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Welfare and the Liberal Conscience

Among critics of state intervention in the economy and public provision for the needs of the poor, it is commonly asserted that classical liberals would have been utterly hostile to measures designed to attenuate the relative disadvantage engendered by free-market systems. Indeed, adversaries of the welfare state often try to make us feel derelict for having abandoned our noble libertarian heritage. Classical liberalism was antistatist, it is assumed, hostile to social planning, fond of liberty above equality, unwilling to engage in redistribution, assured of the spontaneous harmony of interests, trustful of the market, hopeful that the public sector would shrink and that the private sector would expand. Where this account of the liberal tradition prevails, welfare-state liberalism is seen as "radically revisionist," and the normative foundations of the welfare state are said to constitute a fundamental breach with the classical liberal tradition.

My purpose here is to contest these assumptions, and to highlight some neglected similarities and interconnections between eighteenth-century liberal rights and twentieth-century welfare rights. The implications of this exercise, however, must not be overstated. A similarity or correspondence of beliefs, which is all I shall attempt to document, does not constitute proof of historical continuity; evidence of transmission and reception would be required to support any kind of stronger claim. Moreover, even if we could definitively trace the conveyance of a system of liberal values from the Enlightenment to the present, this would not con-

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In This Issue

WELFARE AND THE LIBERAL CONSCIENCE

Stephen Holmes1

VALUING NATURE: ASSESSING DAMAGES FOR OIL SPILLS

Alan Strudler6

FUTILE TREATMENT AND THE ETHICS OF MEDICINE

Nancy S. Jecker10

SCIENCE AND SOCIAL HARM: GENETIC RESEARCH INTO CRIME AND VIOLENCE

David Wasserman14

stitute a *causal explanation* of the emergence and stabilization of contemporary welfare regimes. Too many other factors — general affluence, a dramatic increase in state revenues during wartime, socially accepted obligations toward veterans, the need to secure political stability in the face of boom-and-slump cycles in the economy, the growing bargaining power of previously disenfranchised groups — played a decisive role in the emergence of contemporary economic rights.

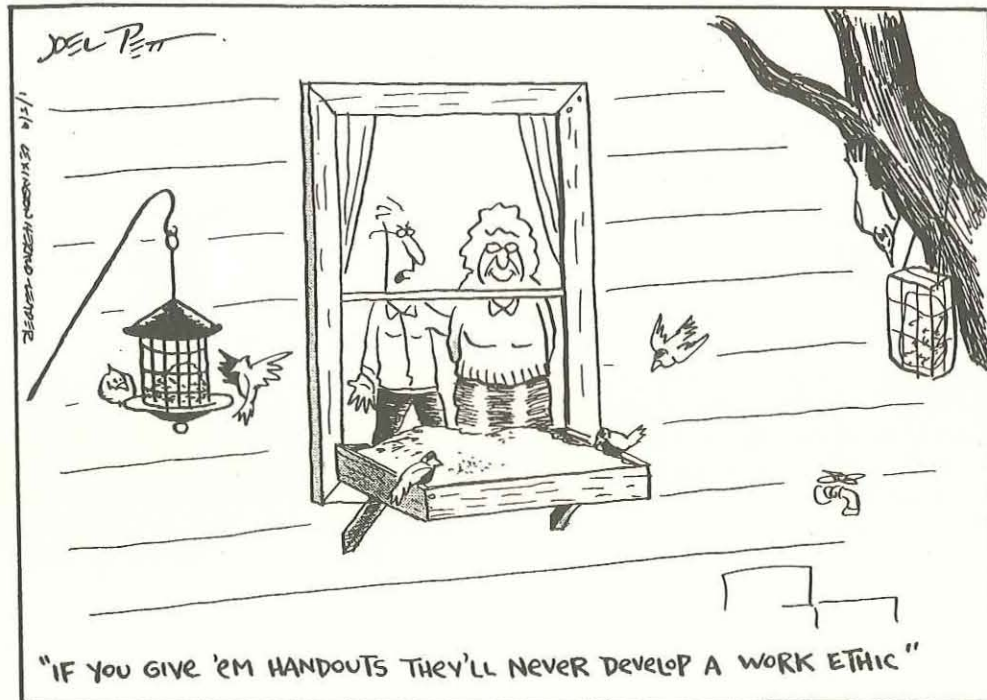
Finally, even if one could announce that public assistance represented a consummation of classical liberal principles, no political consequences would necessarily follow, one way or the other. The perpetuation of traditional orientations and commitments may be a sign of heroic tenacity, but "fidelity to the sources" may also be a symptom of mental rigidity and moral sclerosis. Depending on one's perspective, historical continuity can deserve praise *or* blame. For just this reason, policy debates cannot be sensibly conducted as legacy disputes.

In one sense, then, this demonstration of compatibility between classical liberalism and modern welfare politics is "merely" historical. It explodes the libertarian claim to be the true heir of classical liberalism; but it does not, in itself, refute the more important libertarian claim to be, morally and economically, the more attractive political philosophy. It should therefore be read as a first step or opening bid, by no means as a final word, in response to a widespread but erroneous view of the liberal past.

Latitudes and Entitlements

In speaking of classical liberalism, I take as my benchmark the cluster of views advanced and defended by, among others, Locke, Montesquieu, Hume, Smith, Madison, Kant, and Mill. This list allows us to register skepticism, at the very outset, about the assumption that classical liberals were fiercely hostile to social planning. One of the theorists mentioned actually wrote a constitution; all the others recognized the benefits of shrewd constitutional design; and a constitution, although it does not involve a central allocation of most goods and services, *is* a plan with significant allocative implications.

In the American constitutional system, for example, all liberal rights, including those enshrined in the first ten Amendments, are exercised on the basis of resources furnished by political agencies. The most obvious example of such state provision is physical and psychological security. But private property itself (an institution, not a material object) exists only as defined by the state and protected by legal coercion. Similarly, every citizen's right to litigate is made possible by legal institutions established and rendered accessible by the state. The jury system is costly, but federal and state governments in the United States *must* provide it in certain cases. Public financing of compulsory primary education is a further example of affirmative state action, especially important to those whose inherited resources are meager or nonexistent.



Joel Pett/Lexington Herald-Leader
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Publicly financed education is a redistributive investment in otherwise underdeveloped human capacities, a form of state help designed to prepare *all* citizens for individual achievement.

One reason why political theorists may have neglected the possibility of a substantive continuity between classical liberalism and the moral foundations of the welfare state is their commitment to a distinction between two kinds of rights: between rights as liberties from government interference and rights as entitlements to government support. In fact, the superficially alluring contrast between latitudes and entitlements is inadequate and misleading. Liberal citizens are entitled to a fair trial and to a high school education, for example. *Every known liberal state regularly extracts taxes from its citizens to provide resources as a basis upon, or a means by which, individuals can exercise their basic rights.* To the extent that libertarians doubt this, they fall so far outside the liberal consensus as to become politically irrelevant.

The widely endorsed plan to give tuition vouchers to every school-age child is illuminating in this regard. In the public discussion about vouchers, at least, all parties on the ideological spectrum, including the libertarian right, plainly accept the liberal state's duty to provide a minimum level of resources to all citizens. Entitlements to affirmative state action, then, are a staple of the liberal tradition. The controversy begins only when we ask, What sort of help, and how much, should the government provide? This is a proper topic for partisan debate among rival liberal schools. But it is not a debate that can be peremptorily closed by the assertion that "our" liberal Constitution forbids the government to provide individuals with resources of any kind.

Freedom and Justice

As our list of representative liberal theorists suggests, liberalism should not be considered principally as an antistatist philosophy of limited government. There is, to be sure, a vital anti-tyrannical strand within liberal thought; classical liberals were justifiably afraid of political tyranny, and one of their driving concerns was to prevent hypertrophic or whimsical government from oppressing individuals and groups. But this is not the whole story. Liberals were as wary of anarchy as of tyranny; they advocated not merely freedom from government, but also order through government. Security is impossible, for example, without a state monopoly on the legitimate use of violence. Even a theorist such as Montesquieu conceived sovereign power, organized along liberal lines, as an indispensable instrument of freedom.

The order that liberals admired, moreover, was not just any kind of order, not simply the suppression of random violence and civil war. Instead, it was a cer-

tain kind of order, an order qualified in a specific way: *a just order*. The primacy of justice in liberal thought, alas, is often underestimated. In his fanciful and historically inaccurate redescription of classical liberal thought, Milton Friedman routinely slights the importance of state power not only for the establishment of security but also for the enforcement of the norms of fairness and impartiality: "the intellectual movement that went under the name of liberalism," he writes, "emphasized freedom as the ultimate goal and the individual as the ultimate entity in the society. It supported laissez-faire at home as a means of reducing the role of the state in economic affairs and thereby enlarging the role of the individual." Reading such a passage, one is forced to ask: Who precisely is "the" individual? Is there more than one? Do some ever suffer while, or even because, others prosper? By discussing *the* individual, Friedman manages to repress any worries about impartiality *among* individuals or about the illegitimate uses of private power.

