

Freedom and Fairness: Regulating the Mass Media

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In this issue:

With the growing power of today’s mass media, we need protections *from* the press as well as protections *for* them. Does this mean that heightened regulation of the media may be justified? p. 1

A leading legal theorist examines arguments for and against allowing gender-segregated institutions p. 6

The Legal Services Corporation has been all but dismantled by the Reagan administration. Should it rise again? p. 9

Human beings think they’re better than everybody else. One philosopher says they’re right p. 12

A new working paper series is announced p. 15

Freedom of the press is the cornerstone of America’s image of itself, *par excellence* “what we have that the Russians don’t.” Only compare the striking difference between Soviet press (non) coverage of the Chernobyl disaster with searing, exhaustive U.S. press coverage of the Challenger explosion. Until the day of the funeral, the ill health of a Soviet premier is denied by government-owned newspapers; American papers embarrass the first lady by emblazoning the front page with elaborate diagrams of the president’s colon and prostate gland. Even when we feel that the press goes too far, jeopardizing national security for the sake of a scoop, we often find in the end that its vigilance was justified—most recently, when reporters’ unwillingness to “back off” from investigating the release of hostage David Jacobsen led to the uncovering of Contragate. We cherish the ideal of a press free from government interference.

Of late, however, the shining armor of the press has come in for some tarnishing. The increasing number of libel suits and the size of punitive judgments against the press show public wariness about its trustworthiness. Critics charge that reporters are not, indeed cannot be, impartial spokesmen for the Truth, but necessarily represent the interests of entrenched power groups, inspiring the quip that the only way to have freedom of the press is to own one.

According to Judith Lichtenberg, director of the Center for Philosophy and Public Policy’s project on news, the mass media, and democratic values, the

growing power of the mass media means that we need protections *from* the press as well as protections *for* them, and both, she argues, are consistent with the ideal of freedom of speech. Our commitment to freedom of speech has two different strands: the first is an opposition to censorship, based on a belief that "one should not be prevented from thinking, speaking, reading, writing, or listening as one sees fit"; the second, equally fundamental, is our conviction that "the purposes of freedom of speech are realized when expression and diversity of expression flourish." We want no voice to be silenced; we also want many voices to be heard. While "government intervention seems to intrude upon the first principle, . . . it may advance the second."

Both principles are codified in landmark Supreme Court cases. In *Miami Herald v. Tornillo* the Court struck down a Florida statute requiring newspapers to provide politicians, attacked in the course of an electoral campaign, with a free opportunity to reply. Freedom of the press here was equated with editorial autonomy. But the second strand in our commitment to free speech is represented by *Red Lion Broadcasting v. FCC*, in which the Court upheld the FCC's requirements that radio and television stations provide free reply time to those attacked in station broadcasts. Unlike their print counterparts, the broadcast media, which are subject to federal licensing, are required by the "fairness doctrine" to devote a reasonable amount of time to the coverage of controversial issues of public importance, and to do so fairly. While the asymmetrical treatment of the print and broadcast media is troubling to many, it is not clear whether the discrepancy should be resolved by treating the press more like broadcasting or treating broadcasting more like the press.

Proposals for heightened regulation of the press raise goosebumps in many, however, who view governmental intervention in the mass media as a last resort. They would rather implement the goals of broadening access to the press and stimulating robust wide-open debate of public issues by allowing the press itself to exercise professional responsibility or by relying on market forces. Only if these fail can government regulations be considered—and even then perhaps not. Whether or not we turn to the state to implement our commitment to a diversity of voices may depend crucially on how well it has been shown to work—what kinds of regulation work best, what kinds work at all.

Self-Regulation of the Press

Many journalists maintain that external regulation of the press is unnecessary, because the press itself is its own severest critic. Reporters, at least in popular imagery, are by nature independent and skeptical, delighting in controversy and muckraking, even when some of the muck to be raked lies close to home. In numerous ways the various organs of print and broadcast journalism bend over backwards to achieve fair and balanced coverage of thorny issues. A casual reading of the ombudsman's column in *The Washington Post* and

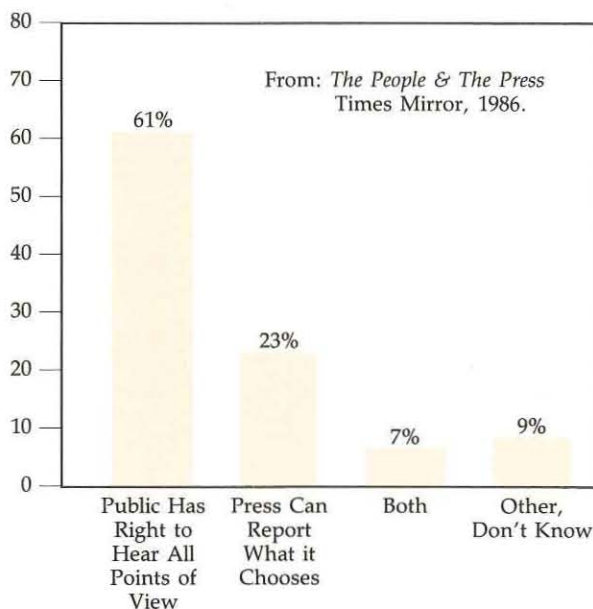
a week's worth of letters to the editor shows the willingness of a major paper to print inside accounts of its own failures and hostile outside criticism. Thus Carl Sessions Stepp, a member of the journalism faculty at the University of Maryland, argues that "journalism is a craft peculiarly suited to internal reform. . . . Journalists are propelled by the First Amendment syndrome, a set of beliefs (maybe even a mythology) that, via broad acceptance, assumes a self-fulfilling power that can drive the profession."

