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Risk Analysis and the Value of Life

To make its research readily available to a broad audience, the Center for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Center for Philosophy and Public Policy.* Named after the abbreviation for "questions," *QQ* summarizes and supplements Center books and working papers and features other selected work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Center or its sponsors.

In this issue:

One of the chief mandates of government is to protect the lives of its citizens. It does this through providing military defense against foreign attack and criminal sanctions against domestic assault. But death comes not only through war and bloodshed, and in this century government, via its regulatory agencies, has protected people as well against various more diffuse threats to life and health: death from any cause leaves its victims just as dead. We believe that it falls within the jurisdiction of government to protect its citizens with equal vigilance against many threats to life.

But if we look at the mandates of different regulatory agencies that share the common goal of protecting life, we see that they pursue this goal with differing degrees of zeal. In some an agency must balance gains in safety or health against the costs of achieving them; in others it must act to reduce risks in whatever ways are technologically feasible. This leads to some startling differences in standards. A review of the cost effectiveness of some proposed lifesaving programs has shown that the median cost of saving a life was $50 thousand at the Consumer Product Safety Commission and $64 thousand at the National Highway Traffic Safety Commission, while the same median value was $2.6 million at the Environmental Protection Agency and $12.1 million at the Occupational Safety and Health Administration. Surely this comparison suggests that we are spending too much in some areas, too little in others, or both.

The estimated cost of saving a life should no doubt be brought more into line across different programs, not only for reasons of equity, but also for reasons of efficiency. We could save more lives for the same total regulatory budget if we allocated these funds differently. But which inequalities should we accept? How should other values weigh against the number of lives we could save? And what should the overall median value be anyway? How do we decide?

The Social Value of Life

Policy analysts have been trying to answer these questions for some years now. One of their practical goals is to bring more order and coherence to the piecemeal approach to health and safety regulation of the 1960s and early 1970s. The methods they have developed—different specific techniques for analyzing and comparing risks, costs, and benefits—are intended to help us think clearly and comprehensively about all these issues.

One way to do this is to calculate what risk analysts call "the social value of life." They look at consumer choices that reveal preferences for safety, as opposed to other goods, and at social decisions to accept some level of risk when the cost of reducing it further would be too great. Measures such as these can be used to establish a systematic, consistent benchmark for deciding what we should spend on lifesaving policies.

A justification for being explicit and analytic about what we are willing to spend to save lives is that by allocating our risk budget more efficiently, we can reduce everyone's risk of early death. Equally important, since every dollar we spend on increased safety is a dollar diverted from enhancing our lives in other ways, we can make better comparisons between improving life's quality and increasing its longevity. Living longer, after all, is a poor substitute for living well.

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But many find the prospect of setting a social value for life a chilling one. This may be partly because they fear entrusting such decisions to a technocratic elite which might abuse its powers. Even setting aside this fear, however, it seems unconscionably cold and calculating to tote up the dollar value of individual human lives in an accountant's ledger. If, for example, we decide to forgo certain safety measures in coal mines, because we have coolly estimated that their costs do not justify their benefits, this will almost certainly mean some miners' deaths will not be prevented. It means, that is, that some real, actual, flesh and blood human beings will die, in order to save what may amount to only a few pennies on a dollar. Likewise, if we decide that certain pollution control measures in a large power plant are not worth their cost, numerous deaths can be expected to result. Isn't this killing to save money?

The risk analyst's response is that, like it or not, trade-offs between safety and other goods do have to be made. We could always spend more—perhaps a good deal more—to make the world safer—perhaps a little bit safer. At some point, as a society, we have to strike a balance. Risk analysis helps us do this in an orderly, rational way. According to Allan Gibbard, professor of

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philosophy at the University of Michigan, "'Killing to save money' is a tendentious way of describing the operation of a power plant with substantial pollution controls. . . . The phrase would allow us to dismiss a thousand man-years of sweat and toil as mere 'money' while underlining diffuse effects on health as 'killing.'" Impassioned rhetoric will not let us off the hook of making hard choices.

Furthermore, a sufficiently sophisticated risk analysis, one that, in Gibbard's terms, looks to "the expected total intrinsic reward" of our lives, will not ride roughshod over our actual feelings, about safety and health, or anything else. Even if our feelings are not rational or consistent, they matter, Gibbard explains, because they are ours: "They determine much in the way we experience our lives and the ways we experience each other." Frustrating them has costs of its own, to be counted in with all the rest: "A risk-cost-benefit analysis that takes into account all contributions to expected total intrinsic reward must count things other than lives saved, injuries and illnesses avoided, and resources diverted to do these things. It must count effects on the ways people who stand ready to carry out a policy experience their lives."

Suppose, for example, that we could save more lives if we spent our budget for mine safety on preventing accidents rather than on heroic, extremely expensive rescue efforts for trapped miners. Nevertheless, Gibbard recognizes, it may be "dehumanizing to stand idly by when strenuous, expensive effort has a substantial chance of saving lives." An ideal risk analysis would count the benefits of saving more lives but also the costs of forfeiting some of the psychological rewards of human fellowship.

But can risk analysis take account of all our other values, throwing them in one gigantic hopper with the number of lives saved and the dollar costs of saving them? Is risk analysis just a neutral way of structuring our decisions, incorporating all our values, whatever they are, and giving them whatever weight we determine to be important? Or are there some values that resist treatment in this way?

Douglas MacLean, director of the Center for Philosophy and Public Policy, notes, "Many people are uncomfortable with the suggestion that risk analysis should be a decision procedure for making choices that seem important both for their consequences and for the real and symbolic value that attaches to how we make them." For this reason, decisions about life and death are decisions we might especially resist consigning to the risk analyst's decision machine.

MacLean argues that this is because human life is a sacred or priceless value. This is often taken to mean that life has infinite value, but MacLean rejects this interpretation of what it is for something to be held as sacred. Certainly we are not willing to spend infinite sums of money to save lives; we have other competing priorities. Indeed, MacLean points out, "Many of the things we regard as priceless may nevertheless have perfectly well-determined market values. To say of something that it is priceless may be only to say that it is not for sale, not that no one could afford it."

The mark of a sacred object, according to MacLean, lies not so much in how much we value it, but in how that value is expressed. In every culture, sacred values are attended by special ceremonies and rituals. MacLean characterizes rituals as irrational or nonrational behavior, actions in which the relationship between means and ends is deliberately inefficient. This aspect of rituals indicates their symbolic meaning and draws the attention of the community to objects, relationships, or roles that have a special place in the life of the group.