Committed to a norm of fairness, classical liberals do not share this happy insouciance. The greatest threat to freedom, they all agree, is the concentration of power. But *this is true whether power is concentrated in the public or in the private realm*. What makes liberalism unique as a political doctrine, arguably, is its simultaneous concern with both public and private abuses of concentrated power. This is just as true now as it was in the seventeenth and eighteenth centuries. The liberal democratic societies that exist today do not sacralize the private sphere; they are not based on a wholly favorable or unqualifiedly protective attitude toward private action. Without effectual state power, private power-wielders would terrorize ordinary people and engross collective resources. Thus, laws designed to protect consumers or the environment from injurious private action, while condemned by some libertarians, cannot be labeled, in principle, as illiberal. And though liberals favor strong protections for private property, they also distrust forms of ownership that translate easily into political influence or authority.

Milton Friedman associates redistributionist policies with an illiberal egalitarian impulse: "the egalitarian . . . will defend taking from some to give to others . . . on grounds of 'justice.' At this point, equality comes sharply into conflict with freedom; one must choose. One cannot be both an egalitarian, in this sense, and a liberal." But why should a conflict between freedom and equality, even assuming that one exists, require an either/or choice? There is nothing so melodramatic about normative dissonance, after all. To put Friedman's liberty-equality conflict into perspective, let us consider the conflict, say, between liberty of the press and the right to privacy. This is a *conflict between freedom and freedom*. It requires not an either/or decision but rather a rough balancing of important but

rival interests. The conflict between freedom and equality, which Friedman and other libertarians magnify into a final showdown between the forces of good and evil (where one will emerge triumphant while the other is extinguished), is no different. It is just another example of the everyday moral conflict characterizing all liberal societies and requiring pragmatic compromise.

Classical liberals, it should be said, never placed *justice* in disdainful quotation marks; they never sacrificed or subordinated justice to freedom, as Friedman's litmus test would require. On the contrary, Hume urges us "to look upon all the vast apparatus of our government, as having ultimately no other object or purpose but the distribution of justice." According to Adam Smith, too, justice was the "main pillar" of society. He was committed not simply to the natural system of liberty but to the "natural system of perfect liberty and justice." Every man should be free to follow his own interests in his own way, Smith argued, but only "as long as he does not violate the laws of justice." Interest-governed behavior can enhance social

stability and security, by an invisible hand, but only if the interests propelling action are just.

Among claimants to the mantle of Adam Smith, this principle is typically overlooked in the effort to paint welfare measures as illiberal. "The central defect of these measures," Friedman writes, "is that they seek through government to force people to act against their own immediate interests in order to promote a supposedly general interest." But is there anything particularly illiberal about the realization that, in the absence of coercion, self-love will induce individuals to exempt themselves from generally useful rules? Liberal constitutions, it is worth recalling, are designed to do precisely what Friedman apparently deplores: to force officeholders, at least, to act against their own immediate interests in order to promote the general interest. And what does Friedman think is the purpose of criminal law?

True, Smith sometimes made statements that seem to rule out a "taking" from the rich to give to the poor: "To hurt in any degree the interest of any one order of citizens, for no other purpose but to promote that of some other, is evidently contrary to that justice and equality of treatment which the sovereign owes to all the different orders of his subjects." But it is unwise to infer any blanket hostility to redistribution from this claim alone. Would Smith, for example, have opposed the use of state power to break up growth-stifling private monopolies? Privileged groups certainly cannot be expected to relinquish their monopolies voluntarily. Interests, as Locke had already made clear, can be legitimate or illegitimate, proper or improper, just or unjust. And despite his disclaimer, cited above, Smith emphatically believed that natural justice *required* the state to hurt the (sinister) interests of one order of citizens for no other purpose than to promote the (acceptable) interests of most others. In plain language, he thought that the interests of the grasping few must be forcibly sacrificed to the interests of the great majority of the people. And he chose the majority's welfare as the criterion to guide public policy because of a prior commitment to distributive justice. His underlying concern for fairness is made explicit in his famous defense of higher wages for laborers:

Our merchants and master-manufacturers complain much of the bad effects of high wages in raising the price, and thereby lessening the sale of their goods both at home and abroad. They say nothing concerning the bad effects of high profits. They are silent with regard to the pernicious effects of their own gains. They complain only of those of other people.

The merchants under attack here had violated the norm of impartiality and fair shares: the self-exemption taboo. They subjected others to a principle to which they had refused to subject themselves. Impartiality demanded the abandonment of the mer-

Passions and Constraint: On the Theory of Liberal Democracy

Stephen Holmes

In this volume, Stephen Holmes brings together his most important essays on the core liberal values, revising and interconnecting them to create a subtly conceived historical reconstruction of classical liberalism. By placing liberalism in its original historical context, *Passions and Constraint* compels the reader to assess what that tradition really has meant and what it can mean today.

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— Isaac Kramnick, Cornell University

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cantile system, which was nothing other than an expression of the unjust and unjustifiable partiality of merchants.

The Facilitative State

Classical liberals never attacked the principles underlying traditional poor relief. Spinoza's assertion that "the care of the poor is incumbent on the whole of society" was echoed by every major liberal theorist. John Stuart Mill, moreover, rejected any suggestion that the task of relieving poverty should be left to "voluntary charity." The state must use tax-derived revenue to provide public assistance because "charity almost always does too much or too little: it lavishes its bounty in one place, and leaves people to starve in another."

At the center of many right-wing attacks on welfare rights, we find a stylized distinction between the state and civil society, between the grim domain of bureaucratic compulsion and the jaunty realm of economic voluntariness. Freedom is at end, we are told, when, ominously and imperialistically, "government interferes in society." The autonomy of civil society, the "prepolitical" nature of extrapolitical life, the utter absence of power relations within the market sphere — these remain potent myths. There is no denying that they were initially promulgated by some classical liberals — think only of Tom Paine. Originally, however, these myths were intended as political programs, not as empirical generalizations. They were exasperated attacks on the temporarily most annoying source of social insecurity, the state, not sociological claims about the capacity of nonpolitical sectors of society to function effectively without any governmental regulation or support. In any case, none of our representative liberals dreamed about a politics-free realm or the pristine autonomy of civil society. Indeed, they all conceived "civil society" as society "civilized" by state action.

For classical liberals, alleviation of poverty is a public good that cannot be provided by the market. Even if most Americans wished to help the poor, they might do so only if they believed with some certainty that most of their fellow citizens would pitch in. In this area, as in many others, coercive government intervention can be essential for individuals to overcome collective-action problems and achieve their goals. "It is in the interest of each to do what is good for all," Mill explains, "but only if others will do likewise."

Opponents of the facilitative state also denounce its "paternalism" in the name of citizen self-reliance. But this may well be a false alternative. In the first place, self-reliance must be organized. When individuals walk into court and sue on the basis of a democratically approved statute, they are no less self-reliant than

when they establish a labor union. In a complex society, all self-reliance requires social dependency and cooperation, indirect techniques, and institutional strategies. (To "do it yourself," as is well known, you must go to a do-it-yourself store and buy a do-it-yourself kit.) As a result, we cannot use the idea of self-reliance to justify a blanket rejection of redistributionist legislation.

In the course of his argument, finally, Mill explicitly challenged the conventional wisdom that poverty is a spur to effort, correcting the one-sided theory that public assistance creates a crippling disincentive to work. "Energy and self-dependence," he wrote, are "liable to be impaired by the absence of help as well as by its excess." Smith had been even more direct in asserting that public provision can foster private initiative. This idea was nowhere more apparent than in his proposal for a publicly financed (though not necessarily publicly operated) system of compulsory elementary education, aimed to improve the condition of the indigent. His bold argument in favor of high wages was also based on a denial of the poverty-as-a-spur-to-effort thesis: "that men in general should work better when they are ill fed than when they are well fed, when they are disheartened than when they are in good spirits, when they are frequently sick than when they are generally in good health, seems not very probable."

Conclusion

The historical relation between eighteenth-century rights and modern welfare entitlements is, and will always remain, somewhat obscure. But the case for some sort of continuity between the two is stronger than most libertarians, at least, have led us to believe. Contrary to what they claim, we have no particular reason to think that classical liberals would have been hostile to a social safety net. Modest redistributions that support, say, health care for the indigent are not "tyrannical." They are not even remotely reminiscent of the cruel and oppressive acts in response to which the ideal of limited government first arose. How can constitutional principles originally designed to outlaw judicial torture and religious persecution plausibly be invoked to forbid the provision of prenatal care to the impoverished?

On many counts, the widely accepted picture of classical liberalism is flawed. As a result, the fundamental continuity between liberal rights and welfare rights is stronger than has ordinarily been realized. It is perfectly plausible to interpret social provision as a faithful application of traditional liberal principles to a new situation. Such considerations do not provide a moral or political justification of the redistributionist state, as I have said. They alone cannot compel us to support

any specific public policy, without examination of costs and alternatives. All that the historian of ideas can plausibly demonstrate is that redistributive policies should not be rejected on the grounds that they are inherently illiberal or represent a betrayal of the great liberal legacy. Without justifying the welfare state, we can nevertheless revoke the bragging license of its enemies.

