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The Costs of Clean Air: How Much Should They Count?

To make its research easily 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 philosophical 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.

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The enormously popular Clean Air Act of 1970 is up for revision, and in the process our national commitment to reduce air pollution is undergoing reassessment. The Act, as amended and implemented, has set standards for seven widespread harmful pollutants. These standards establish maximum allowable levels of air pollutants, which, “allowing an adequate margin of safety,” are required to “protect the public health,” including vulnerable segments of the population, such as the young, the infirm, and the elderly. The current law does not permit pollution control to be balanced against the costs of enforcement and compliance—public health is not to be compromised to achieve economic goals.

A proposed amendment to the Clean Air Act would require pollution-imposed health risks to be assessed in the context of the—often very high—costs of reducing those risks. The public health would be protected from “significant risk” of adverse effects, where risks are measured against a broader economic background. Standards would no longer be set to protect the entire population—however vulnerable—against any risk—however small or expensive to correct.

Public opinion, as canvassed in a recent Harris poll, strongly resists proposed changes in the Clean Air Act that are perceived to relax existing federal standards on air pollution. Harris asked his sample this question: “The Clean Air Act does not permit the consideration of costs when setting standards for the protection of human health. The Reagan Administration is considering asking Congress to require that pollution standards designed to protect human health be relaxed if the costs are too high. Do you favor or oppose relaxing

pollution standards affecting human health if the costs are too high?" By a hearty 65 to 32 percent, a substantial majority declared themselves opposed to any weakening of human health standards on grounds of economic costs.

The controversy over the Clean Air Act raises questions about the role that risk assessment and cost-benefit analysis should play in the political process. No one seriously disputes that costs must at some stage be considered in implementing legislative decisions. The argument centers on the manner in which they are to be considered. Should costs be tallied up after we have reached a consensus on our common goals and are seeking how best to achieve them? Or is consideration of economic costs an essential component in the choice of these goals themselves? In what way and to what extent does our national commitment to clean air depend on how much clean air *costs*?

The Clean Air Act: Costs and Benefits

By almost all accounts, the Clean Air Act has been successful in reducing air pollution. Impressive reductions in the absolute level of the controlled pollutants occurred during the 1970s, and these levels are even more impressive if we compare them to what they would have been today without any such law.

Levels of carbon monoxide, sulfur dioxide, and total suspended particulate emissions have all dropped dramatically since the passage of the Act. Economist Myrick Freeman of Bowdoin College offered congressional testimony that, based on EPA data on air quality trends, there has been an estimated 20 percent average improvement in air quality since 1970.

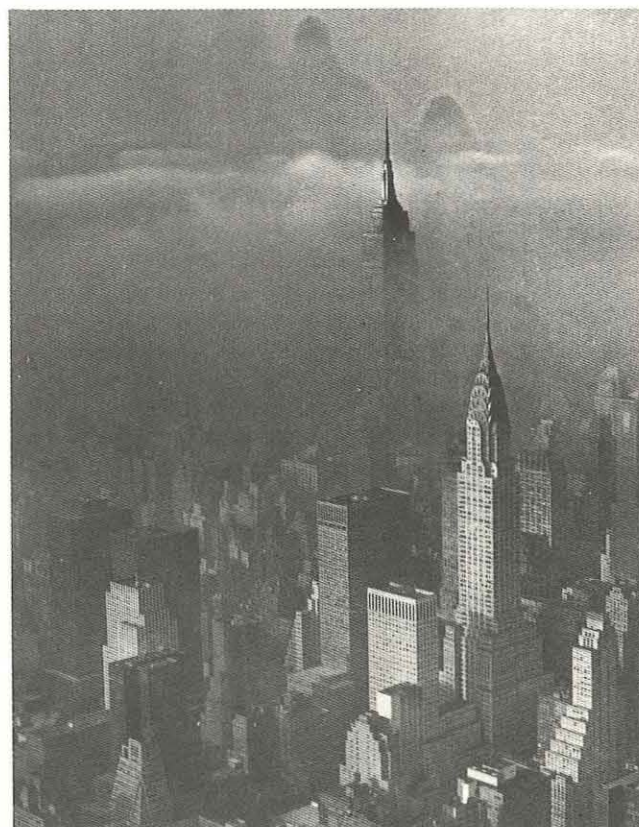
\$21.7 billion in benefits outweighs \$17 billion in yearly costs of pollution control. On these calculations, the United States is ahead to the tune of \$4 billion dollars a year in fighting against air pollution.

Improvements in air quality, however, have not come cheap. The Clean Air Act cost business an estimated \$16-\$17 billion in 1978, with annual costs by 1987 estimated at \$37.5 billion. The Council on Environmental Quality estimates that cumulative air pollution reduction expenditures from 1978-1987 will total \$279 billion. As Everett Dirksen once noted, a billion here and a billion there soon start to add up to real money.

Have the costs outweighed the benefits? Freeman calculates that a 20 percent improvement in air quality would result in a reduction of mortality between .2 and 2 percent per year. This means a reduction of

mortality between 2,780 and 27,800 deaths per year, with a most likely value of 13,900 deaths avoided in 1978 alone. But how are we to put a price tag on each of these lives? What are 13,900 lives supposed to be worth, and to whom?

Economists try to answer this question by figuring out how much individuals are willing to pay for small reductions in their probability of dying within certain time periods. People are willing to pay various amounts to increase their odds of living longer, and from empirical estimates of their willingness to pay economists compile a value of statistical life—varying, according



Credit NAPCA/National Archives

to Freeman, from roughly \$300,000 to almost \$5 million. If a reasonable intermediate value is an even million, then the "monetary benefits of reduced mortality due to the control of particulates and sulfur compounds lie in the range of \$2.8 billion to \$28 billion per year."

Adding in the economic benefits of reduced health risks (savings in hospitalization, doctors' fees, lost wages) and benefits from reduced crop losses, etc., Freeman arrives at a total estimated benefit of between \$4.9 billion and \$51.1 billion. The most reasonable mid-range estimate of \$21.7 billion in benefits outweighs the \$17 billion in yearly costs of pollution control. On these calculations, the United States is

ahead to the tune of \$4 billion dollars a year in fighting against air pollution.