Our society, too, has its own rituals for expressing the sacred value of life. MacLean takes these to include: saving crash victims, fliers lost at sea, or astronauts; retrieving the wounded or dead in battle; diverting resources from making mines safer in order to mount rescue missions for trapped miners; or even supporting individual medical treatment rather than more public health research. These defy economic sense—they are intended to defy economic sense. They are intended to show that life has a value that cannot be cashed out in purely economic terms.

What MacLean concludes from this is that "the value of life is complex. It has at least two aspects, which can conflict with each other. First, human life has intrinsic value: saving lives or preventing early deaths is good, and the more lives saved the better. Risk analysis is an important tool for furthering this value. . . . Second, human life is a sacred value, which must be expressed through rituals and other special actions. Setting acceptable levels of risk must be guided by both aspects of this value, even though . . . they may have to be balanced and traded off against each other. . . . We might reasonably choose to accept certain inefficiencies—to save fewer lives than we might otherwise save—in order to maintain the sacredness of human life. Risk analysts insist that we are willing to accept some risks as a trade-off to improve life's quality; why should we not also accept some risks, some localized inefficiencies, in order to maintain the integrity of the value of human life?"

Charles Pereira, U.S. Park Police

U.S. Park Police rescue victims of the January 1982 Air Florida plane crash.

For MacLean this gives a reason to resist across-the-board applications of risk analysis. But Gibbard responds that a sensitive form of risk analysis can meet these objections. In the end, he argues, we can still look at the various rituals in which we engage to show the sacred value of life and ask whether on balance they contribute, in the deepest sense, to the intrinsic reward of our lives. We can ask: does the existence of this or that ritual—however passionately attached we are to it in the press of daily life—really make our lives more worth living? "In a cool hour," Gibbard maintains, "we should be willing to reflect on what we regard with reverence in normal life." This is the kind of detachment involved in relying on ideal risk-cost-benefit analysis, which tries to remain sensitive to all the values and procedures that contribute to intrinsically rewarding lives.

Muddling Through

Can sacred values, personal commitments, and the important but subtle conventions and practices that characterize a culture be treated in this way? What would it mean to incorporate even these deepest values

A Modest Proposal

One is tempted here to present a new "modest proposal," on how best to use a given amount of the public's resources for lifesaving purposes. First we determine to use those resources to save the greatest number of lives, ignoring the difference of "feel" between saving the lives of identified persons perhaps under our gaze and saving "statistical" lives. So if ten people are clinging to a semi-submerged oil rig, and we have seen their plight on the evening news, we will, before sending the helicopters, ask ourselves: "Could we save more lives, possibly less visible lives, some other way?" Almost always the answer will be yes: an inoculation program to save children from some disease will save more lives for the same expenditure. So let those clinging to the oil rig drown. We have more efficient uses for our money.

The next move is to consider whether we should spend on the inoculation program or invest to spend more effectively later. Medical technology can be expected to advance, so we will save more children from an untimely death by investing our funds in research than by inoculating them now. But since medical research has progressed nicely without great subsidy from public funds, perhaps our best bet for eventually saving more lives is to invest elsewhere, wherever the economic returns look best—say, in oil rigs or atomic plants. That way we will have more funds to use eventually on putting to use the then-latest medical knowledge to save lives.

Once this decision is taken, we will have to have a view on what safety measures to install in our oil rigs and atomic plants. To protect our investment and so eventually save more lives, we will perhaps sacrifice a few workers' lives to keep profits high. We have more efficient ways to save lives than to waste potential lifesaving earnings in measures to save workers' lives.

Periodically, we will face the decision of whether to reinvest or spend our earnings on actual lifesaving. So long as there are still more lives at risk than we can save with our increased funds and profits are still high, we will of course reinvest whenever we face this choice. We still have better things to do with our lifesaving resources than to save lives.

With luck, our very investments and the hazard they produce may kill off enough people so that a time will come when it will no longer make good economic sense to go on investing our lifesaving funds. We will then disburse our funds to save whoever is left at risk, perhaps the entire now-much-reduced population. We will then congratulate ourselves on our rational use of our opportunities. From a position where, had we spent, we would have saved only a fraction of those whose lives were at risk, we have, by our clear-headed, efficient investment policy, made it possible for us eventually to save all the lives remaining at risk. What more rational course of action for the public good could possibly be dreamed up?

—Annette Baier

into some grand risk-cost-benefit analysis that aims at maximizing the intrinsic reward of our lives, in the broadest sense?

MacLean is skeptical that any formal system of analysis could ever capture all our values and concerns with the requisite sensitivity, since these depend so much on details of the concrete contexts in which they arise. Moreover, it is not clear what the yardstick for measurement is to be. If all our values are to be compared and assessed on one single scale, what is that scale? Most risk analysts have taken the common currency to be money, the amount we as individuals or as a society are willing to pay to satisfy our preferences and promote our values. But Gibbard rejects this standard, since, given the vast differentials in income, different amounts of money mean different things to people differently situated. His measure is the far broader notion of the intrinsic reward of a person's life. But is this too vague to be of any practical application?

MacLean argues that we might be better off giving up the search for a sensitive, yet workable, metric, consigning risk analysis to a more limited and less inclusive role, and "focusing our attention on directly examining our values more closely, without presupposing that we can ever find a method that will make them orderly and systematic." He asks: "Why should we think we would be better off allowing our judgments and intuitions to be corrected by some general analytic method?"

Conclusion

What should we conclude from this about how systematic and coherent our government agencies should be in tackling risk to life and health?

Annette Baier, professor of philosophy at the University of Pittsburgh, gives one reason why it may make for more systematic and coherent policy not to aim at a standard across-the-board policy for preserving life. She suggests that our traditional approach has its own rationale that may make more sense and achieve better results than the alternative presented by risk analysis.

Traditionally, we have divided the responsibility for facing various dangers not on the basis of what interests or rights are threatened, but instead by the source of the threat. Thus, the judicial system protects security of life, liberty, property, and contract—all against threats by individual offenders; the Environmental Protection Agency protects many of our vital interests and rights against threats to the environment—furthermore, not against all threats to the environment, only those "that come from thoughtless or ruthless human policies." Different public authorities, on Baier's view, "take on different public 'enemies,' each of which may threaten several vital interests." Should we worry that under this division of labor no one is thinking about all the threats to security of life, or coordinating all measures to protect it?