— Stephen Holmes

Stephen Holmes is professor in the Department of Political Science and the Law School at the University of Chicago. Excerpted from *Passions and Constraint: On the Theory of Liberal Democracy*, by Stephen Holmes, to be published this spring by the University of Chicago Press. By arrangement with the University of Chicago Press © by The University of Chicago.

Valuing Nature: Assessing Damages for Oil Spills

Six years ago the *Exxon Valdez*, an oil supertanker, ran aground on Bligh Reef in Alaska's Prince William Sound. Eleven million gallons of oil poured through its cracked hull, fouling the Sound, contaminating thousands of miles of coastline, and destroying fish and wildlife. As noted in a draft restoration plan prepared in 1993, the oiled areas included "a National Forest, four National Wildlife Refuges, three National Parks, five State Parks, four State Critical Habitat Areas, and a State Game Sanctuary."

The courts have held Exxon liable for the harm it caused in Prince William Sound. In a 1991 civil settlement, for example, the corporation agreed to pay \$900 million in damages to the federal government and the state of Alaska. A criminal plea agreement required additional restitution. More recently, a federal jury in Anchorage, having found that Exxon and the tanker captain had acted recklessly, ordered the company to pay \$5 billion in punitive damages. This award went to thousands of fishermen and other Alaskans who claimed to have suffered losses from the spill. In an earlier phase of the trial, the same jury awarded the plaintiffs \$286 million in compensatory damages.

In press accounts of the trial, evidence that Exxon and its agents engaged in morally wrongful conduct received considerable attention. Without minimizing the significance of Exxon's wrongs, however, it is

important to be clear that if we require Exxon to take responsibility for the oil that leaks from its tankers, we need not rely on the idea that the company deserves to be punished. There may be reasons for holding Exxon liable apart from its moral wrongs. This is important because, unfortunately, we can expect oil spills to continue occurring, and they may not occur only in connection with morally wrongful conduct. An oil spill will sometimes happen as a mere accident, the outcome of comparatively innocent sloppiness — behavior which may not deserve punishment. If we set aside, for purposes of this discussion, the wrongful aspect of Exxon's conduct, we may then focus on the important policy issue of how we, as a society, should respond when environmental disasters are merely accidental. We may, that is, consider the grounds for imposing liability. In this discussion, the relevant moral ideas will be those underlying the law of tort rather than those underlying the law of crime.

Principles of Tort Law

Tort law requires those who in certain circumstances harm others to provide compensation to those who are harmed. Tort suits may arise from comparatively innocent incidents of a sort common in modern life: one motorist nods off and accidentally collides into another; a customer slips and falls on a poorly main-

tained floor in a grocery store. Tort law requires people or corporations to pay for harm they cause even when the harmful action is not criminal.

Tort law is common law. It exists largely as a matter of judicial tradition and not legislative action. In this country, much of the law of oil spills has been formalized and made part of federal code. But the underlying moral idea is the same. Sometimes harmdoers must pay for the consequences of their actions even when these consequences do not arise from behavior so evil as to deserve punishment.

There is, however, one problem with using the model of tort law to understand the moral basis of liability in the case of oil spills. Liability for an oil spill, like any liability imposed in law, must be fair, not whimsical or arbitrary. In the event that liability consists in a demand for a specific amount of money, there must be a reason for fixing on that particular amount. Difficulties in fixing damages for oil spills distinguish oil spill cases from garden-variety tort cases. In the case of accidents involving only damage to personal property, we can often base damages on the cost of repairing or replacing the damaged property. But in the case of damage to nature, the loss is not definable in economic terms alone. The harm done to Prince William Sound, for example, cannot be understood solely in terms of the commercial losses resulting from the spill; the impact of the *Valdez* disaster does not seem reducible to the lost revenues of fisheries or the tourist industry. Nor does the lost pleasure of the few tourists who might have visited the Sound appear to exhaust the spill's impact. But if we don't measure the harm in these ways, what alternatives do we have?

One possibility is to measure the damage in terms of the cost of *restoring* the Sound. Indeed, in actions against oil companies for spills, restoration is a commonly discussed remedy. Yet there are limits on how much the concept of restoration can explain. Once humans cause a catastrophe in nature, we lose our grip on what it means to "restore" it in any standard sense of that term.

The concept of restoration is most often used in art. One might restore a damaged painting, for example, or a sculpture from which some parts have broken off. But it is not clear what it might mean to restore a scene in nature. The concept of nature refers etymologically to that which is born, which arises independently of human manipulation, which is not in any sense artificial. One appeal of nature is its independence from our will, its confirmation of the magnificence of things beyond us. In this respect, restoring nature differs from restoring art. Because it has no life of its own, a broken sculpture might be reassembled in ways that preserve its distinctive value. A natural setting, however, involves a life of its own in ways that resist application of the idea of restoration.

If the value of nature lies in its independence from us, then restoring it must be understood as an act of reinvigoration by which a natural scene regains the vitality to evolve according to its own character. It does not follow that we should eschew the aim of restoring nature, but rather that this aim must involve helping nature to take its own course or heal itself, and not simply fixing broken parts. Perhaps that is why much of the restoration effort actually undertaken at Prince William Sound seems misguided. As an article in *Time* explains, Exxon "squandered" vast sums of money on "ill-conceived cleanup techniques and heroic rescues." These included the cleaning of several hundred otters, "many of which died anyway," at a cost of \$80,000 each, and the "use of scalding-hot, pressurized seawater to hose down beaches" — a tactic which left the beaches "almost sterile, empty of the limpets and other intertidal creatures" whose existence is essential to the local ecosystem.

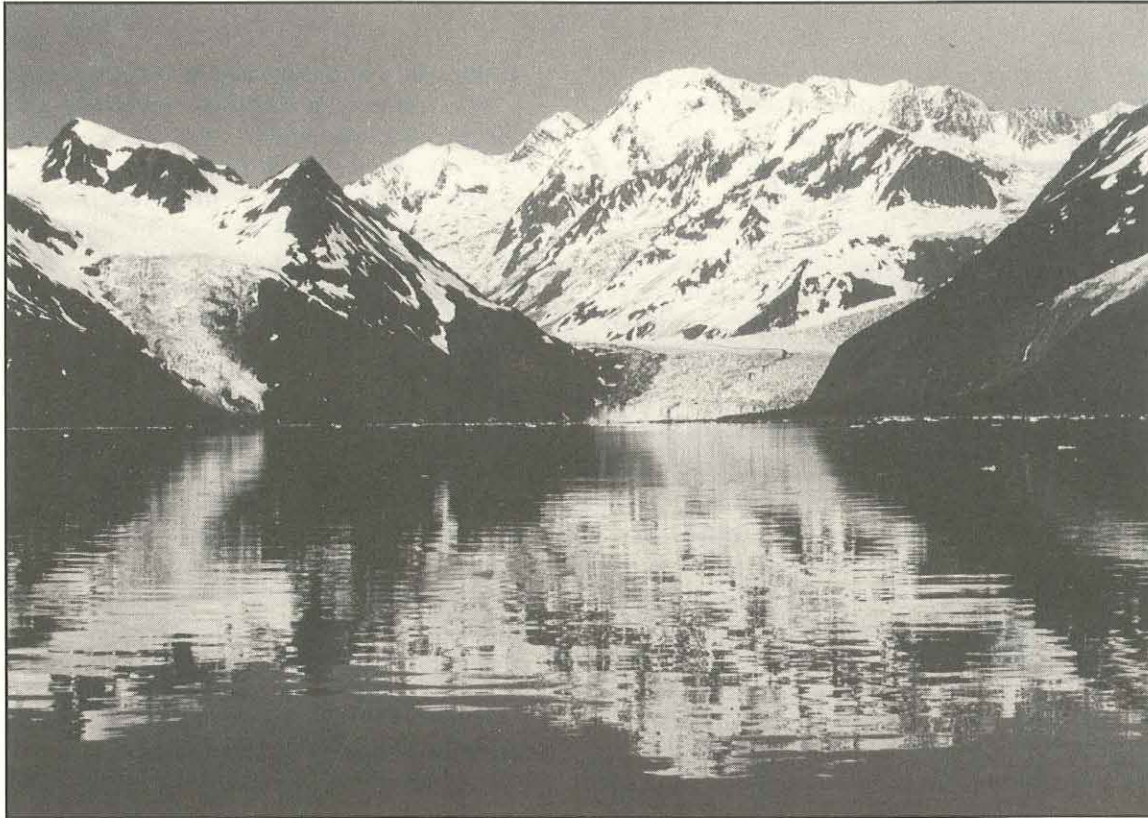
If we often do best by merely aiding nature in the process of self-healing and if vigorous cleanup measures risk slowing the ecological process, then "restoration" by the oil companies may prove comparatively modest and inexpensive. Yet even if this form of restoration is the most appropriate, it only mitigates the harm to nature; it does not undo it. Once a magnificent natural setting has been fouled, the "insult" remains even after the injury has been repaired.