What if these calculations had turned up a top-heavy ratio of costs to benefits instead? Indeed, Freeman's data suggest that the net benefits of automotive emission controls are vanishingly small. The Harris poll indicates that the American public would continue to endorse the Clean Air Act even if the balance sheet had looked quite different. Are the American people simply irrational in this respect? Certainly most Americans are not willing to spend relatively minor amounts to purchase all sorts of other protec-



Credit Billy Davis, Louisville Courier-Journal/National Archives

tions of health and safety, such as smoke detectors, for example. Millions continue to pay for the privilege of fouling their own lungs with cigarette smoke. Yet they are resolved to hold the line on pollution *regardless of cost*. Is it irrational to choose policies whose economic costs may exceed their benefits?

Counting Costs First

Lester Lave, Senior Fellow at the Brookings Institution, insists emphatically that "the benefits of cleaner air must be weighed against the costs of achieving it." He joins many industry groups in charging that the lack of cost-benefit analysis in setting

pollution standards has resulted in control levels that are unrealistically and senselessly strict. In testimony before the House Subcommittee on Health and the Environment, he claims, "When regulations have the effect of closing a plant or preventing construction of a new one, it is foolish to pretend that costs of abatement should play no role in setting standards."

Lave argues that "the notion implicit in the 1970 Clean Air Act Amendments is that a level of quality can be found which will protect the health of even the most sensitive groups." Yet health studies since 1970 strongly suggest that there is no threshold concentration below which exposures are safe. It can be extremely expensive for industry to remedy very small excesses of certain pollutants or to ensure that even atypical segments of the population are protected. On Lave's view, "A more realistic and honest approach is to acknowledge that air quality in an industrial society will occasionally deteriorate to the point where some sensitive individuals will suffer. The issue is how to balance the discomfort and perhaps even serious risk to these people against society's desires for inexpensive products and a growing economy." Risk assessment analysis may aid us in this balancing, so that expensive over-regulation can be avoided.

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Counting Costs Later

Opponents of the ambitious use of risk assessment and cost-benefit analysis in setting clean air standards raise a series of troubling questions about the kind of balancing Lave endorses.

How are costs, risks, and benefits supposed to be counted? Freeman in his testimony translated costs and benefits into exclusively monetary terms, assigning dollar values to death and debilitating illness, even to the aesthetic pleasures of increased visibility and glimpses of bluer skies. This allowed for easy computations and clear comparisons. But the choice of money as a common metric to measure dissimilar risks and rewards is unsatisfactory to many who believe that it misrepresents the way in which these risks and rewards matter to us.

Douglas MacLean, Research Associate at the Center for Philosophy and Public Policy, notes that the use of money as a common yardstick to measure the costs and benefits of risk reduction involves a serious distortion. (Portions of MacLean's congressional testimony on risk assessment and the Clean Air Act appear

Risk to Individuals, Risk to Society

The following discussion is excerpted from the testimony on risk assessment and the Clean Air Act presented before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, by **Douglas MacLean**, Research Associate at the Center for Philosophy and Public Policy.

...The attraction of risk assessment is that it appears to be impartial and all-encompassing. For this reason, it appears to be an ideal basis for making choices and forming policies. It is important to realize, however, that not just any determinate and impartial decision mechanism, applicable in all situations, is rational or desirable. . . .

It is no great achievement merely to cook up a technique that will churn out decisions. The trick is not only to find one that treats all values fairly, since decisions that ignore all values are partial to none; the trick is to make decisions after weighing different values with the requisite sensitivity. We must be concerned with *how* a risk assessment incorporates values. . . .

Rights and justice are examples of values that express *social ideals*. As citizens, we want our laws and social institutions to acknowledge and recognize such values, because we want to live in a society that is regulated by the principles that these ideals imply. But we also want to see somehow expressed at a social level other ideals, which encompass a broad range of moral, aesthetic, and other values.

Social ideals are distinct from *individual preferences*, . . . those things we want for ourselves or for personal reasons. Individual preferences also reflect moral, aesthetic, and other values, but what we

want or value personally can be distinguished logically from what we can agree that we should want or value as a society.

The use of risk assessment can illustrate this distinction in a dramatic way. Risk assessments commonly report regular and predictable health effects to a large population in terms of the probability of risk to an average individual. To an individual, the outcome is hypothetical: he or she may or may not be killed or made to suffer as a consequence of air pollution. But for the society as a whole, the outcome may be accurately predicted statistically for the population at risk. At this level, for some hazards, (one element of) chance gives way to certainty.

Thus, there are two different questions an individual may confront: the first is whether the risk is personally or rationally acceptable to an individual; the second is whether the overall outcome is socially acceptable. It is not irrational, however impractical it may be, to regard the health effects to the nation—the numbers of lives we know will be lost or made less productive—as unacceptable, even if the risk to any individual is small. It is neither irrational nor uncommon to take a political stand on an issue that will have little effect on one's personal welfare.

To say that the controversy over the Clean Air Act is political, not technical, is at least in part to call attention to this distinction. Risk assessments that interpret hazards as risks to an individual cannot address the political issues that are raised by conflicting social ideals. To use such risk assessments to set air standards is to decide that these social ideals shall not be taken into account. Whether or not it is reasonable to make such a decision, it is certainly not neutral, objective, or uncontroversial. . . .

above). To rely on an economic measure "is to decide in advance that only economic preferences shall count in setting policies." It is to treat all reasons for holding various political convictions as economic preferences, weighted by how much we are willing to pay for them. But conflicts about clean air are conflicts about our values and ideals, and these must be judged on their merits, whatever we might be willing to pay for them.

Perhaps costs and benefits can be measured against some non-monetary standard. But MacLean cautions that *any* quantifiable common metric faces this same problem. "To choose any method of measuring in advance . . . is to choose to favor some values and to ignore others." We defend our political goals for a multiplicity of reasons, and each kind of reason must be taken seriously if we are to be fair to all.