Baier thinks not: "To try to deal in one budget (the total lifesaving budget) with the threat to human life posed by a rise in terrorism, and to deal with the threat terrorism poses to liberty in a different budget (the total liberty-saving budget) would lead to less, not greater, coordination. Doubtless there are better ways to partition our public labor than we have yet devised, but . . . 'rationalizing,' if that amounts to identifying some abstract common goal in several areas and then adopting an efficient total plan to reach it, aiming at consistency in all the areas affected, may be one of those rational strategies that it is even more rational to restrict."

MacLean agrees that it would be a mistake for federal regulatory agencies to aim in a coordinated way at maximizing the overall efficiency of how government resources for lifesaving are expended. Regulatory agencies like EPA and OSHA "are not invisible bureaucracies which were established to duplicate the work of the Office of Management and Budget and bring efficiency and coherence to regulatory policies. They are, rather, very public institutions, which the public expects in part to give voice to the ideals of a society that cares deeply about the lives and health of its citizens."

Although we now realize how important it is to the nation and its economy for these agencies to be cost conscious, "nevertheless, when the Administrator of EPA appears at a press conference to announce a regulatory decision, people are not concerned primarily with knowing that the agency has found the ideal cost-benefit ratio. People want to know that the things they value deeply—our health, the environment, and our natural resources—are being guarded and protected by the agency we have created to be the trustee of these values."

In sum, the actions of such agencies have symbolic and expressive significance. MacLean suggests that this might help us to understand the "rituals" that have been forced on some of these agencies, like the taboos against looking at cost-benefit analyses or establishing a social value of human life. It might help us to understand why modest inconsistencies in achieving our lifesaving goals may be less worrisome than certain efforts to correct them. If life is indeed sacred, we may not always choose to protect it in the most efficient way but in a way that recognizes—and expresses—its special value.

The median lifesaving costs cited are taken from John D. Graham and James W. Vaupel, "Value of a Life: What Difference Does It Make?" *Risk Analysis*, Vol. 1, No. 1 (1981). The views of Allan Gibbard, Douglas MacLean, and Annette Baier are taken from their chapters in *Values at Risk*, edited by Douglas MacLean, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Littlefield, 1986). To order *Values at Risk*, see p. 15.

This Land Is *Whose* Land?

In December, 1971, the Alaska Native Claims Settlement Act (ANCSA) attempted to deal with the land claims of Alaska natives by providing a land and cash settlement administered through state-chartered corporations. Under the terms of ANCSA this corporate stock is inalienable until 1991. This date is now only five years away.

Last fall the independent Alaska Native Review Commission, established by the Inuit Circumpolar Conference, issued a report on what ANCSA, originally claimed to be the most liberal settlement ever reached with native America, actually means to native people. Headed by distinguished Canadian jurist Thomas R. Berger, the commission held meetings in 62 native villages and heard testimony from over 1400 native people.

In what follows, Berger distills the findings of the commission, which are presented in full in his book, *Village Journey*, published in 1985 by Hill and Wang. In response, Franklin Ducheneaux, Counsel on Indian Affairs of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, places ANCSA in the context of earlier settlements with native Americans in the Lower 48. Both Berger's and Ducheneaux's remarks are drawn from presentations they made at a Maryland Colloquium on Public Philosophy, sponsored by the Center for Philosophy and Public Policy, which was held on Capitol Hill last year.

Alaska Land Claims: Fifteen Years Later

In Alaska, 1991 has become a deadline—a symbol for issues that the Alaska Native Claims Settlement Act of 1971 (ANCSA) raises for Alaska natives. The year following 1991 is also a symbolic year. For 1992 is the 500th anniversary of Columbus's first voyage to the New World. Here in America the two great streams of humanity, from the Old World and the New, encountered each other. One was able to dominate the other. This has given rise to a recurring ethical question: How can a fair accommodation be reached between the dominant society and the native peoples of the New World?

The Land

ANCSA is a landmark in the settlement of native claims in the modern era. With it Congress officially "extinguished" all title and rights the aboriginal people of Alaska traditionally held to their land. In its place, Congress established 12 regional corporations (a 13th regional corporation represents non-resident Alaska natives) and 200 village corporations. Each Alaska native received 100 shares in a village corporation and 200 shares in a regional corporation. Title to 44 million acres of land was then conveyed to the corporations, together with a monetary settlement of $962.5 million. (A small percentage of these funds was passed through the corporations to individuals.) Thus, as individuals and as tribal entities, Alaska natives received little money and no land. What they received were shares in the newly formed corporations. The point is a significant one; it is the basis for present concerns about the future of native land in Alaska.

The majority of village corporations are at present in financial difficulty, some even threatened with bankruptcy, and losses have been frequent in the regional corporations as well. The climate, geography, and the limited economic prospects in the Arctic and sub-Arctic regions militate against corporate success. But to Alaska natives, the success or failure of the corporations is not the paramount issue, except as it bears on the question of the land.

There are, under ANCSA, three principal threats to continued native ownership of native land:

(1) Corporate failure. Bankruptcy is already a real possibility. If it occurred, corporate assets, including land, could be attached by creditors.

(2) Corporate takeover. After 1991, shares in the native corporations can be sold to non-natives. Take over the corporations, and you take over the land.

(3) Possible taxation. Twenty years after conveyance, lands received by the native corporations, even though undeveloped, can be taxed under state authority. In the 1990s, if Alaska state oil revenues continue to decline, there may be a call to tax native lands in rural Alaska. Failure to pay taxes imposed on subsistence lands could result in land passing to the state.

Furthermore, only those natives alive in 1971 received shares. Thus, though the rising generation of Alaska natives may acquire shares by inheritance, as a whole they have no legal interest, direct or indirect, in their ancestral lands.

For these reasons there is widespread dissatisfaction with ANCSA among Alaska natives. Native people understand that although ANCSA has been since 1971 the means of holding native land, it does not offer future protection for that land; they realize that in fact it is the very instrument under which they may lose their land.

