destruction. First, Malthusian claims about the dangers of population growth have repeatedly been proved false since Malthus first proposed them in the 18th century. Perhaps the most well-known of these neo-Malthusians is Paul Ehrlich, who wrote in 1970 that the earth was "filled to capacity and beyond and running out of food." Ehrlich predicted that millions of humans would starve as the human population grew beyond the means to feed itself, most notably in his book *The Population Bomb*. At the time of Ehrlich's predictions, the world's population was 3.5 billion people. Today the population stands at around 6.5 billion people. Yet we do not see half of the world's population starving. In fact, most people go hungry not from an absence of food, but from the absence of the capability to purchase or secure that food. While this does not show that Malthusian predictions about environmental degradation might not be correct at

some point, it does give reason to be skeptical of fears of population growth.

Second, evidence also suggests that in some cases increased population sizes have actually led to increases in environmental stewardship and preservation of natural resources. One can imagine that as population size and density increase, it becomes necessary to maintain more sustainable stewardship of global public goods. William Adams argues that "empirical research in Africa in the 1990s has started to challenge neo-Malthusian assumptions about the inevitability of environmental degradation as population density rises." For example, examining rural population growth outside Nairobi in Machakos, Kenya, a series of studies led by Mary Tiffen concluded that population growth actually contributed to environmental conservation. "The Machakos experience between 1930 and 1980 lends no support to the view that rapid population growth leads inexorably to environmental degradation. It is impossible to show that a reduced rate of population growth might have had a more beneficial effect on the environment. On the contrary, it might have made less labour available for conservation technologies, resulted in less market demand and incentives for development, and reduced the speed at which new land was demarcated, cleared, and conserved."

Thus, increases in population size need not necessarily increase environmental destruction, and in fact growing populations can decrease both absolutely and per capita their impact on the natural environment. McKibben writes, "Recycling your cans subtracts a tiny number from the equation; reproducing less fervently subtracts a much larger number. If we can cut the birthrate, that's 50 or 100 million fewer cars and furnaces; 50 or 100 million fewer dinners to serve and thermostats to set each day; 50 or 100 million fewer giant balloons hovering above the landscape." It is implied that increased population sizes necessarily increase environmental degradation, and that individuals are not capable of preventing their contributions to these problems.

However, population growth alone does not necessarily cause environmental degradation. Population growth combined with practices of consumption and production causes environmental destruction. Consider Arturo Escobar's assessment of global consumption: "The industrialized countries, with 26 percent of the population, account for 78 percent of world production of goods and services, 81 percent of energy consumption, 70 percent of chemical fertilizers, and 87 percent of world armaments. One U.S. resident spends as much energy as 7 Mexicans, 55 Indians, 168 Tanzanians, and 900 Nepalis." It's not that the industrialized countries are growing faster than other countries (they are not)—it's that they are consuming and producing in such a way that excessive contributions are made to environ-

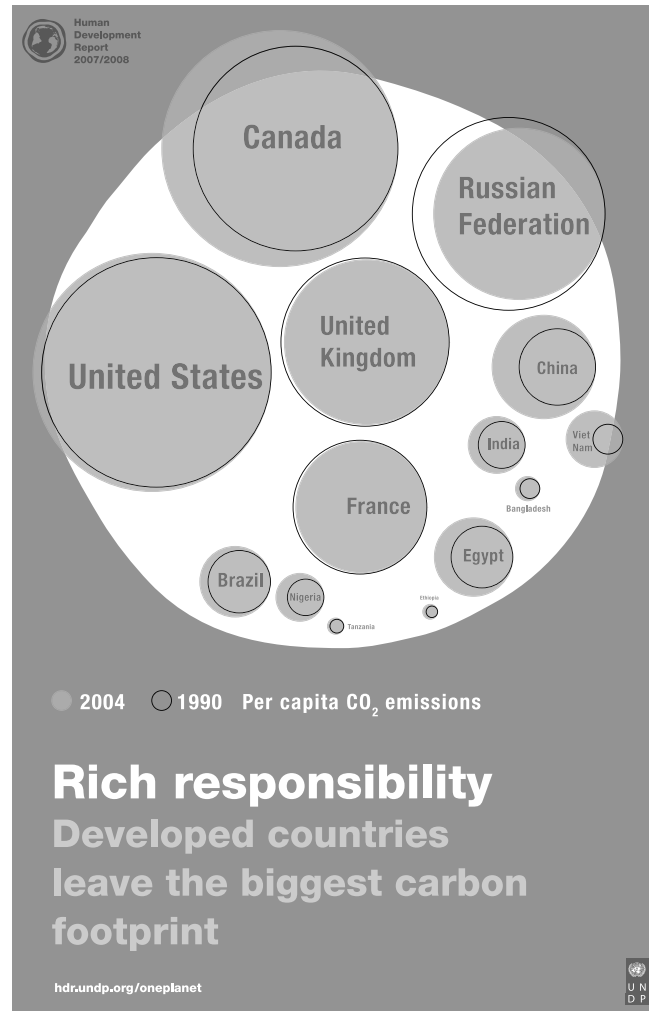
mental destruction. *It is how we live, not how many of us live, that is the primary determinant of our impact on the environment.*