Defenders of risk assessment as an analytical tool seem sure that various risks at least can be measured and compared in terms of the probability of their occurrence and the severity of their negative effects. But even if the level of risk could be scientifically determined, MacLean challenges the assessor's assumption that "the level of risk is all that matters to people and that the kind or nature of risk is not a relevant factor." People value very differently risks they choose themselves (cigarettes) and risks that are imposed on them by others (acid rain, deterioration of the ozone layer).

Research Associate Mark Sagoff, of the Center for Philosophy and Public Policy, notes that while we fear some risks, we *resent* others. In a book in progress, he explains why people may protest certain smaller risks

while tolerating other, seemingly more serious threats. "We resent risks imposed upon us, as members of the public, by those who seek, in doing so, to achieve economic ends. We resent these risks because, in being subjected to them, we are treated not as persons, that is, as ends in ourselves, but more as a mere means for the production of some economic good, such as overall efficiency or utility." Risk assessment has no quantitative tools for distinguishing resentment from other, non-morally motivated sources of opposition to risk.

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Risks and benefits to whom? Even if cost-benefit analysis were successful in totaling up the sheer quantity of relevant risks and benefits, this would still leave out another matter of prime importance from the point of view of justice. It matters who gets the risks and who gets the benefits. It can be argued that relaxing environmental standards to improve the benefit-cost ratio does not really reduce costs but instead shifts them—away from the corporations who produce the pollution to their victims who suffer from it. Costs are transferred from powerful industries to those least able to defend themselves from hazards in the air they breathe.

Risk assessment methods, furthermore, tend to lump different individuals or groups together and give estimates of the risk to some average, statistical person. But because health effects are concentrated in certain more vulnerable groups of the population, statistical averages, according to MacLean, "mask what may, in fact, be sacrificing some people or groups for the economic benefit of others."

Can costs be traded off against rights? Many people believe that air that is safe to breathe is a right of all citizens, a minimal demand which they are entitled to press against potential polluters. But if clean air is indeed a right, then, MacLean points out, "the economic consequences of clean air must be balanced against other economic considerations with extreme caution. Moral rights, according to most popular conceptions of rights, are not a special kind of economic consideration, but rather a way of protecting certain values from being tyrannized by the laws of the marketplace." Just as we outlaw child labor or chattel slavery without first reckoning the costs and benefits of these institutions, so we may want to pass laws protecting

the purity of our physical environment, without first deciding whether or not it is more efficient to allow a certain number of elderly citizens, or young children, to die.

Do we want to rely on cost-benefit analysis to make our political decisions? Finally, risk assessment and cost-benefit analysis seem unable to deal adequately with our social and political ideals. And the controversy over the Clean Air Act is essentially a political debate. In MacLean's words, "The argument is not about how we make our trade-offs, but how we set our goals At this level, beliefs and ideals should be considered on their merits so that a collective goal can be established. The trade-offs and confrontation with economic realities come later. This distinction is crucial. Only if it is respected can we maintain our values and ideals for what they are in a world where economic facts are all-pervasive and trade-offs inevitable."

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Few would deny that cost-benefit analysis and risk assessment can be enormously useful for choosing the most cost-effective means of achieving our common goals—after these goals have been independently determined. Defenders of the Clean Air Act in its current form argue that we should first form our political ideals, first set our standards for individual and community health and safety, and introduce considerations of cost only at the state of implementation. As Nicholas Ashford of M.I.T.'s Center for Policy Alternatives warns, "Cost-benefit analysis can be a useful tool," but it should not be pressed into inappropriate service "as an indiscriminate, decision-making rule." First we affirm our shared values, and only then do we investigate the financial or technical feasibility of realizing them. Risk assessment can help us look more clearly at the economic implications of our decisions about the air we all must breathe. But it does not seem that it can make those decisions for us.

The Center for Philosophy and Public Policy is initiating a major research project on the philosophical and ethical basis for assessing the risk and safety of alternative social decisions. A special portion of this project is focused on airborne risks. The research is directed by Dr. Douglas MacLean and Dr. Mary Gibson under a grant from the National Science Foundation. The first working paper from this project, "Risk and Consent: A Survey of Issues for Centralized Decision Making," by Douglas MacLean, is available from the Center for a postage and handling charge of \$2.50. To order, see p. 15.

Should All Countries Be Democracies?

International declarations of human rights proclaim that all societies, regardless of level of development, should be political democracies. In all societies, however poor and economically backward, public decisions are to be made by citizens expressing their preferences in open and free elections, and the right to participate in the political decision-making process is to be universally respected. Many political theorists and economists argue, however, that developing societies are not fully ready for democracy; democratic institutions presuppose certain economic, social, and political conditions that are simply not present in many poor nations. On their view, democracy may be the ideal against which the governments of the wealthy, industrial nations are to be judged; but it is neither appropriate nor fair to hold the political institutions of developing societies to the same standard.

This debate has considerable importance for contemporary political practice. The conduct of foreign policy by a great power such as the United States may decisively influence the prospects of democratic movements or regimes elsewhere, even when this influence is unintended, and particularly in developing societies whose domestic affairs are especially vulnerable to outside events. Democratic regimes might be destabilized as a result of IMF-imposed austerity measures; authoritarian regimes might be reinforced by favorable aid and credit policies; military assistance intended to strengthen a friendly regime threatened from the outside may provide hardware and training for domestic repression. In morally appraising the consequences of its foreign policy, the United States cannot ignore the question of whether democratic institutions are or are not desirable in all societies.

We can take it as a settled part of our moral outlook that relatively developed industrial societies should be politically democratic. Democratic institutions are justified by appeal to a fundamental principle of political equality: political institutions should be arranged so

that all members are treated as equals. Democracy promotes equality by affirming citizens' respect for themselves and others as persons capable of making and carrying out their own political choices: each individual is regarded by others as a person whose choices deserve to be taken into account. And democratic procedures seem more likely than others to yield policies and practices that take equal account of everyone's legitimate claims. The interests of all are more likely to be furthered under democratic rule.

Such is the traditional justification for democracy in advanced societies. If this justification does not hold for the developing countries of the Third World, the reasons should emerge in a comparison of the social, economic, and political characteristics of developed and developing societies. Do the different circumstances of the world's poorer nations lead to different conclusions about what form of government is morally best for them?