Sovereignty and Subsistence

The United States takes pride in being a home for peoples of any religion or race, any language or culture. Immigrants by the millions have come to the United States. As individuals, as families, they chose America and its institutional arrangements. But native Americans did not choose America in this sense. They were here first, with their own societies, laws, and institutions.

ANCSA did not address the key issue of self-government for native people. The native peoples of the New World have always thought of themselves as sovereign peoples, requiring their own autonomous institutions. Are native corporations a sufficient expression of the distinct identity of native peoples? Or should native institutions be political as well, with legal authority? The question arises with particular force in Alaska as 1991 draws near.

Are native corporations a sufficient expression of the distinct identity of native peoples? Or should native institutions be political as well, with legal authority?

The sovereignty movement is the product of twin crises, both having their origins in ANCSA. I have discussed the threat that 1991 presents to continued native ownership of native land. But it was not only aboriginal title that was extinguished by ANCSA. Aboriginal rights of hunting and fishing—that is to say, to subsistence—were also extinguished. Now native rights to make a living off the land depend on a network of state and federal laws, which often restrict subsistence activities in the name of protecting them. Subsistence is a dynamic enterprise, but government regulatory regimes try to confine it within a steel web of exact definitions, locations, and numbers. Such precision cannot respond quickly to ever-changing human needs and environmental conditions, to which native practices have traditionally been sensitive. This dual threat has led villagers to consider ways of severing the land from the corporations. For subsistence is more than survival in rural Alaska; working in harmony with the land is a way of life.

Recommendations

In every country (including the United States) where there has been a settlement since ANCSA, the main features of ANCSA have been rejected: the idea of shareholders' corporations; the proposition that native land, even though undeveloped, may be liable to taxation; the disinheritance of future generations.

Since the land is now a corporate asset, it is not possible simply to urge that a law should be passed transferring the land from native corporations to tribal governments. But shareholders of village corporations who are concerned that their land may be lost should transfer their holdings to tribal governments to keep the land in native ownership, and regional corporations should consider transferring land to the villages or to regional tribal organizations. Unlike corporations, tribal governments cannot fail, cannot be taken over, and cannot be made liable to pay state taxes. Furthermore, this arrangement accommodates the children disinherited by ANCSA, since they would have been born into tribal membership. Congress can help by passing legislation to facilitate the transfer of land by village corporations to tribal governments without regard for dissenters' rights and to clarify the village tribal governments' right to exercise a veto power over all subsurface development on village-owned ANCSA lands.

Regarding sovereignty and subsistence, the state should recognize traditional tribal governments as appropriate local governments for all purposes under state law. Tribal governments should have exclusive jurisdiction over fish and wildlife on native lands, whether owned by native corporations or by tribal governments. On federal and state lands (90 percent of Alaska's land area), native governments in partnership with state and federal governments should exercise jurisdiction on all hunting, trapping, and gathering lands used by tribal members. Rights of access on state and federal lands and waters and a share of resources fully sufficient for native subsistence must be guaranteed.

Alaska Tourism Collection, Alaska Historical Library

These recommendations are based on the testimony of native peoples in dozens of native villages. They are based on what the native peoples told me they want to do for themselves. Nothing less than the recommendations made here will enable village Alaska to survive. I have seen the effects of assimilationist policies in the villages. Among many Alaska natives there is a feeling of deep, bitter resignation, a sense of irretrievable loss. This has a bearing on the rates of alcoholism, violence, and suicide in rural Alaska. It seems reasonable to suppose that if native peoples can regain a measure of control over their communities and an opportunity to make a living off the land, they will have a firm basis for a renewed collective and personal sense of worth and well-being. The choices Americans confront in Alaska may, in the long sweep of history, provide a unique opportunity to do justice to native peoples. It is an opportunity they must not reject.

—Thomas R. Berger

ANCSA: New Words, Same Story

ANCSA has been hailed as a departure for the resolution of native claims, a step forward from a past in which land was wrested from native people in unjust and inhumane ways. But I would like to suggest that the structure of the ANCSA settlement, based upon a corporate administration of settlement lands and settlement funds, is very much similar to the whole allotment policy for Indians down in the Lower 48 that began in 1887.

From its inception this country developed through the taking of Indian land. The whole series of wars and conflicts that occurred almost from the time that the first non-Indian set foot on the soil of North America was really motivated by the desire and need of non-Indians to secure land. Non-Indians would move into Indian territory, the Indians would defend their territory, wars would result, the Indians would be defeated and driven back, the non-Indians would take the land. The process kept repeating.

By 1887, the date of the General Allotment Act, almost all Indian tribes had been militarily subjugated. Tribes that had not been "eliminated" in the Eastern seaboard had been placed upon reservations. The land that they were placed upon was generally land that non-Indians didn't want. The white man had already taken, through military conquest and through imposed treaties, all the land he felt was desirable.

Toward the end of the century, however, surging immigration created a new impetus for more land. And technology had developed whereby "worthless" desert land could be put to "productive use." But the Indians were sitting on it. How, then, to get it?

Two forces, evil and good, joined together to bring about the General Allotment Act of 1887: the greed of land developers and the compassion of liberal humanitarians, concerned to do something to ameliorate the terrible poverty and misery in which Indians existed on the reservations. Good Christian people felt at that time that the way to help the Indians was to make good Christian farmers out of them. As good Christian farmers, Indians would no longer need their tribal, communal land or their system of tribal government—all they would need was a plot of their own, some oxen, a plow, and a little money to get them into the farming business. Well, this set nicely with those people in the West who wanted to get at the land. This was a way to do it, in two respects.

First, you pass a law through Congress requiring that the reservations be allotted: each head of family gets his allotment of acres, his few implements, his oxen. This serves the purposes of the do-gooders, because the Indians are now going to become good Christian farmers. Then, whatever is left over is "surplus" land, to be opened to white homesteading. And there just happened to be a lot of surplus land left over.

The second avenue of getting at the land was developed somewhat later, when it was discovered that you couldn't make a good Christian farmer out of a person who had his roots in a hunting and gathering economy; you couldn't simply make a good white Christian farmer out of an Indian by giving him a tract of land and an ox, particularly since the tracts of land in many cases were inadequate to begin with.

If the Indians couldn't use the land, what would be a good use for it? Well, there were some white farmers who would like to lease it. So you change the law and permit the Indian first to lease and then to sell his land. There he is, in desperate poverty, and the only asset he has is that land, which he can't use. So he sells it and the land goes out of Indian ownership.