Several recent trends, however, which Stepp himself notes, undermine the journalistic heritage on which his hopes for reform are founded. The first of these is intensified concentration of media ownership. Twenty corporations control more than half the 61 million daily newspapers sold every day; twenty corporations control more than half the revenues of the country's 11,000 magazines; three corporations control most of the revenues and audience in television, ten corporations in radio, eleven corporations in all kinds of books, and four corporations in motion pictures. Continuing concentration drastically centralizes control over the forum in which voices are heard and likely limits access to it.

A second troubling development is the increasing intrusion of non-news corporations into the news enterprise. As Stepp points out, "The press is part of big business, and, increasingly, it is owned and operated by big business corporations that may have only incidental interest in journalism and that may be controlled

FREEDOM OF THE PRESS: A POLL

Question: What does freedom of the press mean to you? Does it mean: That the public has a right to hear all points of view? That the press can cover and report what it chooses? Or something else?



by individuals without grounding in journalistic principles." Finally, the proliferation of broadcast and cable outlets forces the news media to compete incessantly for consumer time, thus driving public affairs coverage further toward entertainment.

Even in the face of these challenges, Stepp still calls for a renewed commitment to professional responsibility on the part of the media themselves, rather than government regulation. In his view, regulation would only make matters worse: "The system is animated by the ideal of First Amendment freedom from government interference; government intrusion would necessarily subvert that ideal and demolish the fundamental assumption on which the press operates. It is hard to imagine that the ensuing system would be an improvement."

But Owen Fiss, Professor of Law at Yale University, fails to see an inevitable tension between government regulation and professional accountability: "Why is it assumed that state regulation of the media and professional independence are necessarily inconsistent? It seems to me that it all depends on the nature of the regulation. Indeed, the fairness doctrine can be seen as strengthening and perhaps even generating the resolve of reporters and editors to act in a way that furthers the democratic aspirations of the First Amendment. As we saw from *Brown v. Board of Education* and the civil rights movement of the sixties, exemplary 'folkways' can sometimes be nourished—and maybe even created or legitimated—by strong exercise of state power." He concludes that professional norms alone are "frail and weak, compared to the challenge."

Let the Market Do It

If self-regulation cannot give us the kind of media we require in a democracy, what about letting the people themselves decide what kind of media they want by what kind of media they watch? Let them vote, so

By allowing the media to be driven by ratings and advertising, we will at least be giving the people the media they want, indeed, the media they deserve.

to speak, with their remote control buttons. Originally regulation of broadcasting was justified by appeal to scarcity of broadcast frequencies; the fairness doctrine was devised to correct the "market failure" produced by the physical limitations of the electromagnetic spectrum. Now, with the advent of cable and satellite technology, scarcity has given way to abundance, oligopoly to cornucopia. With this impediment to a freely functioning market removed, market forces should ensure that if people in fact want a certain kind of news

coverage it will be provided; if in fact they don't, then on one view of democracy the loss is not to be regretted. By allowing the media to be driven by ratings and advertising, we will at least be giving the people the media they want, indeed, the media they deserve. By accurately mirroring popular tastes, ratings are a way of empowering the people to have the final say on television programming.

We might find ourselves appalled, however, at what popular sovereignty in this context really means. Fewer

The "democratic" defense of ratings-driven news misunderstands what democracy really requires.... It treats viewers not as democratic citizens at all but only as consumers tuning in to be amused....

people watch the news every night than watch "Wheel of Fortune." The ratings wars between network news programs have been blamed for the further crumbling of the time-honored wall of separation between news and entertainment and the resulting replacement of hard news coverage with fluffier "lifestyle" stories. (As one network news executive asked, "Do people in Lubbock, Texas, really need to know about the latest vote in Ways and Means?") Interest in events of the day gives way to interest in what sweater Dan Rather is wearing and what sign-off phrase he uses.

According to Jeffrey Abramson, Associate Professor of Political Science at Brandeis University, the "democratic" defense of ratings-driven news misunderstands what democracy really requires; it assumes that "the only news democratic citizens need is news that pleases them—news that they watch for the same reasons that they watch a situation comedy. But this is to treat viewers not as democratic citizens at all but only as consumers tuning in to be amused.... (Such news) can flatter the culture but not examine it; it can please viewers but not make them think."

Abramson also objects that the only audience that matters to Nielsen ratings is the mass audience—measured in forty or sixty million persons. "All power goes to that audience and even a show that attracts, say, thirty million persons in a time slot where competitors are bringing in forty million persons is in danger of cancellation. A television documentary such as PBS's history of the civil rights movement is expected to hold an audience of 1 million persons per segment; but this is a virtual no-show as far as commercial television is concerned."

Each network thus pursues the same mass audience with the same fare in each time slot. As a result, Abramson concludes, "The nation can for the most part conduct its business on television only on borrowed time; the economics of commercial television are

pushed solely by the imperative to capture the largest possible audience for advertisers. This imperative typically stands against the realization of democratic ideals we commonly associate with diversity in programming or access to the marketplace of ideas for the widest possible array of the contending voices."

Is Regulation the Answer?