Cultural Differences

Many contemporary developing societies lack certain cultural features that are present in the Western democracies and appear to be related to their political stability and efficiency. These include widely held attitudes on the part of citizens that political decisions are indeed significant determinants of social welfare, and that citizens generally can and should influence these decisions. Strong political cultures encouraging broad citizen participation are not found in most developing societies. On the contrary, active interest and participation in political events is unusual. If a flourishing political culture is a necessary condition for the development of political democracy, these cultural differences tell decisively.

Assuming for the moment that these observations about the political cultures of developing societies are true, what is their relevance? The mere fact that a civic culture is present in democracies and absent in nondemocracies does not show that it is a necessary condition of democracy. But the political culture argument does undercut the traditional justification for democracy. Democracy does not affirm self-respect if political activity is not viewed as an important means of control over one's life prospects. In traditional cultures self-respect is secured in other

This article is drawn from "Democracy in Developing Societies," by Charles R. Beitz, Assistant Professor of Political Science at Swarthmore College. "Democracy in Developing Societies" appears in *Boundaries: National Autonomy and Its Limits*, edited by Peter G. Brown and Henry Shue (Totowa, N.J.: Rowman and Littlefield, 1981). To order, see p. 15.

ways, for example, by willingly carrying out one's assigned role in a social hierarchy. Furthermore, democracy is likely to produce legislation that takes account of all interests only if political rights are exercised by all segments of the population. In nonparticipatory societies, democratic institutions are unlikely to ensure that all interests will be taken into account.

Even if the political culture argument is valid, however, it does not follow that authoritarian institutions are to be preferred, from a moral point of view, to democratic ones. The important question is whether a particular authoritarian government will fare any

and developing societies lies in the strength of their political institutions. The political institutions of developing societies tend to be weaker and comparatively inefficient and unreliable. They perform their principal functions poorly and they do so at great cost.

According to Samuel P. Huntington, well-known for his work in this area, the political institutions of developing societies must be strengthened before widespread political participation can be encouraged. Huntington holds that the creation of political institutions is undermined by the premature expansion of opportunities for political participation. On his view,



Courtesy National Archives

Pre-election address to a crowd in Ghana

better at sustaining self-respect and taking account equally of all citizens' interests.

There is controversy as well about whether the political culture analysis of nonparticipation in developing societies is accurate. Peasants struggling along in subsistence agriculture may decline political participation for reasons that have little to do with the presence or absence of a strong political culture. If a peasant's main concern is bare survival, political passivity is simply a risk-minimizing strategy. Lack of political participation need not be a sign that political rights have little value in securing self-respect. It may be merely a rational response to the structure of opportunities and costs grimly presented in day-to-day subsistence.

Institutional Weakness

Another important difference between developed

the costs of democracy at early stages in the process of political modernization are excessive: premature creation of participatory institutions will endanger other human rights, such as the right to security of the person, and reduce the efficiency with which government performs its other functions.

Huntington's position can be questioned on several grounds. One might wonder, for example, if experience bears out the hypothesis that political institutions of prematurely participatory societies tend to decay rather than to develop. More fundamentally, Huntington's view invites the conclusion that institutional stability is to be valued regardless of who wields power within those institutions. As institutions are strengthened, the political power of the underlying coalition of social forces is strengthened as well. Huntington's view might justify a government in suppressing personal liberties in order to protect

the most regressive of underlying social interests.

Thus, even if widespread political participation does hamper institutional development, democratic institutions would be inappropriate in a developing society only if alternative institutions would be more likely to promote the development of eventual social justice. Huntington's claims provide no reason to fall back on uncritical support for authoritarian institutions regardless of their social bases and their tendency to enhance or hinder the prospects of liberty.

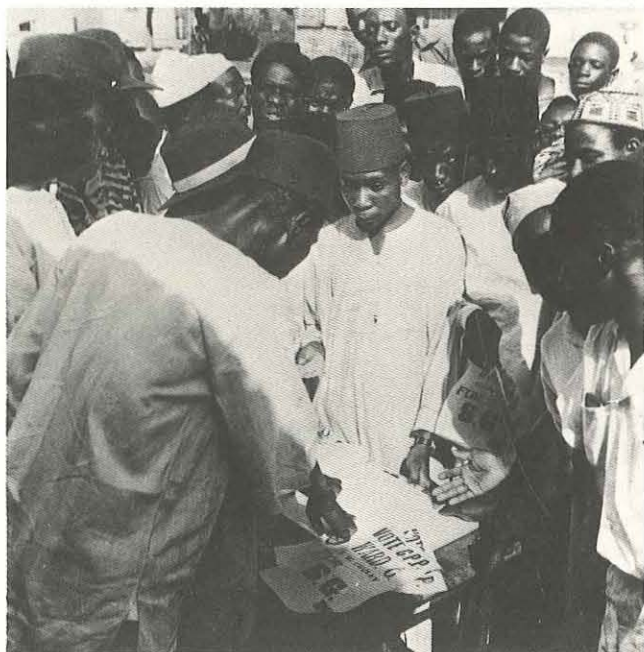
The Dynamics of Growth

By definition, the developing societies have production capabilities vastly below those of developed societies. At the same time, their rates of population growth are comparatively high. For both reasons, economic growth is extremely important. A common view is that democratic politics tends to reduce the rate of growth, both in developed and developing countries. What might be called the "growth first" argument holds that rapid growth is the more urgent goal in developing societies, justifying the suppression of political rights on its behalf.

The argument runs as follows. Growth is primarily a process of capital formation, and the rate of capital formation is a function of the rate of savings. Since the rich have a higher propensity to save, the larger share of national income should be channeled to the wealthy. Democratic institutions tend to work against this pattern of income distribution, depressing the rate of savings below its optimal level. Thus economic growth can best be promoted by authoritarian regimes.