ANCSA is basically no different. The lands and the money of ANCSA are the same as the lands and the reservations of the Indian tribes down here in the 1800s. How should these lands be administered in a settlement? Well, you don't set up reservations. You don't have the lands owned communally by a tribe with tribal jurisdiction and the continuance of native culture. Instead, create corporations for the natives, and each native that belongs to that particular corporation will be issued a share of stock. And they'll learn how to be, not good white Christian farmers, but good white Christian stockholders. But realizing that they know nothing about stockholding and corporations and shares and dividends, just as the Indians in the 1880s knew nothing about farming, we'll make the stock inalienable for twenty years, by which time presumably they *will* have become knowledgeable, sophisticated, suit-and-vest wearing stockholders, able to deal wisely with their stock.

But when the stock becomes alienable in 1991, the same thing will happen to it that happened to many, many allotments of land down here in the Lower 48 in the early 1900s. For the natives in the villages, that piece of paper does not represent their land, their culture, their religion, their way of life. The land's going to be there. So when someone comes along and offers them money for that piece of paper, they sell it, and thereby, not realizing it, sell their land. Between 1887 and 1934 literally millions and millions of acres were lost to Indian people, until in 1934, the Indian Reorganization Act was passed, stopping allotments and returning whatever was left of the "surplus" land (normally the very worst of it) to the tribes. So, in a way, what the village people of Alaska are today asking for is their own "Indian Reorganization Act" to correct the devastation of these past policies: the allotment acts, the laws authorizing lease of lands, the laws authorizing sale of lands, the fragmentation of tribal communities because of the fragmentation of the land.

These policies didn't work down here. They didn't make Indians overnight, or over a period of two generations, into good, hard working, saving, investing, Christian families. It takes a longer period of time to transform "uncivilized" society into what we view as civilized society. Yet it was expected that in fifty years the Indians would acquire the trappings of a civilization that it took non-Indians five hundred years to acquire. How could this not fail? Likewise, native people in the rural communities of Alaska existed in 1971 at the economic, social, and cultural stage in which Indians down here existed in the last century, and yet they were expected to make a leap from that level of societal and cultural development, in twenty years, up to a corporate society. It will not work. It can't work. The land will pass from native ownership and be lost once again.

In the late 1800s a Menominee tribal chief came to Washington, D.C., to conduct business relating to the loss of Indian lands. He was given by the officials in Washington the modern-day suit of that time—top hat, cutaway coat, and vest—and he put it on. And the chief who looked so impressive and dignified in his buckskins, moccasins, and feathers, now looked ridiculous. And he looked at himself, and he said, "This is the way the white man's law fits the Indian." It doesn't.

—Franklin Ducheneaux

The Legacy of Nuremberg

Forty years ago, on September 30, 1946, the trial of the major war criminals of the Third Reich came to a close in the ruined city of Nuremberg. It is a commonplace that the trial was an "historic" occasion, that it left a legacy for future generations. The men who conceived and conducted the trial understood it that way; they intended it to be epoch-making and viewed their own words and deeds (not, perhaps, without a touch of self-aggrandizement) through a reverse telescope from the eyes of a distant and more pacific age.

It is impossible for us to read accounts of the Nuremberg trial without realizing that it signifies something much different to us than it did to those who conceived it. For us, Nuremberg is a judicial footnote to the Holocaust. It stands for the condemnation and punishment of genocide, and its central achievement lies in recognizing the category of *crimes against humanity:* "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds . . . whether or not in violation of the domestic law of the country where perpetrated." For those who conceived the trial, on the other hand, its great accomplishment was to be the criminalization of aggressive war, inaugurating an age of world order. For this reason, its decisive legal achievement lay in recognizing the category of *crimes against peace:* "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances. . . . "

This idea that Nuremberg was to be the Trial to End All War seems fantastic and naive forty years (and 150 wars) later. It is also a dangerous and mistaken idea that has done much to vitiate the real achievements of the trial, in particular the condemnation of crimes against humanity. The Nuremberg Charter incorporates an intellectual confusion, leaving us, as we shall see, with a legacy that is at best equivocal and at worst immoral.

Aggression and Sovereignty

At neither the Nuremberg nor the Tokyo trials was the crime of aggression defined. But in 1974 the United Nations offered the following definition: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. . . . " Though it was not until 1974 that aggression was linked explicitly with the violation of sovereignty, this definition is clearly in the spirit of Nuremberg. But what, then, is sovereignty?

The concept was formulated in the early modern era, the era in which the nation-state began to emerge in Europe. It signified that there is only one ultimate source of law in a state, namely the state's sovereign. From this follows the notorious doctrine of *act of state,* which exempts sovereigns from legal liability for their depradations against other states, on the theory that prosecution of the sovereign of one state by the court of another state amounts to one state's exercising jurisdiction over another.

Historically, the doctrine of sovereignty was formulated to secure the dominance of secular authority over the Church; the doctrine, however, had the additional consequence that so-called "natural law"—constraints on the content of law ascertainable by reason alone—had no place in the theory (since in practice the Church claimed the right to announce natural law—despite the fact that it was supposed to be a matter of reason and not revelation). Nothing constrained the sovereign: from the fact that he was the sole lawmaker it followed that he was the highest lawmaker as well. There are no domestic legal standards according to which he himself can be held responsible, unless these are self-imposed. Conjoined with the act-of-state doctrine, this

The defendants in the dock

conclusion implies that sovereigns are liable under neither domestic nor international law: that "the king is above the law."

It was this doctrine that Article 7 of the Nuremberg Charter assaulted: "The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment." By making even sovereigns legally liable for their deeds, Article 7 denies that the sovereign is the sole source of law in his state; it thus denies the doctrine of sovereignty itself.

Similarly with Article 8: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility. . . . " By criminalizing acts that are legal according to the positive law laid down by the sovereign, Article 8 thus denies that the sovereign is the sole source of law for his subjects.

And similarly with Article 6(c), which outlaws crimes against humanity even when committed by a state against its own subjects and "whether or not in violation of the domestic law of the country where perpetrated." Article 6(c), the most enduring moral achievement of Nuremberg, is irreconcilable on its face with the classical doctrine of sovereignty. Together with Articles 7 and 8, then, it perforates or even destroys the doctrine in the name of "humanity" and individual responsibility toward it.