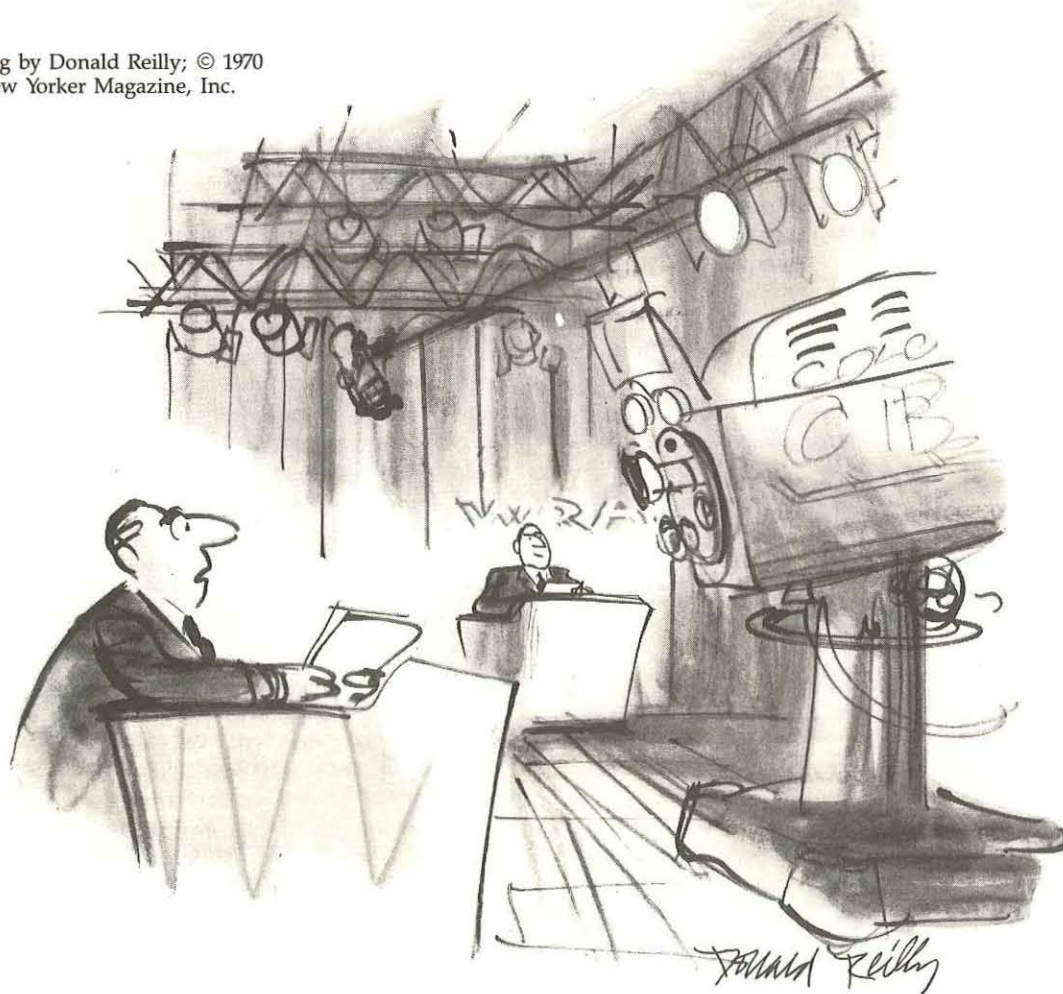
Considerations such as these lead us to turn to the state for a remedy, for government, via such provisions as the fairness doctrine, can mandate broader access to the media and enhance the quality and breadth of public debate. But now the question arises: how can we trust the government to be a watchdog of the media when a chief function of the media is to be a watchdog of the government? If the government is empowered to tell the media how to run their business, won't this compromise the fundamental adversary relationship between the two?

The appropriate response here, according to Lichtenberg, "is not that we can trust government more than

opponents of regulation believe, but that we can trust others less. Regulation is needed just because private power poses a grave threat to the independence and integrity of the press." Lee Bollinger, Professor of Law at the University of Michigan at Ann Arbor, states simply: "Our concern is with power—that is, the ability to command an audience more or less exclusively—and that is a concern that is not diminished by the way in which that power is achieved. It should make no difference to us, in other words, whether the power is the consequence of physical limitations associated with the use of that medium . . . or the result of limitations of the economic system (concentrations of economic power) or the result of clear market success in solidly appealing to a segment or majority of the community. It is the risks associated with power over access to the marketplace that raise the sense of alarm and not the source of that power."

But isn't the state equally subject to the influences of social and economic power that it would seek to control? A democratic government is responsive to the

Drawing by Donald Reilly; © 1970
The New Yorker Magazine, Inc.



"So much for my version of the news. And now over to my colleague for the same news but with a different set of biases, hangups, and axes to grind."

public will, which often means to private money, and hence to privileged power groups. Stepp argues, "If one defines the problem of access and diversity as seeking voice for perspectives other than those of a privileged and powerful minority, then government seems an ironic place to turn for help. Government is by definition integrated with the power class in American society and it is axiomatic that the press already gives greater voice to the 'outs' than the government does or is likely to."

Fiss concedes the danger that the state "will be the victim of the very same forces that dominate public debate and not counteract the skew of the market but rather reinforce it." He maintains nonetheless that "There is still a difference worth observing between a public official and a program manager of one of the networks (or an editor of a newspaper). However imperfect the systems of accountability are in the public sphere, at least they exist." Fiss concludes, "We turn to the state because it is the most public of institutions and because it alone has the power...to counteract, or modulate, the influence of the market and the constraint that it imposes on our policies."

Does Regulation Work?

The final question is a pragmatic one: does regulation work? If there is no objection to it in principle, there may still be objections in practice. Does it in reality enhance or stifle robust, wide-open debate? Does it foster or chill discussion of public issues?

How successful—and how intrusive—regulation is depends on the form it takes. Two broad approaches to regulation of the media are usually distinguished. *Content regulation* makes specific demands of press institutions to cover certain kinds of issues, to cover them in a certain way, or to provide access to certain points of view. (The fairness doctrine is the most prominent example.) *Structural regulation* instead builds rules and constraints into the structure and organization of the media taken as a whole.