Voter Registration

Courtesy National Archives



This argument may well point to a trade-off between growth and democracy. It is less clear, however, that this trade-off should be resolved in favor of economic growth. It is certainly *not* clear unless the goal of economic growth is qualified by distributive considerations. Development strategies designed to maximize growth have in fact often resulted in absolute declines in the well-being of the poorer half of the population. The "growth first" argument as it stands fails to recognize that what is important is not promoting growth per se, but promoting equitable growth: growth that helps to alleviate and prevent the worst forms of poverty. If the "growth first" argument gives us a reason to reject democracy in developing societies, it must be because authoritarian governments are likely to be more successful in fostering *equitable* growth.

There are two ways in which democratic institutions operating in poor societies can fail to promote the economic interests of the least well-off. First, political rights, even where available to all, benefit some more than others. Inequalities in education and wealth result in unequal abilities to take advantage of such rights in pressing effective claims. Second, electoral mechanisms among uninformed and frequently illiterate peasants are particularly prone to manipulation by traditional elites. In both cases inequalities in social background are reflected in large inequalities of political influence, and those most in need of protection are least able to obtain it through political means. A non-democratic regime may be preferred to a democratic one if (and this is a large "if") it more adequately satisfies the requirements of genuine political equality.

Conclusions

None of the anti-democratic arguments supports the general conclusion that democracy is inappropriate in developing societies. All suffer from an unwarranted a priori belief that authoritarian regimes can be expected to govern more successfully than democratic ones. But all authoritarian governments are not created equal: some are competent and some are incompetent; some respect personal rights and some are ruthlessly repressive; some have the support of disadvantaged groups and some represent privileged interests. Surely these differences matter.

There may be circumstances under which democratic governments may be less likely to treat all their members as equals. Initial inequalities in the distribution of material resources may permit advantaged social groups to exploit the machinery of democracy at the expense of those less advantaged. This could not be a sufficient reason, however, to reject democratic forms of government. There must in addition be some reason to believe that an alternative regime would be more successful in these respects, without being morally deficient in other ways, for example, by turning to brutal and repressive means for securing the compliance of the population. These are both tall orders, and it is, to say the least, most unlikely that very many actual authoritarian regimes would pass these tests.

Representing Immoral Clients

When the Nazis wanted to march through the neighborhoods of Holocaust victims in Skokie, ACLU lawyers defended their right to march. When Charles Manson, the Boston Strangler, and the Midtown Slasher went to trial, they all had lawyers by their side. Powerful corporate conglomerates hire armies of lawyers to assist them in crowding out any struggling competition. Anyone in our country who wants to welch on any debt or weasel out of any obligation can probably find a lawyer ready to take on his case.

Under our judicial system, every criminal defendant who so wishes must be represented by legal counsel. However heinous the offense, however frank the avowal of guilt, some lawyer undertakes the representation. In unsavory civil suits as well, many lawyers are willing to make their services available. Often it seems clear to many of us in these cases which side is the "good" side, which side ought, in the name of justice, to prevail. Yet some lawyer is devoting the full measure of his professional devotion to furthering the cause of the other side.

Both lawyers and philosophers have raised difficult moral questions about the representation of "repugnant" clients. Is a lawyer under a moral obligation to take on a repugnant client, or is she under a moral obligation to send him away? Or is the decision to represent properly left to the lawyer's own professional discretion? Is the lawyer damned if she takes the case, damned if she doesn't, or neither?

The Lawyer as Butcher and Baker

The current ABA Code of Professional Responsibility leaves the decision to represent largely up to the individual lawyer. While the Code is not particularly clear or explicit on these matters, it seems to state that lawyers have no duty to represent any given client, aside from duties imposed by court-ordered appointments, or generalized duties of pro bono service. "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client." A lawyer has a duty to refuse representation only "if the intensity of his personal feeling



Drawing by Modell; © 1976
The New Yorker Magazine, Inc.

*"If it please the Court, my client would like it to be known
he has already learned his lesson and is very, very sorry indeed."*

...may impair his effective representation of a prospective client."

This position acquires initial plausibility from an analogy between the legal profession and many other sorts of work. The butcher and baker, it is argued, may sell their goods or services to whomever they please, within fairly broad limits. (They may not discriminate against customers on the basis of race, for example.) The butcher does not have to sell his pork chops to every Tom, Dick, and Harry who happens along. Nor, on the other side, must he refuse to deal with customers who show themselves less than morally upright. The choice belongs to the butcher.

This account requires some qualification, however. We might criticize the butcher on moral grounds for sending a poor and starving customer away empty-handed. Or suppose that the butcher knew that one of his frozen lamb chops would be used as a murder weapon, with the evidence conveniently cooked in a post-crime supper. Would he have a right to avert his eyes as he rang up the sale?

Furthermore, the butcher-lawyer analogy may itself be questioned, on two counts. First, the lawyer interacts with her clients far more extensively and intimately than the butcher with his. She acts in a more direct way to further their morally dubious projects. Second, the legal profession may be argued to have a special moral dimension that many other lines of work do not. The butcher deals in ribs and steaks—the lawyer deals in rights and justice. Defending rights and promoting justice are not incidental components of what the lawyer does in carrying out her professional tasks. Justice and rights are at the heart of what the legal profession is about.

Refusing the Immoral Client

Philosopher Virginia Held of the City University of New York argues that a lawyer's decision to accept or reject a prospective client should be heavily influenced by a concern for justice and individual rights. The lawyer must ask whether a prospective client has a moral (as well as legal) right to press his claim, and whether the interests of justice will be best served by representing such a client.

In criminal cases, of course, every defendant has a constitutional right to counsel, and usually also a moral right to defend himself against the awesome power of the state. In civil cases, however, there is no constitutional right to counsel. There may be a moral right to *some* legal representation, but not to representation by any *particular* lawyer. On Held's view, "A lawyer must first of all exercise responsibility in considering whether he or she is morally permitted to sell legal services to people exercising legal rights they should not, on moral grounds, be permitted to have." Lawyers in our society wield a great deal of power; they are able, for good or for ill, to help alter our judicial system and strengthen or weaken its respect for political and economic rights. In exercising this power responsibly, the choice of clients is extremely important.