This is an important achievement, and nothing to regret. As Robert Jackson, the chief prosecutor at Nuremberg, pointed out, the act-of-state and superior-orders doctrines taken together would imply that no one could be held responsible for the crimes the Tribunal was trying: the former would exempt those exercising sovereign authority, while the latter would exempt their subjects. Yet it would be a moral absurdity (and political impossibility) to punish nobody for Auschwitz. The plain fact of the matter is that the Third Reich was a criminal state in every moral sense that the word "criminal" possesses, and the law had to reach those who carried out its crimes.

Two Problems with Sovereignty

It is an unhappy fact of human existence that we never forget how to commit a crime once we have been taught. The Third Reich may well be the first state whose criminality was virtually its defining feature; it will not be the last. In this regard, the framers of Nuremberg understood very well the importance of their endeavor. Since the Nazis had set dark precedent for criminal states, had invented new forms of evil-doing, had made the unthinkable real (after which it is only a matter of time until it becomes routine), it was necessary to restructure our moral imaginations in order to fortify ourselves for a world of criminal states. If this meant exploding time-honored propositions and concepts, then so be it.

The trouble was that the propositions and concepts reflected a political reality—the system of nation-states—that no one was prepared to condemn. And so, just at the moment Articles 6(c), 7, and 8 of the Nuremberg Charter undermined the doctrine of sovereignty, Article 6(a) fortified it by making aggressive war—violation of sovereignty—a crime.

This proved in the event to be a moral problem even more than a conceptual one. If the law is to be anything humane, it must guide our moral imaginations; and since it is now imperative that our moral imaginations include the awareness of criminal states, the law must also include the awareness of criminal states. For this reason alone, the classical doctrine of sovereignty, which acknowledges the authority of criminal states, is no longer feasible. And so, Article 6(a)—which protects the sovereignty of all states, even criminal states, so long as they do not launch wars—should be seen as a mistake.

In any case, the doctrine of sovereignty bears little relevance to the modern world: it is an old-European concept, meant for nation-states—literally, states whose boundaries correspond with those of homogeneous linguistic and cultural communities. Outside of Atlantic Europe, and particularly in the Third World, we find at best limited correspondence between states and homogeneous communities. For this reason, "statist" politics implies perpetual ferment and instability, as contending ethnic or tribal groups vie with each other for control of the apparatus of sovereignty.

Article 6(a) is Eurocentric in another way as well. The European nation-states (and the United States) exercised economic and often political control over much of Asia, Africa, and Latin America, and at Nuremberg this state of affairs was assumed by all to be fitting and uncontroversial. (It is startling to our ears to hear Jackson refer to the acquisition of colonies as a "legitimate objective" for Germany.) By criminalizing any breaches of sovereignty, Article 6(a) criminalized anti-imperialist struggle as well. This was noted by Justice Pal in his famous dissenting opinion in the Tokyo war-crimes trial: "I am not sure if it is possible to create 'peace' once for all, and if there can be status quo which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace." Pal is not attacking a straw man, for in his opening address at Nuremberg Jackson had stated: "Our position is that whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions."

Statism Versus Human Rights

These theoretical confusions and practical misfortunes are, unhappily, an enduring legacy of Nuremberg. Articles 6(c), 7, and 8 are founding documents of the modern human rights movement, and of that form of politics that favors intervention on behalf of human rights, even when violations occur within the boundaries of sovereign states. Article 6(a), however, has been a major moral enemy of the human rights movement, inasmuch as attempts at sanctions or interventions against human rights offenders are inevitably denounced as violations of their sovereignty. It is the tension between statism and human rights that renders the legacy of Nuremberg equivocal; the human rights movement and human rights violators are vying for the contested legacy of Nuremberg.

Jackson saw this point all too clearly. To arguments that humanitarian intervention in a country's internal affairs was a traditional legal principle that would be contravened by Article 6(a), he countered that nonintervention was sacred to Americans, who had no intention of letting other countries interfere in our own policies of racial discrimination: "It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. . . . We have some regrettable circumstances at times in our own country in which minorities are unfairly treated." Jackson, in other words, argued for subvening Article 6(c) to Article 6(a) partly in order to enclose American human rights violations within a wall of state sovereignty. By contrast, the other horn of the Article 6 dilemma was seized by Thurgood Marshall and his colleagues in the NAACP in their brief in *Morgan* v. *Virginia*, a transportation desegregation case: they argued that Americans had not spilled their blood in a war against "the apostles of racism" abroad only to permit its flourishing at home.

Let me be clear: I am not claiming that Articles 6(a) and 6(c) are logically or legally contradictory. They can be reconciled simply by making an exception to the doctrine of sovereignty when crimes against humanity are at issue: one allows humanitarian intervention in a sovereign state's affairs, but only when the humanitarian issue has risen to the horrific level of crimes against humanity.

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But I am asking about the *legacy* of Nuremberg. That means: the potential of its principles for growth and development, for extension and precedent-setting, for adaptability to changed political circumstances, for underlying moral commitments that are not so much the logical implications of the principles as they are their "deep structure." Ronald Dworkin speaks of precedents exerting a "gravitational force," and we must ask what the gravitational force is of reconciling Articles 6(a) and 6(c) in this fashion.

Article 6(a) tells us that we cannot intervene in the affairs of a sovereign state on behalf of human rights until—here Article 6(c) enters the picture—the violations rise to the level of horror of crimes against humanity. That means that in each case we must indulge in a grotesque and blood-curdling calculus of murder, torture, and enslavement to determine which clause of Article 6 controls. This is the price we pay for making Article 6 consistent.

If, on the other hand, we abandon the attempt to reconcile Articles 6(a) and (c), we must choose one of them. The choice of 6(c) is a fecund one: when the condemnation of crimes against humanity is allowed to develop as a principle of law and morality, it flowers into the politics of human rights. For the condemnation of "inhumane acts committed against any civilian population" and "persecutions on political, racial or religious grounds" need not be restricted to Holocaust-size events in its gravitational force. It extends to human rights violations in general.

By contrast, Article 6(a), as Justice Pal predicted, flowers into a deification of the status quo and allows the notion of state criminality to slip through its conceptual net. The choice between the two should not be a difficult one.

—David Luban

This article is condensed and adapted from David Luban's paper, "The Contested Legacy of Nuremberg."