Most press resistance has been mounted against content regulation, as both dangerous and ineffective. Sara Engram, Deputy Editorial Page Editor for the Baltimore *Evening Sun*, reflects the sentiments of many journalists in arguing that the fairness doctrine ends up working against the goals it is designed to achieve: "Instead of encouraging enlightening discussion of matters of public interest, the fairness doctrine provides a crutch for the kind of journalism that can be described as, at best, terminally bland." In her view, the fairness doctrine "can—and does—encourage a constricted notion of fairness that ultimately limits the public debate. . . . I suspect that in practice 'each side' quickly becomes 'both sides' and the broadcaster can move on to the next 'issue' satisfied that he has gotten the FCC off his back."

Bollinger replies, however, that evidence for the alleged "chilling effect" of the fairness doctrine rests largely on broadcasters' own testimonial claims, which are likely to be self-serving. He points out that the often

overlooked first provision of the fairness doctrine, which requires broadcasters to provide coverage of public issues, could be used to overcome any chilling tendencies of the requirement of fairness. Finally, he insists that any amount of chilling must be balanced against the enhancement of speech provided by the expanded number of voices heard.

But has the fairness doctrine, as it is now enforced, enhanced public debate significantly? Henry Geller, Director of the Washington Center for Public Policy Research, charges that the FCC has "failed miserably" in requiring broadcasters to devote a reasonable amount of time to issues of public concern: "In a half-century of regulation, it has never denied a license for failure to deliver sufficient news or public affairs. . . . The comparative renewal process is just as great a charade. The incumbent always wins, no matter what its past record." The fairness doctrine has shaped broadcasters' concern more by the shadow it casts than by the stick it wields.

We might do better, then, to rely on structural approaches to regulation, such as rules prohibiting multiple ownership of news organizations or designating certain cable channels for public access. Economic incentives can be offered to news organizations to promote diversity or provide services that are unlikely to be offered in the unrestricted marketplace. Geller proposes eliminating the concept of broadcasters as public trustees, bound by the fairness doctrine, and in its place exacting from station owners a modest "spectrum fee," to be used to subsidize public affairs and similar programming by public radio and television stations, who are willing and able to provide the high-quality broadcasting that other stations eschew. This proposal faces the objection that only a miniscule proportion of the population tunes in to public stations and so the majority would still lack exposure to thorough, thoughtful treatment of the issues of the day. But their deprivation would be self-chosen, and in any case, most people already avoid public affairs programming assiduously.

Conclusion

The press has had a long history of resisting governmental regulation and defines itself by its adversary role to government. But as it grows more powerful, the government may be needed as an adversary to it, and, in the late twentieth century, both may be needed as adversaries to powerful economic interests. The question we should be asking, then, is not whether regulation of the press is permissible, but what kinds of regulation work most effectively to enhance the diversity and quality of public debate in our democracy.

The views of Judith Lichtenberg, Carl Sessions Stepp, Owen Fiss, Jeffrey Abramson, Lee Bollinger, Sara Engram, and Henry Geller are taken from their essays in *Democracy and the Mass Media*, edited by Judith Lichtenberg, Maryland Studies in Public Philosophy (forthcoming). The book culminates a two-year project on "News, the Mass Media, and Democratic Values" funded by the John and Mary R. Markle Foundation.

Private Clubs and Public Values

In a celebrated 1959 law review article, Columbia law professor Herbert Wechsler expressed his misgivings about the Supreme Court's repudiation of "separate but equal" doctrine in racial segregation cases. At the close of the article, Wechsler put what were obviously intended as rhetorical questions: "Is there not a point . . . in the statement that 'if enforced separation stamps the colored race with a badge of inferiority' it is solely because its members chose to put that construction upon it? Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is by judgments predominantly imposed by males?"

A quarter century later, those questions no longer appear either rhetorical or adequate to capture the complexities of gender segregation. Not all women resent all forms of separatism, and American society remains deeply divided over which forms are invidious. To defenders of sex-segregated institutions, the pre-eminent issue is not equality but liberty, and the values of personal identity and cultural diversity that underlie it. Moreover, some feminists have questioned women's focus on getting in, as opposed to doing in, men's clubs. From this perspective, the response to exclusion should be a kind of Groucho Marx stoicism. Any association that bans women is not the kind women should want to join.

For many individuals, however, the issues surrounding access to gender-segregated institutions are not so readily dismissed. As a practical matter, such clubs constitute a declining but still substantial presence on the social landscape. Membership in the associations of Elks, Moose, Lions, and Eagles totals well over five million, and smaller, more elite institutions provide forums for highly significant political and commercial interchanges. As a symbolic matter, exclusion of women, like that of racial or religious minorities, carries a stigma that affects individuals' social status and self-perception. And as a theoretical matter, separatism poses questions that have been at the core of feminist legal struggles for the last century: questions about public and private, sameness and difference, and formal versus substantive equality.

Legal Challenges

Almost all of the legal challenges to sex-segregated associations have been directed at all-male groups. Such challenges have met with only partial success. In general, the membership policies of private organizations are not subject to constitutional scrutiny. Title II

of the federal Civil Rights Act bans discrimination in public accommodations on the grounds of race, religion, or national origin, but not sex. Although many state public accommodations laws include prohibitions on gender discrimination, virtually all of these statutes do not apply to private associations. Accordingly, their effect on sex-segregated clubs has been limited. The most significant progress is likely to come only in jurisdictions willing to give broad construction to the meaning of "public."