Nonuse Values

Much oil company lobbying has been directed at limiting corporate liability for disasters such as the *Valdez* spill. The effort has been not so much to limit liability for commercial loss, or the lost pleasure of tourists, or the costs of restoration, but instead to limit or eliminate liability for what economists call nonuse or existence values. Nonuse values, it may seem, have the potential to be valued at a staggeringly and unpredictably high dollar amount.

Nonuse value is a peculiar category, invented by economists in the 1970s as a response to complaints that the analysis of value in purely commercial or hedonic terms leaves out something important. Nonuse value is easy to define in the negative: it is the value that something has apart from its commercial value and apart from the pleasure produced by viewing it; in its positive sense, nonuse value is the value of knowing that a particular thing or place exists.

Some economists have developed a technique for attaching an economic interpretation or dollar amount to nonuse value and non-market goods more generally: contingent valuation. In rough terms, contingent valuation proceeds by surveying people about how much they would be willing to pay for a specific improvement or protection of a good, and then multiplying the average amount a person is willing to pay by the number of



*Surprise glacier in Harriman Fjord, Prince William Sound
Patrick J. Endres/Wide Angle Productions
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people in the population. One might conduct a contingent valuation study of damage to Prince William Sound, then, by first determining how much people would have been willing to pay to prevent the damage, and multiplying this number by the number of people in some relevant population. Some courts have found contingent valuation useful in measuring damage to nature. After all, to assign monetary damages, one needs numbers, and contingent valuation apparently lacks competition as a number generator. Yet writers have long been skeptical about contingent valuation, and the attack from the social science community is increasingly pronounced.

Some of the nation's most distinguished economists and psychologists recently released a set of papers arguing that contingent valuation is methodologically unsound and lacks scientific validity. Indeed, many of these scientists argue that the flaws in contingent valuation are so deep that no amount of improvement in the technique will salvage it. People lack meaningful preferences regarding how much they would be willing to pay to protect nature from disaster. They concoct arbitrary answers to contingent valuation survey questions, and their answers to these questions are mere artifacts of the surveys. Thus, these scientists argue, judges who rely on the surveys to produce

numbers measuring damages for oil spills would do just as well to spin a roulette wheel. Of course, not all scientists agree that contingent valuation is hopeless. For example, the Department of Commerce, through one of its agencies, the National Oceanic and Atmospheric Administration, recently asked a panel of economists to develop recommendations for making contingent valuation studies valid. But no argument shows that following their recommendations will salvage contingent valuation.

If the case the social scientists make against contingent valuation seems cogent, the policy implications of their work remain open to dispute. Their studies were sponsored by a consortium of oil companies, and when the oil lobby reprinted them in a packet made available to legislators and lawyers, the packet included a paper by one of its lawyers. He suggests that in the face of the impossibility of measuring nonuse values, we should be satisfied with requiring oil companies to pay for what we can measure — things such as commercial loss and restoration costs. That is, we should cease holding oil firms responsible for nonuse harm in oil spill cases.

Yet there are grounds for resisting the oil lobby's suggestion that we cease making oil companies pay for nonuse harm. The fact that economists have trouble

with nonuse value provides little reason for doubting the importance of nonuse value but some reason for doubting that we should look to economics to answer all our social policy conundrums or to explain all that matters to us as a society.

There are plenty of things in common experience whose value seems primarily what economists call a nonuse value but whose character falls outside the economist's net. Indeed, the value of a scene of natural beauty like Prince William Sound lies neither in the amount of money we might produce by exploiting it commercially nor in the amount of happiness that we get from viewing it. Rather, its value lies in its cultural and aesthetic identity. All this means, in practical terms, is that when we try to articulate to one another why the Sound matters, facts about its market value have far less explanatory force than facts about its role in our history and its magnificence as a piece of wilderness.

The economically recalcitrant character of nonuse value may seem even more obvious in another kind of example. The mere discussion of this example, I fear, may seem offensive. But this only helps to establish a point I wish to make, that some of the values most important to us are independent from and even at odds with the market values that paradigmatically concern economists.

Consider the body of a dead national hero — say, John F. Kennedy — resting in its grave. Now suppose that groundskeepers inadvertently destroy it. Something terrible has happened. How should we understand it? How should we gauge our loss? Restoration value gets us nowhere; it is abhorrent to consider restoring the decayed pieces of a corpse. Nonetheless, there is no commercial loss, since we didn't charge people to look at the Kennedy corpse or gravesite, and the loss to concessionaires in the vicinity of Arlington National Cemetery is irrelevant. What we lose in the workmen's error verges on the sacred, and we do not mourn it because of any commercial setbacks. Nonuse values are real. If the body were destroyed, we would suffer a loss and economists would be right to worry about it. It remains an open question whether they can analyze the loss.

Nonuse values, then, may be compromised in tragic accidents like the destruction of a gravesite. Such accidents are therefore events that possess moral significance apart from issues of economic loss and apart from issues of the evil of the people who cause the accidents. Failing to acknowledge this significance is a sign of moral insensitivity. That there is nothing we can do about the destruction of the corpse in our example does not imply that we should ignore it and feel nothing. Admittedly, though, it remains a hard problem to determine what the accident means or what is required of us if we are to take this accident seriously.

Consider a more mundane example of an accident that causes noneconomic harm but which nonetheless must be taken seriously. Imagine that you are standing in the aisle of a bus when it comes unexpectedly to a stop. You lose your balance and fall on a person seated nearby. Even if you learned that you had not harmed him, bodily or economically, it would be insensitive of you to make no gesture of apology or regret for what had happened. Your fall, even though unintentional, compromises the sanctity of his person. Common decency suggests feeling some responsibility for this. You would therefore apologize even though the fall was not your fault. To stand up silently and walk off constitutes a failure to acknowledge the significance of what you have done to your fellow passenger. It announces that the sanctity of his person means little to you; it is a direct insult to him.

The ritual of apologizing or expressing regret is an important device for acknowledging the moral significance of accidents. The bus accident may be a comparatively trivial example of this phenomenon, but the reliability of human responses in such cases seems a prerequisite for the existence of a moral community. If we had no disposition to make such responses, it would demonstrate a lack of mutual concern and respect.

Payment of damages is a socially compelled ritual for the expression of regret; forcing a harmdoer to pay is symbolic recognition of the importance of the suffering of accident victims. Forcing a person to pay doesn't mean that he actually feels regret, but it does mean that we as a society refuse to acquiesce in a failure to feel regret. A forced apology is an apology even if an unfelt one.

It may seem that expressing regret by paying money is needlessly tacky and expensive. But in a society like ours, in which relations are largely and necessarily impersonal, we lack obvious alternatives. Requiring the payment of money as acknowledgment of the moral significance of causing harm seems better than simply ignoring the harm.

It may be important that we as a society recognize the significance of tragic accidents like the oil spill in Prince William Sound. The system of accident law provides a mechanism for expressing the seriousness of this concern. People often characterize what matters most to them as priceless. A scene of beauty in nature, such as Prince William Sound, is an example. When the priceless is compromised, it seems hard to specify a particular sum of money payment which expresses decent concern for the harm done — even though that is what court-imposed liability for accidents ordinarily requires.

What conclusions can we draw from the elusiveness of determining dollar amounts commensurate to nonuse values? It may seem that this elusiveness

implies that any dollar amount imposed by a court will be arbitrary and thus violate the basic requirement that a law applied against someone be fair. But this would be a rash conclusion. Arbitrariness in this variety of case can be limited by judges who review damage awards to assure their consistency with comparable cases. It can be further limited by assuring that the level of damages is not ordinarily so high as to pose a threat to the vitality of a normally functioning firm.

Even if we limit arbitrariness in oil spill cases, we cannot eliminate it. Attaching monetary value to non-market goods will always have some measure of arbitrariness. But it would be presumptuous to suppose that all arbitrariness can be removed from the law. Adopting any legal rule involves settling on a convention and sticking with it, a process that necessarily contains an arbitrary component. Moreover, even if burdens imposed by law contain a degree of arbitrariness, they may nonetheless serve to limit the arbitrariness of other burdens people confront. Accidents themselves are deeply arbitrary, instances of bad luck to their victims and of things gone wrong in ways outside the plans of people who cause them. In the case of oil spills, there is no reason that the weight of the arbitrary

should fall entirely on the shoulders of the public. By imposing liability for compromising nonuse values on firms like the Exxon Corporation, we do not mete out an excessive burden, and the burden of arbitrariness is more fairly shared.

— Alan Strudler

Sources: Exxon Valdez Oil Spill Trustee Council, *Draft Exxon Valdez Oil Spill Restoration Plan* (November 1993); Keith Schneider, "Exxon is Ordered to Pay \$5 Billion for Alaska Spill," *New York Times* (September 17, 1994); *Reuters Business Report* (November 16, 1994); *The Economist* (August 17, 1991); Thomas A. Campbell, "Natural Resource Damage Assessments: A Glance Backward and a Look Forward," *Baylor Law Review*, vol. 45 (Spring 1993); Peter A. Diamond and Jerry A. Hausman, "Contingent Valuation: Is Some Number Better than No Number?," *Journal of Economic Perspectives*, vol. 8, no. 4 (Fall 1994); Michael Lemonick, "Alaska's Billion-Dollar Quandary," *Time* (Sept. 28, 1992); Jerry A. Hausman, ed., *Contingent Valuation: A Critical Assessment* (North-Holland, 1993); *Federal Register*, vol. 58, no. 10 (January 15, 1993).