Adultery

According to a 1980 survey in *Cosmopolitan,* 54 percent of American wives have had extramarital affairs; a study of 100,000 married women by the considerably tamer *Redbook* magazine found that 40 percent of the wives over 40 had been unfaithful. While such surveys are, to some extent, self-selecting—those who do it are more likely to fill out questionnaires about it—sexual mores have clearly changed in recent years. Linda Wolfe, who reported the results of the *Cosmopolitan* survey, suggests that "this increase in infidelity among married women represents not so much a deviation from traditional standards of fidelity as a break with the old double standard." Studies show that men have always strayed in significant numbers.

Yet 80 percent of "COSMO girls" did not approve of infidelity and wished their own husbands and lovers would be faithful. Eighty-eight percent of respondents to a poll taken in Iowa in 1983 viewed "coveting your neighbor's spouse" as a "major sin." It seems that while almost nobody approves of adultery, men have always done it, and women are catching up.

The increase in female adultery doubtless has to do with recent and radical changes in our attitudes toward sex and sexuality. We no longer feel guilty about enjoying sex; indeed, the capacity for sexual enjoyment is often regarded as a criterion of mental health. When sex itself is no longer intrinsically shameful, restraints on sexual behavior are loosened. In fact, we might question whether the abiding disapproval of infidelity merely gives lip service to an ancient taboo. Is there a rational justification for disapproving of adultery which will carry force with everyone, religious and nonreligious alike?

Trust and Deception

Note first that adultery, unlike murder, theft, and lying, is not universally forbidden. Traditional Eskimo culture, for example, regarded sharing one's wife with a visitor as a matter of courtesy. The difference can be explained by looking at the effects of these practices on social cohesiveness. Without rules protecting the lives, persons, and property of its members, no group could long endure. Indeed, rules against killing, assault, lying, and stealing seem fundamental to having a morality at all.

Not so with adultery. For adultery is a *private* matter, essentially concerning only the relationship between husband and wife. It is not essential to morality like these other prohibitions: there are stable societies with genuine moral codes which tolerate extra-marital sex. Although adultery remains a criminal offense in some jurisdictions, it is rarely prosecuted. Surely this is because it is widely regarded as a private matter: in the words of Billie Holiday, "Ain't nobody's business if I do."

However, even if adultery is a private matter, with which the state should not interfere, it is not a morally neutral issue. Our view of adultery is connected to our thoughts and feelings about love and marriage, sex and the family, the value of fidelity, sexual jealousy, and exclusivity. How we think about adultery will affect the quality of our relationships, the way we raise our children, the kind of society we have and want to have. So it is important to consider whether our attitudes toward adultery are justifiable.

Several practical considerations militate against adultery: pregnancy and genital herpes immediately spring to mind. However, unwanted pregnancies are a risk of all sexual intercourse, within or without marriage; venereal disease is a risk of all non-exclusive sex, not just adulterous sex. So these risks do not provide a reason for objecting specifically to adultery. In any event, they offer merely pragmatic, as opposed to moral, objections. If adultery is wrong, it does not become less so because one has been sterilized or inoculated against venereal disease.

Two main reasons support regarding adultery as seriously immoral. One is that adultery is an instance of promise-breaking, on the view that marriage involves, explicitly or implicitly, a promise of sexual fidelity: to forsake all others. That there is this attitude in our culture is clear. Mick Jagger, not noted for sexual puritanism, allegedly refused to marry Jerry Hall, the mother of his baby, because he had no intention of accepting an exclusive sexual relationship. While Jagger's willingness to become an unwed father is hardly mainstream morality, his refusal to marry, knowing that he did not wish to be faithful, respects the idea that *marriage* requires such a commitment. Moreover, the promise of sexual fidelity is regarded as a very serious and important one. To cheat on one's spouse indicates a lack of concern, a willingness to cause pain, and so a lack of love. Finally, one who breaks promises cannot be trusted. And trust is essential to the intimate partnership of marriage, which may be irreparably weakened by its betrayal.

The second reason for regarding adultery as immoral is that it involves deception, for example, lying about one's whereabouts and relations with others. Perhaps a marriage can withstand the occasional lie, but a pattern of lying will have irrevocable consequences for a marriage, if discovered, and probably even if not. Like breaking promises, lying is regarded as a fundamental kind of wrongdoing, a failure to take the one lied to seriously as a moral person entitled to respect.

Open Marriage

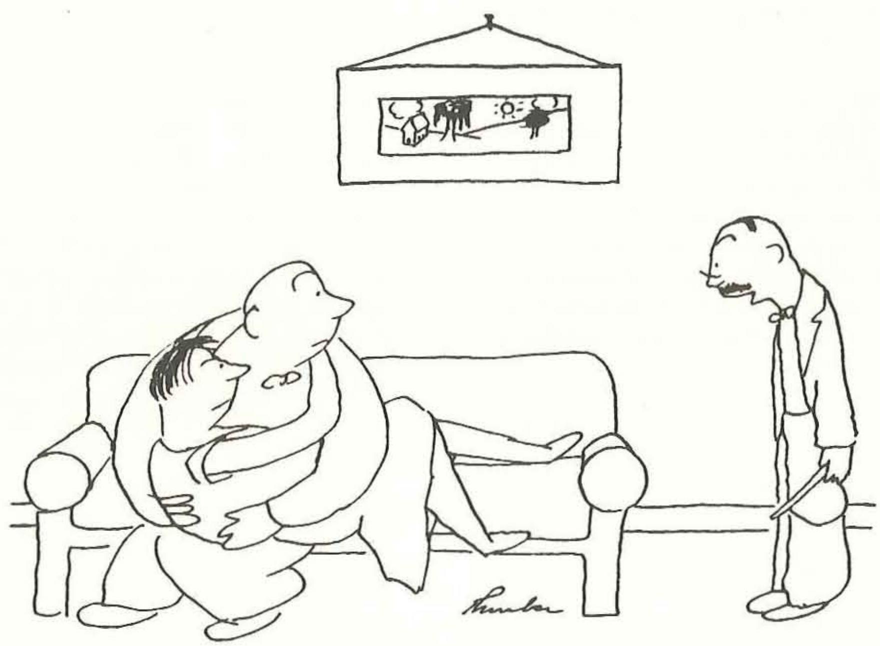
These two arguments suffice to make most cases of adultery wrong, given the attitudes and expectations of most people. But what if marriage did not involve any promise of sexual fidelity? What if there were no need for deception, because neither partner expected or wanted such fidelity? Objections to "open marriage" cannot focus on promise-breaking and deception, for the expectation of exclusivity is absent. If an open marriage has been freely chosen by both spouses, and not imposed by a dominant on a dependent partner, would such an arrangement be morally acceptable, even desirable?