In 1984, the Supreme Court gave cautious approval to such an approach, although the terms of its holding do not promise any fundamental assault on sex-segregated associations. *Roberts v. Jaycees* involved a challenge to the Jaycees' policy of permitting full membership status to all males between the ages of eighteen and thirty-five, while granting only "associate" status to females, a status that conferred no power to vote, hold office, or receive awards. Justice Brennan, speaking for the majority, argued that the state's interest in eliminating discrimination outweighed the First Amendment rights of association asserted by Jaycees' members. In so holding, Justice Brennan began by noting that the Court has traditionally protected association in two senses. One line of decisions has shielded certain intimate human relationships against state intrusion in order to preserve fundamental elements of personal liberty. A second line of precedents has recognized rights to associate in order to engage in other constitutionally protected activities—speech, assembly, and religious expression. As to the first interest, the Court concluded that the Jaycees had not exemplified the kind of intimate attachments warranting constitutional protection. So, too, although a "not insubstantial" part of the Jaycees' activities constituted protected expression on political, economic, cultural, and social affairs, the Court found no basis for concluding that the admission of women as full members would alter or interfere with that expression.

A threshold difficulty with this approach lies with the intimate/non-intimate distinction. Under the framework endorsed in *Jaycees*, the ultimate question is whether an association seems more an extension of home or market. That leaves large numbers of affiliations occupying an awkward middle ground, and where any particular one will fall on a particular court's continuum is inevitably indeterminant. Certainly none of the criteria the Supreme Court has identified—size, selectivity, and exclusivity—will yield conclusive distinctions. For example, the Minnesota Supreme

Court labeled the Kiwanis as "private," although that organization's size, functions, and recruiting techniques were comparable to the Jaycees'. Moreover, missing from the *Jaycees'* analysis was any acknowledgment of the values that separatism might serve, independent of an association's size or exclusivity. The dynamics of mixed and single-sex organizations differ, and separatism in some contexts may present opportunities for self-expression and collective exploration that would be inhibited by sexual integration.

Equally disquieting was the Court's ready dismissal of the organization's expressive claims. Throughout the litigation, the Jaycees asserted that women might have different attitudes about various issues on which the organization had taken a public position, particularly its campaign supporting President Reagan's economic policies. Justice Brennan dismissed such claims as "social stereotyping." The problem with that analysis was not simply its failure to acknowledge a wealth of gender-gap studies supporting the Jaycees' argument. A more fundamental difficulty was the implication that access to an all-male institution may depend on whether female members would endorse its existing values. If the price of admission is a promise of assimilation, that strategy is not one all women's rights advocates will be prepared to embrace.

Yet the case for full female participation in associations like the Jaycees does not depend on a denial of sex-based differences or the value of single-sex affiliations. Rather, it entails a more contextual assessment of the significance of those differences and values in various cultural settings. Inclusion of members with a different perspective might enrich, rather than impair, the organization's expressive activities. One can concede that sexual integration might in some measure affect an association's philosophical cast or social dynamics, without conceding that its basic functions would alter. That seems particularly likely in cases like the Jaycees, where female associates were involved in most civic functions. The second-class membership policies at issue appeared more concerned with perpetuating male hierarchies than male sanctuaries.

In any event, these organizations are public in a sense that conventional legal frameworks fail to acknowledge. The exclusion of women from spheres conventionally classified as private contributes to women's exclusion from spheres unquestionably understood as public.

The perpetuation of all-male clubs has worked to women's disadvantage on several levels. The most direct harms involve lost opportunities for social status, informal interchanges, and personal contacts that such associations have traditionally provided. In a society where men obtain almost one third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued. Nor should their political significance be overlooked. Elite all-male associations such as the Bohemian or Cosmos clubs have often been the locus for private discussions that later emerged as public policy. Moreover, sex dis-

Dunn Photographic Associates, Inc.



The Cosmos Club

crimination by private institutions carries substantial symbolic freight. Relegating women to separate dining rooms, separate entrances, or separate organizations is an affront to individuals' dignity and sense of self-worth.

In responding to this line of argument, defenders of all-male institutions frequently maintain that women do not, in fact, experience separatism as degrading, but rather enjoy having their own clubs or dining facilities. Such rejoinders, which resemble explanations often given for excluding racial or religious minorities, obscure a fundamental distinction. Separatism imposed by empowered groups carries a different social stigma and instrumental significance from separatism chosen by subordinate groups. Exclusivity of the latter kind does not convey inferiority or serve to perpetuate existing disparities in political and economic power. By contrast, the forms of institutional separatism chosen by dominant groups tend to reinforce their privileged position and the stereotypes underlying it.

The explanations that private club members commonly advance for excluding women leave little doubt about the lingering potency of such stereotypes. It is variously claimed that a female presence would alter club demeanor and decor. As one representative club manager argued, "If a man has a business deal to discuss, he doesn't want to sit next to a woman fussing about how much mayonnaise is in her chicken salad." Yet when sexist stereotypes dictate association policy, they tend to become self-reinforcing. No women are present to counteract the assumption that males' luncheon conversation focuses on mergers while females' fixates on mayonnaise. Men who are uncomfortable associating with women in such social settings

will never become less so if discomfort remains a valid justification for exclusivity. And the males who have trouble treating women as equals at clubhouse lunches are unlikely to be free of such difficulties in corporate suites. As long as women do not "fit in" in the private worlds where friendships form and power congregates, they will never fully fit in in the public sectors with which the state is justifiably concerned.

As long as women do not "fit in" in the private worlds where friendships form and power congregates, they will never fully fit in in the public sectors with which the state is justifiably concerned.

The boundary between public and private is fluid in still another sense: most "private" clubs depend heavily on public support, largely in the form of tax subsidies and municipal services. Clubs gain tax exemptions by claiming to be private organizations in which "substantially all" activities are for pleasure, recreation, and other non-profit purposes, while members (or their employers) deduct dues and fees as "ordinary and necessary business expenses." This privileged status points up the difficulties of seeking to dichotomize organizations as either commercial or non-commercial, public or private.