Third, acceptance of the argument for limiting family size might actually weaken the environmental movement. Suppose the small families argument began to gain steam and became a powerful cultural norm. Individuals who would be responsive to such an argument are those individuals who are already trying to act so as to improve the state of the natural world—those people who are already purchasing organic, locally grown food while driving low fuel consumption vehicles or riding public transportation while calling or writing their elected representatives to protect the environment. Individuals who would not be responsive to the small families argument are not trying to improve the state of the environment—those people who are purchasing mass-produced, environmentally irresponsible foods while driving gas-guzzling cars and supporting elected representatives opposed to protecting the environment. Assuming that children adopt many of the beliefs and practices of their parents, if the small families argument were changing population growth patterns, we would expect that the population of environmentally concerned people would decrease while the population of people who are not concerned about the environment would increase and become disproportionately large.

If the power of consumer-driven environmental activism is limited and institutional intervention is required to prevent further depletion of the earth's resources, it would be deeply problematic for the size of the constituency of environmentally concerned citizens to decrease. A strong, global, intergenerational movement is needed to deal with issues like climate change, biodiversity loss, depletion of the world's fisheries, conflicts over potable water, and other pressing environmental problems. The minimal environmental benefits of environmentally concerned individuals having fewer children are certainly outweighed by the significant costs of decreasing the number of environmental activists who will carry out the environmental movement in the 21st century. In fact, if parents use environmentally responsible methods of child rearing, it is likely that most children of parents who would be receptive to the small families argument would have had a net positive impact on the environment. Therefore, individuals concerned about the environment might well have a greater positive impact on the environment by having *more* children, not fewer.

Understanding the Moral Relationship to Potential Future Children

The argument for limiting family size for environmental reasons also distorts the moral relationship we have



(United Nations)

to our potential future children. As I noted above, for at least some families, we might actually think that individuals ought to have larger families for environmental reasons. But both arguments instrumentalize what should be a more robust, complex, and deep moral relationship to potential future children. While it is certainly prudentially and morally appropriate for parents to think about whether they will be able adequately to care for and provide for future children, whether the children will have a life worth living, and what impact the children will have on their community and world, it shouldn't be the primary way in which we make decisions about children.

Our love for our existing family members, our love for our future children, and the desire to have a large, fun, supportive family are more morally appropriate ways to think about our future children. The special relationship that parents have to children can and should be formed even before the children are born, and decisions about future children should be made in

a manner consistent with cultivating that special relationship. To reduce that relationship to a mere environmental cost-benefit analysis is to misunderstand the relation that parents ought to have with their future children. In Mexico City a monument of a mother holding her young child is dedicated, "To those who loved us even before knowing us." I suspect the monument would be less moving if it read, "To those who calculated that the environmental costs of our lives were not sufficiently excessive to make it such that we ought not be born."

Feminist and Anti-Racist Reflections on Limiting Family Size

The argument that we ought to limit family size for environmental reasons doesn't necessarily imply anything about women or people of color that is morally objectionable. But debates and practices regarding child rearing and population control have been sites at which feminists and anti-racists have contested both theory and practice.