Futile Treatment and the Ethics of Medicine

Ryan Nguyen was born six weeks prematurely on October 27, 1994, with a weak heartbeat and poor blood flow to his organs. His physicians at Sacred Heart Medical Center in Spokane, Washington, employed heroic measures to revive him. A few weeks after his birth, it became clear to Ryan's doctors that the aggressive medical interventions keeping him alive were futile and should be withdrawn. Ryan had multiple medical problems including kidney failure, bowel obstruction, and brain damage. To survive, he would require kidney dialysis for approximately two years followed by a kidney transplant, a feat most consulting experts on kidney disease agreed was "virtually impossible to pull off." According to one consultant, a professor of pediatrics and director of the kidney program at Children's Hospital and Medical Center in Seattle, "long-term dialysis would not only be inap-

propriate, but would be immoral . . . it would prolong pain and agony in a child that has no likelihood of a good outcome."

As is often the case, some physicians could be found who disagreed with generally accepted practice standards. When Nghia and Darla Nguyen, Ryan's father and mother, rejected the Sacred Heart doctors' prognosis for their baby, they sought out such physicians. Denying that Ryan had brain damage and believing that his kidneys were getting better, the Nguyens approached four other medical centers requesting dialysis and other life-prolonging treatments for Ryan. Each time, they were turned down on the ground that aggressive lifesaving measures were futile.

The Nguyens' search continued. A self-described "pro-life attorney," Russell Van Camp, agreed to represent them. Mr. Van Camp accused the Sacred Heart

physicians of acting from questionable motives. The doctors were withholding treatment, he charged, because Ryan's parents were unemployed and on Medicaid, and also because the baby "doesn't have blond hair and blue eyes" (Ryan's mother is an American Indian and his father is a Vietnamese refugee). In other statements, Mr. Van Camp accused the doctors of trying to kill Ryan, perhaps as a way of covering up medical mistakes made during the baby's delivery. Through their lawyer, the Nguyens sought a permanent injunction that would force the Sacred Heart doctors to treat Ryan unless another hospital accepted him. The Nguyens obtained a temporary restraining order requiring Ryan's doctors at Sacred Heart to resume kidney dialysis, which had been stopped without the parents' consent in order to allow Ryan to die a comfortable death.

During their ordeal, Ryan's parents kept a diary of their baby's travails, depicting the medical and legal battles they overcame on their son's behalf and including signatures from television and newspaper reporters who interviewed the family. They steadfastly maintained, "He'll make it, if we can find a doctor who cares."

Eventually, a physician at Legacy Emanuel Children's Hospital in Portland, Oregon, Dr. Randall Jenkins, read news accounts of the case and agreed to admit Ryan to Emanuel's kidney program. Once at Emanuel, Ryan's condition improved. He was taken off a ventilator and began to breathe independently. He underwent surgery to correct a bowel obstruction. When doctors removed him from dialysis, he was able to urinate on his own.

As this article goes to press, Ryan is being discharged from the hospital. According to Dr. Jenkins, the baby's kidneys are functioning at about three fourths of normal capacity. Since, at this level of functioning, his kidneys will "wear themselves out," he will eventually require a kidney transplant. Ryan continues to rely on tube feeding, and his long-term prognosis remains unclear with regard to possible cerebral palsy, muscle impairment, and brain damage. Still, Ryan's physicians and parents are grateful that he has made enough progress to leave the hospital, and everyone hopes he will do well in the future.

Questions about Futility

The case of the so-called "Spokane baby" is at the heart of a larger debate now raging within medical centers around the country over the use of medically futile interventions. Among the questions Ryan's case raises are the following. In light of the uncertainty associated with any medical decision, how can members of a health care team ever justify withholding or withdrawing a futile intervention? How can society prevent the sort of situation alleged by the Nguyens'

lawyer, in which claims of medical futility provide a smoke screen for invidious racial or other prejudice? How can physicians avoid "imposing" their values upon patients and families? Once doctors determine that a treatment is futile, must they find another institution willing to provide it if the patient or family insists? Finally, should it make a difference if patients have the ability to pay for futile treatment? If insurers are willing to reimburse doctors for futile interventions, is there anything wrong with doctors offering such treatments?

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Dealing with Uncertainty

Public perceptions about medical futility are undoubtedly colored by the fact that the media are more likely to report rare medical successes than routine medical failures. The public is thereby encouraged to ascribe God-like powers to physicians, and to expect "medical miracles" to occur. And in Ryan's case, it is true that despite a consensus of opinion that dialysis and other life-prolonging treatments would be futile, the patient has made considerable progress.

Most health care professionals who have practiced for any length of time are familiar with cases of this kind, where a patient with a dismal prognosis "beats the odds." Indeed, doctors and nurses learn early in their training never to say "never." Medicine, after all, is an empirical science. No matter how many times a treatment has failed in the past, there is always a *chance* that the next time it is used it will succeed. There will always be instances where a futile treatment works, just as there will always be instances where a recommended treatment fails. This hardly shows that medical judgment is worthless. Nor does it show that patients should always be treated irrespective of expected outcomes. The real question health care providers face is, How many times must they observe a treatment to fail before calling it futile for a given category of patients?

In trying to address this question, we should think about the term "futility" as marking a point along a probability continuum at which the likelihood of benefiting the patient is exceedingly poor. Specifically, it has been argued that we should call a treatment *quantitatively* futile when the chance that it will benefit the patient is less than 1 in 100. If a treatment is futile in this sense, it will occasionally succeed: Ryan, for example, did better than expected. Yet this does not estab-

lish that physicians should use life-prolonging treatments in future cases resembling Ryan's. Most babies in his situation will not do well. Moreover, institutional policies that routinely sanction futile treatments will condemn many patients to suffer needlessly. Therefore, general standards of medical practice require justifying the use of painful and invasive technologies by showing that they hold a reasonable prospect of helping the patient.

There is another way in which the term "futility" is used. Even in cases where the likelihood of benefiting the patient is relatively good, the quality of benefit may nonetheless be exceedingly poor. In such instances, treatment may be considered *qualitatively* futile. For example, the kidney specialists asked to consult on Ryan's case agreed not only that Ryan was doomed to die, but also that the quality of outcome Ryan would gain from dialysis was very bad. That is, it was widely held that Ryan was suffering greatly as a result of dialysis and other life-prolonging interventions.

Preventing Abuses

To the extent that health care providers openly discuss medical futility, and to the extent that health care institutions develop explicit policies about the withholding and withdrawal of futile interventions, abuses involving assertions of medical futility are less likely to occur. If a hospital has a policy in place carefully defining medical futility, then it cannot mean whatever the doctors in a given case decide it means. Nor can futility be invoked as a subterfuge for discrimination based on race, socioeconomic status, or other factors that should be irrelevant to medical decision-making. In short, the judgment of medical futility should not rest with individual physicians at the bedside, but should instead reflect a more general professional and societal consensus.

Such a consensus has been emerging gradually over the past several years. This is apparent in the public pronouncements of influential medical organizations, such as the American Medical Association and the American Hospital Association, among others, and in public statements from bioethical organizations, such as the Hastings Center and the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.

Local consensus is also developing in places such as Denver, where area hospitals have jointly developed criteria for deciding that a treatment is futile. Such guidelines establish, for example, that aggressive treatments, such as CPR, are futile and generally should not be provided for patients who are bedfast with metastatic cancer, or patients with HIV who have had two or more *Pneumocystis carinii* pneumonia episodes, or patients with multiple organ system failure with no improvement after three days of intensive care. Other