Even in criminal cases, Held maintains that lawyers have an obligation to choose clients carefully. Here, too, "those most deserving of an outcome favorable to them in a legal controversy ought to have the strongest legal talent on their side. Lawyers should...employ their talents in behalf of those clients who most clearly deserve them." Unless she is the "last lawyer in town," the lawyer should refuse to sell her services in a morally repugnant cause.

Representing the Immoral Client

On the other side of this dispute are those who argue that the lawyer has instead an obligation to *withhold* independent moral judgment. The lawyer does not serve justice by heeding, but by muffling, the still small voice of his private conscience. Judge George Sharswood, in his 1854 treatise on professional responsibility, wrote that "The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury." In both civil and criminal cases, the final decision is to be reached through the full judicial process, and not preempted by the lawyer's personal verdict.

Does this mean that a criminal lawyer should defend even the known guilty? Charles Wolfram, Visting Professor at Cornell Law School, identifies this as the traditional lawyers' reply: "Defense of the known guilty is appropriate in order that the established governmental system, and not private legal perceptions, determine guilt and innocence." Even in cases of seemingly cut-and-dried guilt (and guilt is rarely if ever *that* cut or *that* dried), lawyers should not set themselves up as extra-judicial tribunals.

In civil cases as well, Alan Donagan, Professor of Philosophy at the University of Chicago, argues for the right of individuals to pursue, so far as the law permits, what they take to be reasonable and justifiable ends. In a complex and complicated society like our own, one person's ends may very well come into conflict with another's, and "persons of honor in a free society" may disagree about what would count as a just and fair resolution. Frequently such conflicts will be carried into the courts.

According to Donagan, "A society fails in respect to the human dignity of its citizens if it fails to allow them a fair opportunity to raise such questions about what is due to them under the law before properly constituted courts, and to defend themselves against claims upon themselves or charges against themselves; it would so fail if it denied them the opportunity to hire legal advisors whose professional obligation would be...to represent them in doing these things."

Now, "whatever a lawyer may believe about his client's case, [typically] he cannot deny the possibility that his client may be morally as well as legally in the right." It behooves the lawyer, therefore, to reserve his private judgment and, by accepting some morally dubious cases, assist in maintaining a legal system in which the human dignity of all claimants is equally respected.

Charles Wolfram suggests a different justification for a limited duty to represent even disreputable clients. Just as the butcher may be under an obligation to give a piece of meat to someone who is starving, the lawyer is sometimes under an obligation to represent "a necessitous client who has a compelling need for legal services . . ." The underlying duty here is "a fundamental moral duty to rescue," qualified by considerations of "the capacities of the lawyer, the risk that may be incurred by the lawyer or caused to others, and the nature of the client's legal needs." This duty to rescue extends to the rescue of morally disreputable clients if "the client's claim is legally just, the client's claim is a socially important and morally compelling one, and the need of the client for this particular lawyer's services are truly pressing."

On Wolfram's view, the duty to represent does not arise for minor legal matters, but only to vindicate some legal right to an essential human need. Thus, some lawyer might have an obligation to defend an innocent Nazi erroneously accused of a serious crime. But for Wolfram, a Nazi's right to march through Skokie is not an urgent enough legal matter to generate an obligation to represent Nazi clients, at least not on grounds of *rescue*.

The Last Lawyer in Town

The "last lawyer in town" may be obligated to represent immoral clients if refusing means that human dignity will go unrespected or urgent legal needs unmet. But what about everyone else? Do the arguments for a duty to represent mean only that *some* lawyer will have to accept an unsavory case, or that *no* lawyer can justifiably refuse?

Held suggests that, while everyone may be entitled to counsel, not everyone is entitled to the *best* counsel.

First-rate lawyers may—and, on Held's view, should—pick their cases with care, while mediocre lawyers, and all lawyers sharing the burden of representing unpopular clients, will occasionally get stuck representing clients with unjust or immoral ends. Likewise, Donagan's argument from human dignity does not seem to imply that every lawyer has an obligation to take every case, but that lawyers should be on guard that their private judgments do not conspire to leave any claims unrepresented. Wolfram specifies that his duty of rescue does not apply if many other lawyers are available and willing to handle the necessitous client's case.

It does seem, however, that if the last lawyer in town is *obligated* to represent a disreputable client, it is at least *permissible* for other lawyers to do so as well. It does not seem necessary to have in hand a certificate of unanimous refusal before accepting a morally problematic case.

Lawyers, like everyone else, are morally accountable for their actions, both private and professional. They are morally accountable for representing disreputable clients and morally accountable for refusing. In the absence of clear instructions from the professional code, it is left up to the individual lawyer to weigh his obligations to promote justice, to respect human dignity, and to preserve his own moral integrity. Each lawyer must face the hard question: will he be known for the company he keeps, or for the company he turns away?

The views of Virginia Held, Charles Wolfram, and Alan Donagan are taken from drafts of papers prepared for an ongoing research project on lawyers' ethics, conducted by the Center for Philosophy and Public Policy and the University of Maryland School of Law. For information about working papers available from this project, see p. 15.

Making Fathers Pay

In any examination of the profile of American poverty, one fact is especially striking. The overwhelming majority of children receiving welfare in this country do so because they are denied the support of their fathers. The absence of fathers from the home is the principal cause of AFDC (Aid to Families with Dependent Children) dependency, accounting for 85 percent of AFDC cases (widowhood, once the chief concern of the AFDC program, now accounts for 4 percent of cases). More than one out of six children are currently living apart from their fathers, and more than one third of those children live in poverty.

The proportion of absent fathers who fail to support their children is astonishingly high. Only one quarter of AFDC mothers have child support orders, and in about 80 percent of all cases mothers with support orders experience delinquency in payments owed. Roughly 40 percent of all divorced, separated, and single women never receive *any* support from the fathers of their children.

One might think that in the case of AFDC children much paternal negligence can be explained by poverty—if a poor father just hasn't got any money he can hardly mail off a monthly support check to his kids. It

is not true, however, that most of the fathers defaulting have low incomes: 60 percent of fathers with earnings below \$5000 pay nothing; 50 percent with income between \$5000 and \$10,000 pay nothing; and 52 percent with more than \$10,000 pay nothing. Fathers' records in providing payments do not seem to be much affected by their total earnings or by the ratio of support payments to those earnings.