Feminists have long recognized that child bearing and rearing place substantial and disproportionate burdens on women. Many feminists might thereby be inclined indirectly to support small families as a means of relieving disproportionate burdens borne by women.

At the same time, feminists have long opposed both legal and normative structures that attempt to control women's sexuality and have worked to increase women's control over their bodies, and in particular their access to a variety of contraceptive and reproductive technologies. More generally, birthrates decline when gender equity increases. Given these commitments, feminists might be inclined indirectly to oppose the small families argument for fear that it might place normative or legal restrictions on a woman's right to make choices regarding reproduction.

Anti-racist opposition to a) draconian immigration reforms that disproportionately target people of color and b) policies that try to prevent population survival and growth among people of color are long established. Although McKibben has resisted a number of the concerns I will present, there have been and continue to be groups that have attempted to control reproduction through the bodies of women, particularly women of color, in order to control the population size. It is worth considering some of the possible dangerous (even though non-logical) implications of the small families argument.

McKibben himself notes that one of the largest contributions to the population growth in the United States is immigration, and he suggests that we ought to control immigration to preserve natural resources. Since the United States uses more resources per capita than any

country in the world, this country is a primary target for population growth reductions. In fact, Steve Sirota, Director of Research at the Center for Immigration Studies, argued before Congress that the primary contribution to population growth is immigration and this will contribute to an increase in global warming. He argued that immigration would inevitably lead to increases in U.S. pollution and that this connection was unavoidable, given that most immigrants were coming from low per capita carbon emitting countries to a high per capita carbon emitting country.

But what might be legitimate concerns about the environmental impact of immigration can be and have been exploited by xenophobic white supremacist groups to push for more radical immigration reforms. For example, a recent Sierra Club board election was plagued by

Policy and practice seeking to control the bodies of women of color have often been waged under the banner of concerns about population growth and environmental protection.

the issue of immigration and the potential influence of white supremacy groups. According to the *San Francisco Chronicle*, "A club spokeswoman said about 20 racist groups have urged their members to join the club and participate in the club's board elections, including VDare.org, named after Virginia Dare, the first white child reputedly born in a U.S. colony; Overthrow.com; and the National Coalition of White Writers."

Although McKibben doesn't advocate draconian measures to restrict immigration or prevent births by women of color, it is worth reflecting on the ways in which the state has intervened into the bodies of women of color in the past in the name of lowering costs to the larger society. Andrea Smith writes, "the notion that communities of color, including Native communities, pollute the body politic continues to inform the contemporary population control movement. People of color are scapegoated for environmental destruction, poverty, and war. Women of color are particularly threatening, as they have the ability to reproduce the next generations of women of color."

There has been a long history of forced and coerced sterilizations among women of color, unequal distribution of abortions in communities of color, testing of experimental birth control on women of color, and generally engaging in policies that treat women of color as "better dead than pregnant." Policy and practice seeking to control the bodies of women of color have often been waged under the banner of concerns about population growth and environmental protection. This is not a logical implication of the view that we ought to

have smaller families for environmental reasons. But it is one we ought to guard against when considering arguments based on the threat of population growth.

Conclusion

Although parents certainly do have obligations to consider the environmental impact of their families as producers, consumers, and citizens, it is not true that individuals ought to have smaller families for strictly environmental reasons. Parents ought to make decisions regarding future children out of their love for both existing and potential future family members. From a public policy perspective, there are many good reasons to promote gender equity and increase women's control over their reproductive choices, which may in some cases result in smaller family sizes. But these policies should be pursued independent of environmental concerns, and individuals should not let environmental concerns shape their family planning choices.

Scott Wisor
Department of Philosophy, University of Colorado
at Boulder
scott.wisor@colorado.edu

Note: Many thanks to Claudia Mills for excellent comments on several versions of this paper, and to a productive audience at the annual meeting of the Association for Practical and Professional Ethics in Spring 2007.