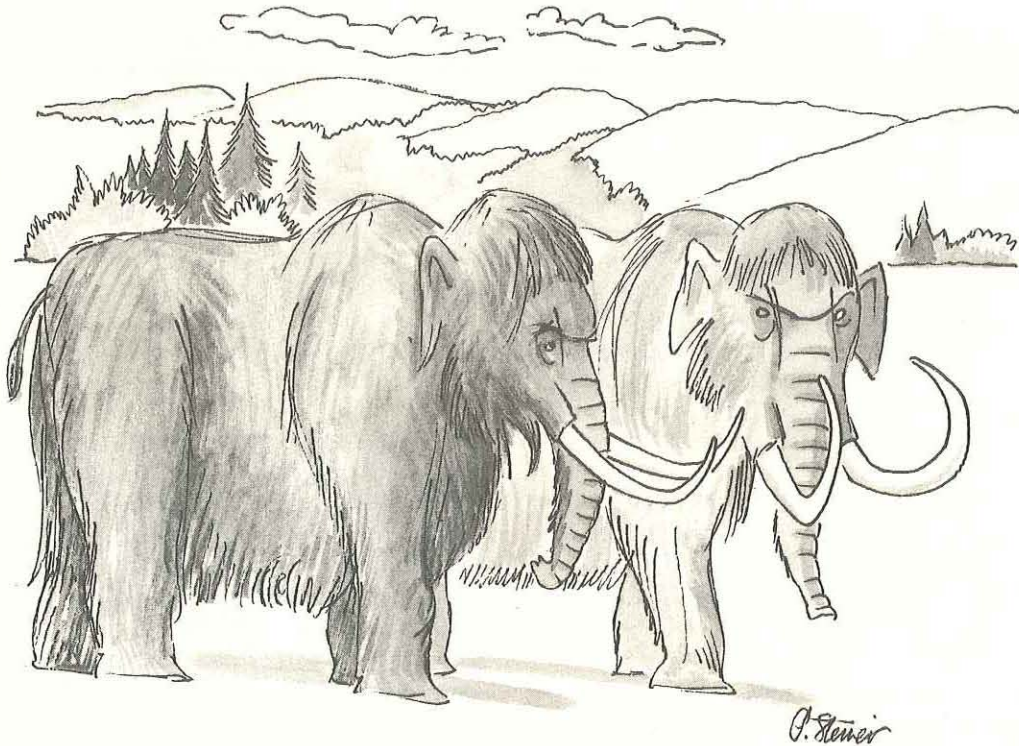
institutions, such as Santa Monica Hospital Medical Center, have defined futility more broadly to refer to "any clinical circumstance in which the doctor and his or her consultants, consistent with the available medical literature, conclude that further treatment (except comfort care) cannot, within a reasonable possibility, cure, ameliorate, improve or restore a quality of life satisfactorily to the patient." A generally worded policy can be useful so long as it specifies, as this one does, a relevant procedure or set of standards for evaluating judgments of medical futility. Here, consensus and consistency with medical literature are required, and futile treatment is carefully distinguished from caring efforts which should continue to be provided when treatment is futile. Such a policy provides institutional support to individual practitioners who face difficult choices. In addition, courts look to an institution's standards of care to determine the reasonableness of medical decisions in particular cases.

Those who oppose allowing health care providers to withhold or withdraw futile treatments may argue that such decisions are moral or ethical in nature, and that providers have no business imposing their values on patients and families. After all, medical school trains doctors only in medicine, not in ethics; therefore, physicians (and other health care providers) can claim no special expertise in ethics. In response, it can be said that value judgments are an inevitable part of practicing medicine. In Ryan's case, for example, providing dialysis as the Nguyens requested would not have enabled the medical team to escape making a value judgment. To the contrary, both *refraining from* interventions to keep Ryan alive and *employing* such interventions involved a value decision.

Referring Patients Elsewhere

Were Mr. and Mrs. Nguyen entitled to a referral? Were the Sacred Heart physicians obligated to find an institution willing to take Ryan, despite the fact that pediatric kidney experts agreed about the futility of dialysis? There are at least three different answers one might give. First, it might be argued that physicians have a duty to refer patients (and their families) to someone else who is willing to provide futile treatment. This answer implies that futile medical treatment is analogous to services such as abortion that fall within the range of ordinary medical services but which individual physicians may object to on the basis of personal conscience. The problem with this reply is that futility judgments reflect more than the personal beliefs of individual providers. Properly understood, they reflect general professional standards of care.

Second, it might be claimed that refusing to provide futile treatments is analogous to refusing to provide lifesaving medical care to a brain-dead patient. Just as we do not say to a family who requests continued ven-



"I hear they can freeze you until they discover a cure."

*Drawing by P. Steiner; © 1992
The New Yorker Magazine, Inc.*

tilator support for a brain-dead patient, "I don't treat the dead, but I know someone who does," so the Sacred Heart doctors should not say to the Nguyens, "We don't offer futile treatment at this hospital, but we know another hospital that does." According to this view, just as there is a generally accepted definition of death, so too there are generally agreed-upon standards governing medical futility. In Ryan's case, all the pediatric nephrologists Sacred Heart consulted agreed that dialysis was futile. Although there was some opposition at the margin, there is also opposition at the margin for the Uniform Death Act, and this hardly renders it invalid.

There is a final answer one might give to the question of whether physicians have a duty to refer patients elsewhere for futile treatments. It holds that although consensus about medical futility is in the process of developing, a truly stable and informed consensus takes time and builds slowly. Consensus, Daniel Yankelovich suggests, begins with dawning awareness of an issue, moves to a sense of urgency and discovery of choice, then to a more mature stage of taking a stand intellectually and integrating that stand with moral and emotional judgment. Although there may never be a national futility policy, in many areas of the country there is a fairly well-developed consensus, including explicit public guidelines govern-

ing futile treatment. In other areas, this process has hardly begun to occur. In light of this, it might be argued that to the extent that a stable consensus about the futility of a particular intervention is not forthcoming, health care professionals cannot appeal to professional standards to back the futility judgments they make. In such situations, providers are obligated to refer patients elsewhere for treatments that they cannot in good conscience provide. Ryan's case hardly fits this description, however, as there was general agreement among both the Sacred Heart doctors and medical experts across the country that dialysis was not medically indicated.

The Bottom Line

Some commentators may argue that so long as insurers are willing to pay for futile treatment, futile treatment should continue to be available. Such an argument assumes that most of the medical and ethical issues surrounding futile treatments can be resolved satisfactorily if physicians simply provide whatever services are in demand. This is an ethically dubious proposition, however. It is tantamount to saying that doctors are justified in doing anything for money.

In fact, the long-standing tradition of ethics in medicine prohibits physicians from using futile interventions. Medicine, the Greek physician Hippocrates reportedly

said, exists "to do away with the sufferings of the sick, to lessen the violence of their disease," but also "to refuse to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless." Socrates apparently offered a sharp warning to doctors who were tempted by money to prescribe futile interventions. He warned that they may suffer the same fate as Asclepius, a reputable physician who was killed by lightning after being "bribed with gold to heal a rich man who was already dying."

Although modern doctors sometimes encourage the false perception that medicine can perform miracles, the ethical standards of modern medicine are increasingly judging such actions harshly. Even if Ryan survives to lead a reasonable life, this hardly refutes the judgment made earlier by the Sacred Heart doctors. They correctly judged that the odds of dialysis benefiting Ryan were exceedingly slim and the odds of causing Ryan significant pain were overwhelming.

Caring for Patients

The Nguyens stated more than once that they longed for a physician who "cared." Yet painful, futile treatments are a poor substitute for genuine caring. When lifesaving interventions are futile, caring is best expressed by doctors and nurses who reaffirm to patients and families that they will not be abandoned, and that everything possible will be done to minimize the patient's suffering. Undoubtedly, some families will reject these overtures and continue to insist on

futile interventions. Yet far too often, demands for futile treatment arise not because the family has been offered other options and rejected them, but because the choice the medical team presents is between futile treatment or "doing nothing." By redoubling their efforts to care for patients and families, providers can make the process of acknowledging futility a more acceptable and humane prospect.

— Nancy S. Jecker

Nancy S. Jecker is associate professor in the Department of Medical History and Ethics, University of Washington, and coauthor (with Lawrence Schneiderman) of *The Wrong Medicine: Doctors, Patients, and Futile Treatment* (Johns Hopkins University Press, forthcoming). Sources: Gina Kolata, "Battle over a Baby's Future Raises Hard Ethical Issues," *New York Times* (December 27, 1994); J. Todd Foster, "Parents, Hospital Battle over Fate of Sick Infant," *Spokane Spokesman Review* (December 13, 1994); Lawrence Schneiderman, Nancy Jecker, and Albert Jonsen, "Medical Futility: Its Meaning and Ethical Implications," *Annals of Internal Medicine*, vol. 112 (1990); Daniel Yankelovich, *Coming to Public Judgment* (Syracuse University Press, 1991); Jeanette White and J. Todd Foster, "The Struggle over Baby Ryan," *Spokane Spokesman Review* (December 26, 1994); Nancy S. Jecker, "Knowing When to Stop: The Limits of Medicine," *Hastings Center Report* (May-June, 1991); Hippocrates, "Art"; Plato, *Republic*, Book III.

Science and Social Harm: Genetic Research into Crime and Violence

A variety of current research programs investigate genetic influences on violent, impulsive, aggressive and criminal behavior. Some attempt to tease out genetic from environmental influences through the study of twins and adoptees; others utilize the latest genetic technology to search for markers, and ultimately genes, associated with crime and violence. Still others are laboratory and clinical studies of the neurobiology of human behavior. While they differ greatly in method and ambition, these programs share the assumption that it makes scientific sense to look for

genetic influences on morally or legally significant categories of human behavior.

Vigorous objections have been raised against funding such research. As a liberal academic and criminal defense lawyer, I have become well-acquainted with these concerns, having spent much of the last three years organizing, then defending, then reorganizing, an interdisciplinary conference on the research and its social, legal, and ethical implications. Opponents of genetic research into crime and violence have argued that it promotes racism, diverts resources and atten-

tion from the appalling social conditions that breed crime, and lays the groundwork for intrusive programs of social control.