Barbara Bergmann, Professor of Economics at the University of Maryland, has pieced together this cheerless picture of support for the families of "fatherless" children:

- The mother's own earnings account for roughly 50 percent.
- The contributions of other family members account for 15 to 20 percent.
- Welfare payments from the government make up roughly 30 percent.
- Payments from the children's father may make up 5 to 10 percent.

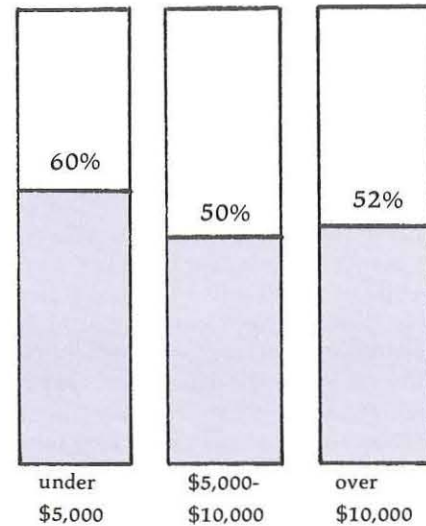
Bergmann estimates that the total monetary contribution which fathers make to children living apart from them averages only 2 to 5 percent of absent fathers' income.

Why Fathers Don't Pay

This pattern of delinquency and neglect raises some obvious and troubling questions. Why *don't* absent fathers pay toward the support of their children and why doesn't somebody *make* them pay?

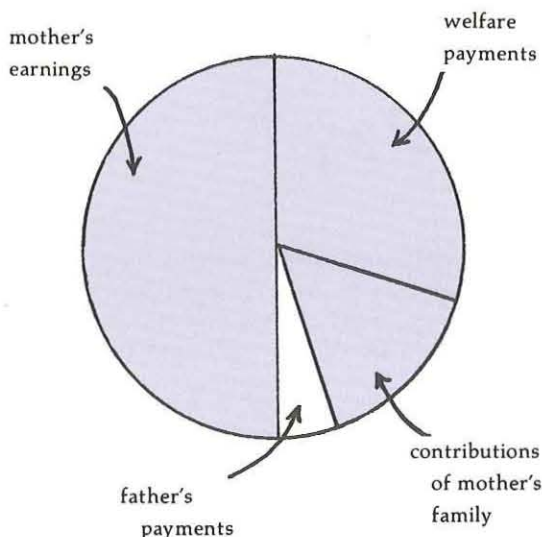
The principal reason explaining the statistics lies in the shortcomings of the legal system. Bergmann explains that there is most often no official govern-

DEFAULTING FATHERS, BY INCOME



Data relating to 1973 from the Michigan Panel Study of Income, analyzed by Jones, Gordon, and Sawhill

SUPPORT OF "FATHERLESS" CHILDREN



Data analyzed by Barbara Bergmann

mental effort put forward to enforce paternal child support. Even where "a divorced father has been ordered by a court to make payments for the support of his children, the court in most jurisdictions sets in motion no governmental mechanism that sends him bills, notes his payments and delinquencies, and moves against him if he is delinquent." It is the mother's own responsibility to initiate expensive legal proceedings to collect payments owed. "The process is so cumbersome," Bergmann concludes, "that obedience to support orders can almost be said to be voluntary." Most fathers, apparently, do not volunteer to pay.

Cases of illegitimacy pose still more sensitive problems. Although biological paternity testing is increasingly accurate (90 percent of non-fathers can now be excluded on the basis of blood tests), an identity problem of some magnitude remains. Furthermore, many mothers are reluctant to name candidates for paternity testing, or refuse to have any connections with the father. A man who can be shown to have fathered a child out of wedlock can be ordered to contribute to its support. But few mothers pursue this often painful and difficult option to a satisfactory conclusion.

Should Fathers Be Made to Pay?

There is little disagreement, one would hope, about the underlying principle of parental obligation: *both* parents have a duty to support their children to the best of their ability. While in practice our society seems to tolerate fathers' shirking this obligation, it seems clear to most that it is indeed an *obligation* they are *shirking*. The more difficult questions concern the moral legitimacy of invoking the power of the state to

enforce this obligation, and the desirability and feasibility of enforcement.

In *On Liberty*, John Stuart Mill wrote that to bring a child into the world without providing for its support "is a moral crime, both against the unfortunate offspring and against society; and if the parent does not fulfill this obligation, the State ought to see it fulfilled at the charge, so far as possible, of the parent." Mill commented sarcastically on the reluctance of his fellow countrymen to enforce paternal duties: "while this is unanimously declared to be the father's duty, scarcely anybody, in this country, will bear to hear of obliging him to perform it."

Though Mill was an ardent champion of liberty in his century, in ours his suggestion may seem to countenance excessive powers of intrusion on the part of the state. In our society, we decline to exact fulfillment of financial obligations in ways that interfere with personal liberty. Baruch Brody, Chairman of the Philosophy Department at Rice University, comments: "If I have voluntarily incurred a great many debts, society allows me to go bankrupt to clear them up. No one suggests that I be compelled to work for a period of time to satisfy those debts. If I sign a contract under which I voluntarily accept certain obligations, our law rarely requires that I actually fulfill those accepted obligations. . . . Why am I not compelled to do what I have agreed to do? A standard answer is that our social value-scheme places a high value upon human freedom."

The absent father's right to liberty, however, is certainly not absolute. Weighed against it must be the extreme deprivation his children may suffer, and the costs to society of supporting a tragically increasing number of paternally abandoned children. All children, it would seem, have a right to a decent share of food, shelter, health care, and education, a right which the state, in one form or another, must see respected and upheld. Martha H. Phillips, former Assistant Minority Counsel of the House Committee on Ways and Means, points out that "if illegitimate children and female-headed households become the predominant situation, as seems to be the case in several cities, our institutions will have to find alternatives or break under the weight of excessive responsibilities. It can be argued that we must return to enforcement of individual obligations if we are not willing to pay for public support of a large percentage of our children." In this context, a father's "right" to a life unencumbered by the consequences of his past choices and commitments cannot weigh decisively.