Sources: Bill McKibben, *Maybe One: A Case for Smaller Families* (Plume, 1999); Paul Ehrlich, *The Population Bomb* (Sierra Club-Ballantine Books, 1970); W. H. Adams, *Green Development: Environment and Sustainability in the Third World*, 2nd ed. (Routledge, 2001); Mary Tiffen, et al., *More People, Less Erosion: Environmental Recovery in Kenya* (John Wiley and Sons, 1994); Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, 1995); David Sirota, Testimony prepared for the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Border Security, and Claims August 2, 2001; Martin Glen, "Board Election Divides Sierra Club: Environmentalists Renew Fight Over Controlling Immigration," *San Francisco Chronicle* (Wednesday, February 11, 2004)—available at <http://www.cammon-dreams.org/headlines04/0211-04.htm>; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (South End Press, 2005).



Verna Gehring, who recently stepped down as editor of this journal, joined the Institute in early 2000 and for almost all this decade served as our editor, counselor, public relations officer, and friend. Verna generously shared her wisdom and intelligence with her colleagues at the Institute and at the School of Public Policy, with her students, and with her readers. There is little we have done that has not benefited from her graceful guidance and good advice. We are grateful to her and wish her the best success in the coming years.

Institute for Philosophy and Public Policy
School of Public Policy
University of Maryland
College Park, MD 20742

Non-Profit Organization
U.S. Postage
PAID
Permit No. 10
College Park, MD

Address Service Requested

Established in 1976 at the University of Maryland and now part of the School of Public Policy, the Institute for Philosophy and Public Policy was founded to conduct research into the conceptual and normative questions underlying public policy formation. This research is conducted cooperatively by philosophers, policy makers and analysts, and other experts both within and outside of government.

To make its research readily available to a broad audience, the Institute for Philosophy and Public Policy publishes this quarterly journal. Articles are intended to advance philosophically-informed debate on current policy choices; the views presented are not necessarily those of the Institute or its sponsors.



The Institute for Philosophy and Public Policy

Research Scholars:

Mark Sagoff, Director
David A. Crocker, Research Scholar
Stephen L. Elkin, Affiliated Research Scholar
William A. Galston, College Park Professor
Deborah Hellman, Affiliated Research Scholar
Daniel H. Levine, Research Scholar
Peter Levine, Affiliated Research Scholar
Xiaorong Li, Research Scholar
Judith Lichtenberg, Affiliated Research Scholar
Christopher W. Morris, Affiliated Research Scholar
Jerome M. Segal, Research Scholar
Karol E. Soltan, Affiliated Research Scholar
Robert Wachbroit, Research Scholar
Alec D. Walen, Research Scholar
David Wasserman, Affiliated Research Scholar

The Institute's Scholars constitute the *Philosophy & Public Policy Quarterly* Editorial Board

Claudia Mills, Guest Editor

Carroll Linkins, Program Management Specialist
Barbara Cronin, Business Manager

Editorial Policy: While the principal mission of *Philosophy & Public Policy Quarterly* (ISSN 1067-2478) is to present the work of Institute members, the work of individuals who are not members of the Institute also appears in the *Quarterly* from time to time. Interested individuals should direct submissions to the editor. Articles that appear in the *Quarterly* may be made available in whole or in part to third-party indexing sources.

Correspondence with Contributors: Readers may direct their correspondence to authors, whose mailing addresses and e-mail addresses follow their articles, or in care of the editor.

Subscriptions: A subscription to *Philosophy & Public Policy Quarterly* is free of charge to anyone making a request. Please let us know of changes in address, or whether you are receiving multiple copies of the *Quarterly*.

Electronic Access: The Institute for Philosophy and Public Policy directs interested individuals to its Web site: <http://www.puaf.umd.edu/IPPP>. Current and past issues of the *Quarterly* are available on the site. Copies of articles may be downloaded for personal use free of charge. Downloading for classroom or other use requires permission.

Permission: All materials are copyrighted by the Institute for Philosophy and Public Policy, unless otherwise acknowledged. Please direct to the editor all requests for permission to reprint articles appearing in this publication.

<http://www.puaf.umd.edu/IPPP>