An Alternative Framework

An alternative approach to single-sex organizations will require a reconceptualization of public and private. The focus ought not simply to be on an organization's intimate or expressive character, but also on the totality of its public subsidies and public consequences. Rather than focusing on any single nexus of state involvement, courts and legislatures should consider the aggregate of governmental and commercial entanglements. Grants, licenses, and tax subsidies by the state, as well as reimbursement of expenses by employers, could serve as legitimate bases for governmental prohibitions. The state could also withdraw support in the form of tax exemptions and deductions for sex-segregated organizations, both public and private. Since employers provide an estimated 1.6 billion dollars in annual support to private clubs, and 40 to 50 percent of the revenues of certain elite men's associations, the cumulative effect of such strategies might be substantial.

The more categorical the approach, however, the more over- and under-inclusive it is likely to prove. Withdrawal of support for any single-sex association comes at a price. Subjecting associational policies to state oversight increases the risk of harassing litigation and narrows the range of private choice. We have,

however, managed to prohibit racial discrimination by private association without the disabling social consequences that critics often envision. The issue is not simply whether single-sex associations are beneficial, but whether experiences of commensurate value are available in mixed environments with fewer social costs.

The implications of categorical policies for women's groups present a harder case. It would, of course, be possible to create exemptions for all-female clubs. Such a framework would be asymmetrical with respect to sex but not with respect to power. And from the perspective of reducing gender inequality, it is power that matters. From a prudential perspective, however, it is risky to argue for a policy that explicitly declares the value of female but not male bonding.

Yet even if a categorical approach works to encourage more women's groups to adopt formal postures of gender neutrality, it is by no means clear that their composition would in fact change. As women are more fully integrated into male organizations, the need for some all-female associations also may diminish. Moreover, one advantage of denying favorable tax treatment for single sex associations rather than prohibiting them outright, is that women's organizations would be less adversely affected than men's institutions; fewer are as dependent on business expense deductions.

A final problem with legal strategies lies in their inevitable under-inclusiveness. The law is too crude and intrusive an instrument to reach many of the most influential separatist networks. Poker games, golfing groups, and luncheon cliques that form along gender lines doubtless play a more substantial role in limiting women's opportunities than any one of the organized entities susceptible to legal intervention. Even in those

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organized affiliations, access does not necessarily ensure acceptance. Getting women into the right clubs is far easier than getting them to the right tables. But access is a necessary first step. While we cannot eliminate social segregation by legal fiat, we can at least seek to minimize its crudest form and the social legitimacy that underlies it.

— Deborah L. Rhode

Deborah L. Rhode is Director of the Institute for Research on Women and Gender and Professor at Stanford Law School. This article was condensed and adapted from her article "Association and Assimilation," *Northwestern Law Review*, Symposium on the First Amendment (forthcoming) and from her book *Justice and Gender* (Harvard University Press, forthcoming).

Should Legal Services Rise Again?

The Legal Services Corporation (LSC), founded by Congress in 1974 to provide legal services for poor people, has been reduced since 1980 to a shell of its former self. Conservative critics from Spiro Agnew to Ronald Reagan charged that LSC lawyers were abusing their charter to enact a liberal agenda. Under the Reagan administration, the LSC's budget has been slashed and funds redirected to conservative causes. An unsympathetic board and several scandals have harmed morale among legal aid lawyers. Finally, strict limitations have been imposed on the kind of activities in which LSC-funded lawyers could engage, chief among these very stringent requirements on filing class actions against the government.

Class action suits have become an emblem for opponents of everything they find objectionable about the LSC. In such suits (it was believed), lawyers recruit a purely nominal plaintiff-of-record representing a class of litigants who have never heard of the case and who may very well oppose the litigation; on behalf of this class, the lawyers proceed to demand widespread restructuring of social institutions, or extravagant damage awards, thereby enacting their own social agenda through the courts in subversion of the democratic will as expressed through legislatures or executive action.

So goes the argument. In reply, LSC supporters point out that only a few percent of the litigation entered by legal aid programs has involved class action suits or attempts to restructure institutions. (In the legal services vernacular, such cases are called "impact" cases.) The overwhelming bulk of the LSC caseload has been individualized service—divorces, child abuse or neglect cases, landlord/tenant cases, Social Security, etc. (In the vernacular, this kind of work is sometimes called "handing out band-aids.")

Both sides of such a debate presuppose that there is something suspicious about impact work. I wish to argue that this presupposition is wrong—that there is absolutely nothing illegitimate about impact work by legal services lawyers, even highly politicized legal services lawyers. On the contrary: law reform of this sort is at once an admirable attempt to further social justice and a professional responsibility to help more clients rather than fewer. It is precisely what lawyers ought to be doing.

Let me answer four objections to it in turn.

The Taxation Objection

To be sure, there are strong arguments for the presupposition that (too much) impact work is illegitimate.

There is, first of all, the argument that it is wrong to use the tax money of people opposed to liberal aims and programs to further them.

This objection seems at first glance to be merely a stupid gripe. People don't like to pay taxes; they do like to complain about them, and about how revenues are spent. As a matter of fact, however, no one can seriously class the dollar-a-year per capita that goes to legal services as (in the words of one well-know critic) an "incredible taxpayer rip-off."

Rather, talk of taxes is a stand-in for a less frivolous argument, based on the ideas (1) that governmentally funded agencies in some sense "stand for" public values and decisions, (2) that such agencies should as a consequence not take sides on hotly contested political issues, and (3) that impact litigation does take sides. The phrase *how my tax dollars are spent*, that is, is a surrogate for *what my government stands for*. And the Taxation Objection then amounts to the claim that the government should not stand for anything as controversial as LSC-funded impact work.