The research does not, on its face, seem to warrant these accusations. It looks exclusively at individual, not group, predispositions to criminal behavior. The populations on whom most of this research has been conducted are not African-American but Scandinavian, and the claims of genetic influence it yields are generally quite modest. No mainstream researchers believe that there are single genes that cause violent or anti-social conduct; all regard behavioral phenotypes like criminal behavior as arising from a complex interaction of many genes and environmental factors. None believe that genetic influence makes criminal behavior less mutable, and many suspect that the most effective ways of countering genetic influence will involve social and economic reforms. Finally, few of these researchers advocate, or believe their findings would support, mandatory screening, involuntary medication, or harsher sentences.

There are some researchers, certainly, who embrace simplistic theories of the genetic causation of behavior, and who claim or attempt to find racial differences in genetic predisposition. But they are relegated to the margins of the scientific community, and financed by a small number of private foundations. Their claims are not the subject of most of the publicity, or most of the organized protest.

But even though mainstream researchers reject simplistic models of genetic influence, claims of racial differences in genetic predisposition, and dragnet screening programs, their research may reinforce public perceptions of criminal behavior as an essentially biological problem, affecting some races more than others. This is what their critics contend: that human genetic research focused entirely on individuals, and apolitical on its face, will nonetheless reinforce racist stereotypes and promote repressive policies of social control. I want to examine some of the more plausible concerns raised by these critics, to assess their legitimacy and their implications, if any, for the conduct of research on genetics and crime.

From Individual Predispositions to Group Stereotypes

Some critics argue that the distinction between research on individual and group predispositions is untenable, because claims of individual differences in genetic predisposition will inevitably lend support to claims of group differences. There are several ways in which this might happen. First, if some researchers find genes or genetic markers associated with criminal behavior in individuals, other researchers inevitably will try to compare the incidence of those genes or markers in different racial and ethnic groups. (The

material for such comparisons may even be found within studies on individual predispositions, if these studies involve multiracial populations and code subjects by race.) There are good reasons to doubt that the researchers would find significant group differences, or that any differences they found would correspond to differences in present rates of offending.

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Still, the discovery of individual differences in genetic predisposition may well have an adverse impact on minority groups even if, as seems likely, those groups are not found to have a higher incidence of the relevant genes or markers. There will be considerable pressure to use those genes or markers for detecting criminal tendencies in young children and assessing dangerousness in convicted offenders. Universal screening, as in the case of PKU, is very unlikely, but the selective screening of those who seem "vulnerable" by dint of misbehavior is well within the realm of social possibility. Those screened are likely to be drawn disproportionately from predominantly black and Hispanic inner cities, since these are the areas in which violent crime is concentrated. Such screening programs would create the appearance that genetic predispositions to crime and violence are largely a minority problem, because the genetic propensities of the predominantly white youth from areas where violent crime is less concentrated would be tested far less often.

Finally, even without population research or screening programs, the discovery of genes or markers associated with individual criminal behavior may be publicly perceived as implicating the black community. Many Americans see violent crime as a black or minority problem, in part because of the disproportionate number of African-Americans in prison, in part because of deeply embedded prejudices that make violent crime appear more characteristic of blacks than whites and obscure the enormous differences in behavior and disposition *within* groups.

The public reaction to my planned conference on genetic research and crime is instructive. Despite emphatic denials that the conference, or any of the researchers invited to it, were claiming or seeking to find racial differences in genetic predisposition, much of the interested public assumed they were. On a radio talk show, the callers were about equally divided between whites who endorsed the conference because they always knew that "those people" were predis-

posed to crime, and blacks who opposed the conference because they objected to being so destructively stereotyped.

Such stereotyping already inflicts terrible damage on the lives of young black men. Consider a black novelist's foreboding about her son's approaching adolescence. Marita Golden writes that her son would soon

inhabit that narrow, corrupt crawl space in the minds of whites and some black people too, a space reserved for criminals, outcasts, misfits, and black men. Soon he would become a permanent suspect.

Much of the opposition to research on genetics and crime is informed by the conviction that such research will strengthen the association of young black men with "criminals" and "outcasts," and confirm their status as "permanent suspects," regardless of its findings. Several African-American scholars have told me that fear and distrust of genetic research runs so deep in their community that any discussion entertaining the possibility of a link between genetics and crime is seen as a threat and an affront. The most zealous opponents of human behavioral genetics have exploited these anxieties by recklessly linking all research or discussion of genetics and crime to racist ideology and repressive programs of social control. But while these opponents must share responsibility for the fear and offense felt by members of the black community, the strength and persistence of those reactions are social facts which researchers can hardly ignore.

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Diverting Resources, Diverting Attention

Critics also argue that claims of genetic and biological influence undermine social reform by making it seem either ineffective or inefficient — ineffective in working against the biological grain; inefficient in trying to achieve by large-scale social engineering what can be accomplished far more cheaply and reliably by medication or conditioning.

One fear is that research on genetic influence will divert resources from programs aimed at alleviating social and economic deprivation, including efforts to rehabilitate or train youths involved or at risk of involvement in crime. The direct effect will be negligible: even if human services and biomedical research competed for the same fixed resources, the amount

spent on all biomedical research is only a small fraction of the human services budget.

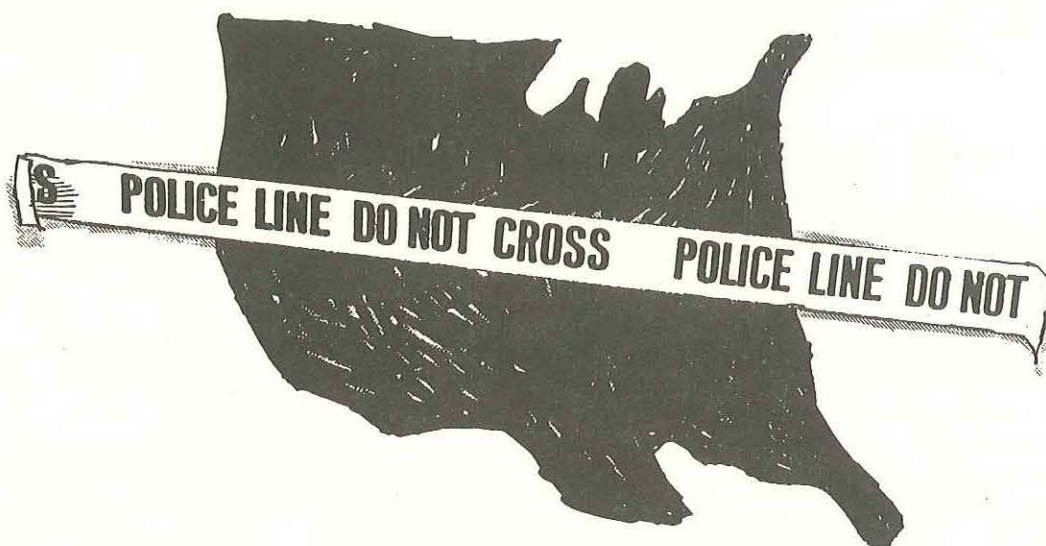
The indirect effect, however, may be far greater. The actual or reported findings of biomedical research may convince legislators that social reforms are inefficient, especially in comparison with biomedical programs offering "early detection" and "preventive intervention." Consider, for example, current programs of intensive supervision and social support for children believed to be at risk of criminal activity. Their supporters argue that these programs are much cheaper than the violent crime and incarceration they prevent. But such programs may seem extravagant in comparison with biomedical treatments, especially since the social and moral costs of such treatments are difficult to quantify.

A broader apprehension is that the discovery of genes or markers associated with criminal behavior will divert attention from social and economic conditions that promote crime. Indeed, some critics argue that what is objectionable about the research is not only its focus on genetic factors, but also its focus on *individual* behavior. These critics claim that merely by investigating the criminal predispositions of individuals, rather than the criminogenic character of the environment, the researchers mistakenly treat the former, not the latter, as the abnormality that needs to be explained. What demands explanation, the critics say, is the persistence of institutional racism and appalling social and economic conditions, not the fact that these conditions elicit criminal behavior in many of the young men subjected to them.

Researchers on genetics and crime might protest that they are not making the implicit judgment imputed to them by these critics — that their focus on individual behavior does not imply that the behavior is abnormal or pathological while the social environment is not. Researchers examine many causes of crime and their interactions; they recognize pathologies in individuals *and* their environments. Yet for critics, the social pathologies usually studied — perinatal trauma, infant malnutrition, drug use, parental neglect and abuse — are for the most part symptoms of a more comprehensive but less quantifiable injustice. To examine the symptoms piecemeal is to neglect the real explanation and the real problem.

Moral Abandonment

I have left for last the concern I find most troubling: that research on genetic predispositions may discourage any attempt to understand and empathize with those individuals *of all races* who are violent and predatory. As a society, we make intermittent efforts to understand and identify with those who engage in conduct that frightens and repels us. These efforts at understanding and empathy need not make us more



THE UNITED STATE OF ANXIETY...

Walt Handelsman

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lenient: we may still hold the offenders accountable for what they have done, and find their actions deserving of blame or reproach. But we resist the wholesale moral abandonment reflected, for example, in legislative efforts to consign repeat offenders to permanent, irrevocable imprisonment.