A second problem concerns the practical desirability of enforcing fathers' obligations. Phillips cites two arguments against enforcement. The first is that AFDC children themselves may be made actually worse off in the process. "It is argued that AFDC children will not only fail to receive increased support from vigorous enforcement, but that they will end up with less total income than before. Welfare benefits are reduced dollar by dollar by child support pay-

ments, leaving the same total income. But in many low-income communities, fathers provide occasional help, gifts, and emergency financial assistance which, not being reported, supplement rather than supplant the mother's welfare payment." Strict sanctions against delinquent fathers might encourage denial of paternity, thus depriving children both of additional financial assistance and of participation in a wider kin network. Second, enforcement of a father's obligations to his former family may drive his current family into poverty and onto the public relief rolls.

Few would defend the abstract justice of enforcement if it succeeds only in further victimizing poor children. Here more information is needed to assess the practical strength of these arguments. Certainly paternal assistance does not at present make a very significant contribution to welfare families. And even if enforcement makes no net positive contribution to child support, it would still seem fair to reduce the tax burden placed on parents who do meet their own familial obligations.

The final question addresses the feasibility of enforcement. Since 1975 the federal government has provided funds to support state efforts to establish paternity, locate fathers, and secure their payments to mothers receiving AFDC (and, on a voluntary basis, to non-AFDC mothers). Under Title IV-D of the Social Security Act, the Child Support Enforcement Program, \$365 million was spent in fiscal 1979 to collect \$1.3 billion. HEW reports that in fiscal 1978, paternity was established by the courts for 110,700 children; 1,142,000 parents were located; 315,700 support obligations were established; and the AFDC caseload dropped to its lowest level since August 1971. Phillips concludes, "This program has been both politically and substantively successful in increasing paternal child support payments." Another alternative, suggested by Bergmann, would be a mechanism for withholding support payments from fathers' paychecks, administered by the Internal Revenue Service and/or the Social Security Administration. Or a special tax could be imposed on absent fathers to provide support generally for all "fatherless" children.

Conclusions

In an era of budget cuts and retrenchments in social programs, governmental enforcement of paternal obligations seems increasingly desirable, from both a moral and practical point of view. Mothers have long enough been left with an unfairly heavy and lonely burden of child care and economic support. The time may have come for a greater number of fathers to shoulder their share.

The views of Barbara Bergmann, Baruch Brody, and Martha H. Phillips have been drawn from their contributions to *Income Support: Conceptual and Policy Issues*, edited by Peter G. Brown, Conrad Johnson, and Paul Vernier (Totowa, N.J.: Rowman and Littlefield, 1981). All statistics are taken from this book. To order, see p. 15.

Workshops and Briefings

In order to convene individuals from different backgrounds with a common interest in philosophy and public policy, the Center sponsors workshops and briefings for academics, policymakers, and others concerned with the philosophical implications of current policy choices. Three different kinds of programs are offered for the first half of 1982.

Third Thursday Briefings

February 18, 1982 • Robert Fullinwider
"Two Cheers for Quotas: The Moral Grounds of Affirmative Action"

Response: Charles Cooper, Special Assistant for Law and Policy, Division of Civil Rights

March 18, 1982 • Douglas MacLean
"Economic Approaches to Regulation: Suggestions for Applying Executive Order 12291"

Response: David Bodde, Assistant Director, Congressional Budget Office

April 15, 1982 • Henry Shue
"Human Rights: Is the Current U.S. Conception Too Narrow?"

Response: to be announced

Third Thursday Briefings, by Center research staff, will be held in Room 457 of the Russell Senate Office Building in Washington, D.C., from 4:15 to 6:00 p.m. These briefings are open to the public, free of charge.

Liberalism: Does It Mean Anything Today?

A three-day workshop on the political theory of liberalism will be held at the metropolitan-Washington-area campus of the University of Maryland, April 1-3. U.S. Sen. Paul Tsongas, Ronald Dworkin, Marshall Cohen, Christopher Lasch, Theda Skocpol, and other speakers from across the political spectrum will address questions raised by recent shifts in political allegiances. The conference will begin Thursday evening and conclude Saturday afternoon. The conference fee is \$75.00. Accommodations for Thursday and Friday nights are available in limited numbers at the University's Adult Education Center (single—\$34.13/night; double—\$42.00/night). Other accommodations at higher prices are available nearby. See information and registration form, facing page.

Teaching Philosophy and Public Policy

A three-day workshop on the teaching of philosophy and public policy will be held in Washington at Trinity College June 23-25. Daniel Callahan, Director of the Hastings Center, will be keynote speaker. Center staff with extensive experience in teaching a wide range of policy-oriented philosophical courses will conduct seminars and discussions on the moral and conceptual controversies generated by such issues as conscription, workplace safety, energy policy, and the environment. Emphasis will be placed on strategies for effective teaching about the underlying philosophical issues. The conference fee is \$75.00, not including room and board. See information and registration form, facing page.

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LE-1 "The Adversary System Excuse" by David Luban

LE-2 "The Moral Failure of Clinical Legal Education" by Robert Condlin

A complete bibliography of Center working papers is available upon request. The charge for working papers is \$2.50 per copy.

Food Policy: The Responsibility of the United States in the Life and Death Choices, edited by Peter G. Brown and Henry Shue (New York: The Free Press, 1977—\$14.95; paper, 1979—\$8.95).

Human Rights and U.S. Foreign Policy: Principles and Applications, edited by Peter G. Brown and Douglas MacLean (Lexington, Mass.: Lexington Books, 1979—\$16.95; paper, 1980—\$10.95).

Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, by Henry Shue (Princeton, N.J.: Princeton University Press, 1980—\$17.50; paper, 1980—\$4.95).

The Reverse Discrimination Controversy: A Moral and Legal Analysis, by Robert K. Fullinwider (Totowa, N.J.: Rowman and Littlefield, 1980—\$22.50; paper, 1980—\$9.95).

Income Support: Conceptual and Policy Issues, edited by Peter G. Brown, Conrad Johnson and Paul Vernier (Totowa, N.J.: Rowman and Littlefield, 1981—\$27.50).

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