If, however, it is wrong to spend the tax dollars of opponents of integration on attempts to enforce it, it is equally wrong to spend racial minorities' tax dollars to support discrimination. In fact, anything that government does or fails to do about a controversial issue implicates it in values that are antagonistic to one side or the other; any time the government is a party in a lawsuit it is "taking sides" against those who hold its adversary's values. As it stands, then, the Taxation Objection fails to show that governmentally funded legal service work, even when politically controversial, is illegitimate.

The Equal Access Objection

Insofar as impact work diverts legal aid lawyers from handing out band-aids, it might be thought that it is actually inimical to the ideal of equal access to the legal system. For then legal aid officers will turn away clients with "band-aid" problems because the lawyers are too busy filing class action suits, or whatever. If a legal aid office makes a decision to target, for example, public housing cases at the expense of others, legal problems not "on target" will not receive counsel; this is in effect to deny these problems equal consideration by the legal system. Targeting, to put the point another way, treats clients aggregatively rather than individually—a client's problem is addressed only if enough other clients share the same problem. What, then, has become of the ideal of equal access to the legal system that is the *raison d'être* of legal aid?

The answer is that the ideal had its budget cut. Had there been enough money to maintain a larger staff, the office could have taken all cases; as is, some sort of selection or triage principle must be applied. The decision to target a goal such as public housing can be justified by considerations such as the importance of shelter as a basic need and the greater number of people benefited. At this point the ball is in the objector's court: what is her candidate for a triage principle?

If the equal access objection is taken seriously, the only candidate for a triage principle is first-come-first-serve or even a "lottery," for nothing about a potential client's case can be taken into account except the bare fact that the client has requested legal services. First-come-first-serve treats everyone's problem as of precisely equal worth to everyone else's. Never mind that it may lead to a very inefficient allocation of scarce legal resources. Never mind that the total service thus rendered to the poor population has little to do with its net needs and desires. Never mind that it's crazy—it may be crazy, but it's fair.

Clearly, however, it is too crazy to be fair. By ignoring differences in urgency among cases, first-come-first-serve ignores the connection between access to the legal system and people's reasons for wanting access to the legal system. And once their link with human projects and values is broken, it becomes hard to see why legal services should exist at all. A woman faced with court-ordered sterilization needs a lawyer faster and more desperately than does her neighbor who wants to make Montgomery Ward honor the warranty on her dryer; first-come-first-serve, however, in effect puts both their names in the hat. It disconnects demands for legal aid from needs for legal aid, and thus abdicates the very

judgment on which the importance of legal aid rests.

If urgency can be taken into account, however, it is difficult to see why a legal aid office's decision to target an issue such as public housing is ruled out. One dimension of urgency—"intensive urgency"—concerns the importance of the interests at stake; another dimension of urgency—"extensive urgency"—concerns the number of people affected. Targeting by a legal aid office usually means going after cases that are urgent in both these senses. The purpose for seeking law reform or high impact, instead of handing out band-aids, is that the former will help more people in more important ways. This, I submit, is quite a reasonable ground for choosing cases.

The Client Control Objection

A third objection is that in impact work lawyers rather than clients are calling the shots, using the legal system to achieve ends that the lawyers have chosen independently of the wishes of the people they ostensibly represent. Let me begin by conceding the accusations that lie at the basis of this objection: that public interest lawyers bent on law reform sometimes recruit clients as plaintiffs; that they occasionally pressure their clients on behalf of The Cause; that they may even file class actions when a large part of the class—maybe even a majority—opposes them.

What I do not concede is that there is anything wrong with this.

This is clearly so in the question of lawyers recruiting clients for law-reform activities. It does not matter whose idea the project is: all that matters is that the client, like the lawyer, becomes committed to the project. There are obvious reasons why a plaintiff might have to be recruited by lawyers in a law reform case. Potential plaintiffs might not know that what is being done to them is illegal or may assume that action against it is out of the question. It takes guts to litigate against an institution that has its thumb poised over your eye.

The accusations that lawyers rather than clients have seized control are more troubling. Consider an example. Ms. *P* belongs to a tenants' organization and agrees to be the plaintiff in a suit against *D* Real Estate ("unhealthiest tenements in town"). *P* is represented pro bono by *L*, a committed tenants' rights lawyer who hopes that *P* v. *D* will set an important precedent. *D* does not want the precedent and tries to "buy out" *P* with a cash settlement before the trial. It is clearly in *P*'s personal interest to accept the offer. Should *L* counsel her to do it? If she wants to accept it, should *L* nevertheless try to pressure her into going to trial? Who is *L* representing—*P* or "the cause"?

Similar problems can arise in class action suits. When the "class" in such a suit is itself divided on the issue at hand, lawyers will be acting in opposition to the wishes of some—perhaps even a majority—of the very people whose interests they claim to represent. In several cities, for example, NAACP attorneys' commitment to racially integrated schools has led them to file

From a 1981 Conservative Caucus direct mailing:

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Especially on issues like taxes, welfare, crime, busing, defense, quotas, food stamps, OSHA and energy.

One big reason for liberal victories and conservative defeats is the taxpayer-funded Legal Services Corporation...

The LSC funds a nationwide network of liberal activists, who use your money to... lobby for new laws and administrative rulings which will further socialize America... [and] get liberal judges to write new laws in court that can't be passed in Congress.

Our goal is to completely eliminate the Federal Legal Services program and to reject any and all funding for it.

Remember the only battles we lose are the ones we fail to fight.