The attractiveness of extramarital affairs, without dishonesty, disloyalty, or guilt, should not be downplayed. However satisfying sex between married people may be, it cannot have the excitement of a new relationship. ("Not *better*," a friend once said defensively to his wife, attempting to explain his infidelity, "just *different*.") Might we not be better off, our lives fuller and richer, if we allowed ourselves the thrill of new and different sexual encounters?

Perhaps the expectation of sexual exclusivity in marriage stems from emotions which are not admirable: jealousy and possessiveness. That most people experience these feelings is no reason for applauding or institutionalizing them. Independence in marriage is now generally regarded as a good thing: too much "togetherness" is boring and stifling. In a good marriage, the partners can enjoy different activities, travel apart, and have separate friends. Why draw the line at sexual activity?

The natural response to this question invokes a certain conception of love and sex: sex is an expression of affection and intimacy and so should be reserved for people who love each other. Further, it is assumed that one can and should have such feelings for only one other person at any time. To make love with someone else is to express feelings of affection and intimacy that should be reserved for one's spouse alone.

This rejection of adultery assumes the validity of a particular conception of love and sex, which can be attacked in two ways. We might divorce sex from love and regard sex as a pleasurable activity in its own right, comparable to the enjoyment of a good meal. In his article "Is Adultery Immoral?" Richard Wasserstrom suggests that the linkage of sex with love reflects a belief that unless it is purified by a higher emotion, such as love, sex is intrinsically bad or dirty.



"The party's breaking up, darling."

From James Thurber's *Men, Women and Dogs*
New York: Harcourt, Brace and Company, © 1943

But this is an overly simplistic view of the connection between sex and love. Feelings of love occur between people enjoying sexual intercourse, not out of a sense that sexual pleasure must be purified, but precisely because of the mutual pleasure they give one another. People naturally have feelings of affection for those who make them happy, and sex is a very good way of making someone extraordinarily happy. At the same time, sex is by its nature intimate, involving both physical and psychological exposure. This both requires and creates trust, which is closely allied to feelings of affection and love. This is not to say that sex necessarily requires or leads to love; but a conception of the relation between love and sex that ignores these factors is inadequate and superficial.

Alternatively, one might acknowledge the connection between sex and love, but attack the assumption of exclusivity. If parents can love all their children equally and if adults can have numerous close friends, why should it be impossible to love more than one sexual partner at a time? Perhaps we could learn to love more widely and to accept that a spouse's sexual involvement with another is not a sign of rejection or lack of love.

Exclusivity seems to be an intrinsic part of "true love." Imagine Romeo pouring out his heart to both Juliet and *Rosalind!*

The logistics of multiple involvement are certainly daunting. Having an affair (as opposed to a roll in the hay) requires time and concentration; it will almost inevitably mean neglecting one's spouse, one's children, one's work. More important, however, exclusivity seems to be an intrinsic part of "true love." Imagine Romeo pouring out his heart to both Juliet *and* Rosalind! In our ideal of romantic love, one chooses to forgo pleasure with other partners in order to have a unique relationship with one's beloved. Such "renunciation" is natural in the first throes of romantic love; it is precisely because this stage does *not* last that we must promise to be faithful through the notoriously unromantic realities of married life.

Fidelity as an Ideal

On the view I have been defending, genuinely open marriages are not *immoral*, although they deviate from a valued ideal of what marriage should be. While this is not the only ideal, or incumbent on all rational agents, it is a moral view in that it embodies a claim about a good way for people to live. The prohibition of adultery, then, is neither arbitrary nor irrational. However, even if we are justified in accepting the ideal of fidelity, we know that people do not always live up to the ideals they accept and we recognize that some failures to do so are worse than others. We regard a brief affair, occasioned by a prolonged separation, as morally different from installing a mistress.

Further, sexual activity is not necessary for deviation from the ideal of marriage which lies behind the demand for fidelity. As John Heckler observed during his bitter and public divorce from former Health and Human Services Secretary Margaret Heckler, "In marriage, there are two partners. When one person starts contributing far less than the other person to the marriage, that's the original infidelity. You don't need any third party." While this statement was probably a justification of his own infidelities, the point is valid. To abandon one's spouse, whether to a career or to another person, is also a kind of betrayal.

If a man becomes deeply involved emotionally with another woman, it may be little comfort that he is able to assure his wife that "Nothing happened." Sexual infidelity has significance as a sign of a deeper betrayal—falling in love with someone else. It may be objected that we cannot control the way we feel, only the way we behave; that we should not be blamed for falling in love, but only for acting on the feeling. While we may not have direct control over our feelings, however, we are responsible for getting ourselves into situations in which certain feelings naturally arise. "It just happened" is rarely an accurate portrayal of an extramarital love affair.

If there can be betrayal without sex, can there be sex without betrayal? In the novel *Forfeit*, by Dick Francis, the hero is deeply in love with his wife, who was paralyzed by polio in the early days of their marriage. Her great unspoken fear is that he will leave her; instead, he tends to her devotedly. For several years, he forgoes sex, but eventually succumbs to an affair. While his adultery is hardly praiseworthy, it is understandable. He could divorce his wife and marry again, but it is precisely his refusal to abandon her, his continuing love and tender care, that makes us admire him.

People do fall in love with others and out of love with their spouses. Ought they to refrain from making love while still legally tied? I cannot see much, if any, moral value in remaining physically faithful, on principle, to a spouse one no longer loves. This will displease those who regard the wrongness of adultery as a moral absolute, but my account has nothing to do with absolutes and everything to do with what it means to love someone deeply and completely. It is the value of that sort of relationship that makes sexual fidelity an ideal worth the sacrifice.

Neither a mere religiously based taboo, nor a relic of a repressive view of sexuality, the prohibition against adultery expresses a particular conception of married love. It is one we can honor in our own lives and bequeath to our children with confidence in its value as a coherent and rational ideal.

—Bonnie Steinbock

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