The effort at sympathetic identification may be blunted by the belief that those who commit violent crimes are genetically different from the rest of us. The suspicion that the most violent and predatory offenders are born with dispositions that we (presumably) lack renders them alien and opaque, inaccessible to sympathetic identification. I can feel that "there but for the grace of God go I" even if it would be literally impossible for me to have gone that way, but only if I have some foothold for identification. I will not be inclined even to attempt to identify with someone whose inborn temperament appears alien and threatening. Claims of genetic predisposition, then, may work to cut off empathy, and remove the check on our retaliatory and defensive impulses that empathy provides.

The research itself certainly does not prescribe the withdrawal of empathic concern. But it may lend support to social practices which have that effect, by treating "violence-prone" individuals as impaired or diseased. The genetic diagnosis of criminal predispositions could contribute to the medicalization of the crime problem, in a society that increasingly relies on

"soft" social control — the use of therapeutic methods to control antisocial behavior. The discovery of genes and markers associated with criminal behavior could make it easier to treat disruptive, antisocial, and criminal acts as symptoms of pathological conditions that should be treated and cured.

In much human genetic research, the concern is that prediction will outstrip treatment, leaving conditions that can be diagnosed but neither prevented nor cured. In this area, however, the prospect of treatment is disturbing in itself. While the forced medication of boisterous and disruptive children — the specter raised by critics such as Peter Breggin — seems unlikely in light of our constitutional scruples, it is not hard to imagine genetic testing and medical treatment being made a condition of probation or parole, and being offered to disruptive or delinquent employees as an alternative to termination. Other psychiatric medications, from anabuse to lithium, have been introduced in this way, setting a strong and ominously seductive precedent.

Moreover, pharmacological treatment, even if it is voluntarily undertaken, may threaten the agent's autonomy, and the perception of the agent as autonomous. Unlike rehabilitative and deterrent measures, psychotropic medications may bypass the agent's deliberative processes. An agent who abandons crime because of greater interest in lawful pursuits, greater empathy with prospective victims, or greater fear of punishment, acts autonomously in a way that a chemically

tranquilized agent does not. (This contrast may be overdrawn, but I will assume that it is valid for at least some psychotropic medications.) The medicalization of the crime problem may thus reinforce the treatment of violence-prone individuals as dangerous beasts rather than as morally responsible agents, to be drugged or confined rather than educated or reproached. Thus, rendering genetic predispositions more mutable in this way may actually worsen the prospects for sympathetic identification with the predisposed.

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It is possible, of course, that research on individual predispositions will reveal that genetic variations associated with aggressive or impulsive behavior in other settings do little to predict or explain inner-city crime; that the social pathology of the inner city "swamps" any genetic influences in eliciting criminal behavior. Such negative findings might dramatize the contribution of social conditions to crime and challenge popular expectations, if they were widely disseminated. But they would run up against an asymmetry of publicity: negative findings, like good news, get less media attention.

What, if Anything, Is to Be Done?

I can imagine some researchers becoming impatient with the litany of concerns I have described. None of these concerns directly challenge the scientific validity of their work, nor do they fully explain the intensity of the opposition that the research has faced. Undeniably, many of the attacks on human behavioral genetics are based on misunderstanding, oversimplification, and caricature; some on elusive accusations of a biological determinism denied by the researchers and belied by their assumptions, methodologies, and findings.

Yet the concerns I have examined do have implications for the way this research is conducted. For example, I think that researchers should be more cautious about the auspices under which their work is carried out and funded, and more vigilant in preventing the distortion of their findings. And I think that funding agencies should judge this research as basic rather than applied science.

In a time of government retrenchment, all scientists are under pressure to emphasize the practical value of their work. But those engaged in genetic research have

stronger reasons than most to resist this pressure. Researchers who are highly sensitive to the complex interaction of biological and social factors in the traits they study are often insensitive to the interplay of political interests in the application of their findings. It may be reckless to offer, or promise, more refined techniques for predicting and treating juvenile delinquency or adult criminality to educational and criminal justice institutions that have shown little capacity to treat their clients humanely or to respond effectively to the array of social conditions that provoke misconduct. I think it is unwise for researchers to be beholden to grantors who expect or demand findings of immediate practical value and are impatient with scholarly qualifications and caveats.

It is also unwise, and indeed irresponsible, for genetic researchers to ignore the appropriation of their findings by journalists and politicians. Researchers should respond publicly and vigorously to distorted presentations and applications of their work. Moreover, they need to maintain contact not only with its most eager consumers — criminal justice, correctional, and mental health agencies — but also with the social scientists, community activists, and political reformers who are the most wary of genetic research.

The concerns I have discussed have some complementary implications for the agencies that fund human behavioral genetics. While I do not think that research on genetics and crime should receive lower priority simply because it is controversial, I also do not think it should receive higher priority because it is seen to promise solutions to the problems of crime and delinquency. The support of this research by medical, public health, and substance abuse agencies may also be problematic, to the extent that it creates the expectation of pharmacological solutions to crime and violence.

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political reformers who are
the most wary of genetic research.*

It is better to frame, and to fund, this research as basic genetic and neurobiological science, judging it more by the contribution it could make to those areas of inquiry than by its practical value in solving social problems. If, as the researchers insist, their approaches and techniques have significant scientific potential, their projects should flourish under this funding rubric. But if, as the critics insist, the research has little scientific merit, it should lose out in the competition.

Scientific Merit and Social Harms

These modest proposals, however, skirt a larger issue that has emerged in the course of this essay: should legislatures and public agencies take account of the social harms associated with human behavioral genetics in making funding decisions, or should they attempt to judge it strictly on its scientific merits? There are problems both in assessing proposed research strictly on its scientific merits and in subjecting it to a calculus of social costs and benefits. The former seems naive, ignoring the extent to which appraisals of scientific merit reflect socially and culturally conditioned judgments of plausibility and urgency, as well as economic interests. It also ignores the extent to which funding agencies have a legitimate interest in seeing public money spent in ways that do no public harm. But the latter standard threatens to open the floodgates to an array of concerns of varying weight and relevance, and to make the funding of scientific research an ideological battleground.

This ambivalence about the appropriate standard of review makes it difficult to give a principled defense of a line I wish to draw between funding research on individual predispositions and funding research on group differences. I do not think that research on genetic differences in criminal predisposition between racial groups should receive funding from any source (though I certainly would not prohibit private foundations from funding it). On scientific grounds alone, research on group differences seems unlikely to yield useful results, in light of the vagaries of racial classification, the sources of group differences recognized by population genetics, and the standard problems facing human behavioral genetics. But opposition to this research is widespread among people who, like myself, are not scientists, and our conviction is not based on the scientific merits alone. Many of us, I assume, would oppose funding for this research even if racial classifications were less suspect, and if the understanding of behavioral predispositions were more refined.

If, however, we base funding decisions on a social calculus of harms and benefits, might it not be applied adversely to the research on individual predispositions? After all, I have argued that the danger of reinforcing harmful stereotypes arises less from the remote prospect of actually finding racial differences in genetic predisposition to criminal behavior than from the public perception that the discovery of *any* genetic predisposition implicates the black community. And while we non-scientists may think that research on individual predispositions has greater scientific value than research on group differences, we are hardly in a position to make a confident judgment of scientific merit.

I believe, though, that there are two further differences between research on individual predispositions and group differences that must enter into a social calculus. The first concerns the source of the feared harm. The risk of harm from research on individual predispositions arises largely from misunderstanding and misappropriation — such research, after all, does not assume, and was not designed to show, that genetic predispositions are immutable, or that they are unevenly distributed among racial or ethnic groups. In contrast, research on group differences *does* aim to discover whether some racial or ethnic groups are more predisposed to crime than others — findings that, however unlikely, can only reinforce prejudice and stereotyping. Even if there were genetic differences between races, there is no reason that such differences should affect our treatment of individuals, but every reason to fear that they would.

This leads to the second distinction I wish to press — the moral legitimacy of the questions being addressed. While the potential abuses of individual-predisposition research in our present society are legion, it is possible to imagine a society fairer and more humane than our own where findings of individual differences in behavioral predispositions could be used in an appropriate fashion. In contrast, I cannot imagine any reason that a fair and humane society would be interested in genetic differences between racial or ethnic groups. Even if aggregate differences existed, I do not see what legitimate purpose their discovery could serve. And I do not see why we should pay for research that could serve no legitimate purpose, even in a society far better than our own.

— David Wasserman

A previous version of this essay was presented as one of a series of talks on "Censorship and Silencing: Practices of Cultural Regulation," California Institute of Technology, January 26, 1995. Sources: Albert J. Reiss, Jr., and Jeffrey Roth, eds., *Understanding and Preventing Violence* (National Academy Press, 1993); Adrian Raine, *The Psychopathology of Crime: Criminal Behavior as a Clinical Disorder* (Academic Press, 1993); R. C. Lewontin, *Biology as Ideology: The Doctrine of DNA* (Harper Perennial, 1992); Marita Golden, *Saving Our Sons: Raising Black Children in a Turbulent World*, quoted in *Washington Post Book World* (January 15, 1994); Peter Breggin, remarks from a panel discussion entitled "The Bush Administration's Violence Initiative: Is It Racist?", Congressional Black Caucus Legislative Weekend (September 25, 1992).

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