Sincerely,
Howard Phillips
Chairman

class actions even though black parents preferred upgrades in the quality of education in all-black schools over integration.

In terms of the bar's ethical codes, both problems involve forbidden conflicts of interest between lawyers and their clients. I want to suggest, however, that lawyers and their clients can engage in a political mode of action that differs significantly from the ordinary lawyer-client relationship.

When a client engages the services of a lawyer for everyday business, they enter a contractual relationship, in which the element of reciprocity consists in the client's promise to pay the lawyer in return for services. At that point, however, the lawyer becomes the client's *agent*, and the duties are no longer mutual. An agent has a primary one-way commitment to her principal and a derivative one-way commitment to successfully carrying out the various pieces of business transacted on behalf of the principal.

When attorney and client are engaged in politicized public interest law, by contrast, their relationship is one of mutual political commitment. Political allies have a primary one-way commitment to their political cause and a derivative *mutual* commitment to each other, undertaken freely and reciprocally by people who regard each other as political equals.

Political allies have a primary one-way commitment to their political cause and a derivative mutual commitment to each other, undertaken freely and reciprocally by people who regard each other as political equals.

Return now to Ms. *P*, the member of the tenants' organization who now wishes to settle her precedent-setting case against *D* Real Estate because *D* has made her an offer she doesn't want to refuse. Ms. *P* engaged in the suit to further the goals of the tenants' organization, and lawyer *L* represented her pro bono because of his commitment to those goals. At this point, Ms. *P* is on the verge of betraying *L*, her other allies in the tenants' organization, and the cause for which they were all working. Since *L*'s relationship with her is a relationship of mutual political commitment, of primary commitment to the cause and only secondary commitment to Ms. *P*, it is entirely appropriate for *L* to pressure her to decline the settlement even though doing so is not in her personal interest.

Problems of class conflict in class action suits can be resolved by a closer look at what it is for a lawyer to represent the will of a political group. Who is the NAACP's client class? Is it the black parents in the city that the lawyers are trying to desegregate, or is it all American blacks, whose interests in racial integration

may be adversely affected if large local pockets of segregation are left undisturbed? More importantly, the NAACP may have to take into account the interests of future generations of blacks in and out of the city. If this intergenerational conflict of interest is real, the demand for representativeness cannot require the lawyers to conform their actions to the wishes of the parents.

Yet the NAACP lawyers must side with one class or the other, since if they do nothing they are doing exactly what one part wants them to do. It seems to me that they have only one recourse, and that is to do what, in their considered judgment, is the best thing. We must not forget that many black parents in Topeka wanted school improvement rather than integration and opposed the NAACP's suit in *Brown v. Board of Education*. Had the NAACP lawyers refused to act in cases of class conflict and division, segregated schools would still be legal today.

The Objection from Democracy

The Objection from Democracy says that it is wrong for groups that are unable to get what they want through ordinary democratic means to frustrate the democratic will by obtaining in court what they cannot obtain in the political rough-and-tumble. In a democracy, law is to be made by majoritarian legislatures, and the role of the courts is restricted to protecting the rights of minorities, not making law themselves.

But in reality legislatures themselves do not work on majoritarian principles. Democratic control over the action of elected individuals is exercised only indirectly, through pressure groups or interest groups, which need not represent the viewpoint of electoral majorities. The most effective pressure groups are often the best organized, best connected, and most affluent special interests, and these are not likely to reflect the majority point of view. The costs for majorities to organize are prohibitive; it is simply too tempting for each individual to "free-ride" on the time and energy invested by others. Between 80 and 90 percent of public TV watchers make no voluntary contribution to its funding, even when they agree that it is a bargain at the price. Political organization is less of a bargain and the price is higher.

Critics often lose sight of the fact that the class-action device was introduced precisely to overcome such economic blocks to organization. Their use can enhance democratic decision-making by allowing courts to police legislative failures based on the free-rider problem. They give a voice to the silent majority. And if it is democratically appropriate for the courts to intervene in the political process because it has failed to be democratic, then it is appropriate for lawyers to advocate such intervention. It is a service to democracy, not an assault on it.

—David Luban

This article is excerpted and adapted from David Luban's forthcoming book *Lawyers and Justice: An Ethical Study*.

Defending Human Chauvinism

My title is a little misleading. Although I shall be offering certain thoughts in defense of a position that some would regard as "human chauvinism" or "speciesism" I am really more concerned with getting clear about just what is being said by those who use those terms in clamorous denunciation and what value their supporting arguments have.

The locus of my comments will be the moral concerns and outlooks that have fathered (or mothered?) two political movements—animal liberation and environmentalism. Despite points of tension between the animal and nature liberationists, both have in common that they may be plausibly viewed as calling for a new ethic. The characteristic move of the new ethicists is to declare that the traditional ethic is defective in its emphasis on the importance of human beings. This is speciesism or human chauvinism. The old ethic was human centered, the new will be. . . well, it will have some other center.

One Bad Argument

One bad argument against speciesism consists in drawing attention to the fact that just as we come to realize that moral concern cannot be restricted to the members of our own race ("racism") or of our own sex ("sexism"), so by a sort of analogical extension we come to see that it cannot be restricted to our own species ("speciesism"). But this argument gets things the wrong way round. It is clearly possible for someone who puts special moral importance upon humankind to object to racist policies precisely because they treat their victims as being not human or, in Hitler's classic phrase, subhuman. When we consider that a common element in the usual moral criticism of racism and sexism is precisely that such outlooks ignore the fact that the members of the maltreated class are members of the human species like ourselves, then the condemnation of speciesism can hardly seem a simple extension of those other condemnations.

Justifying Human Superiority

Yet, at this point, it will be said that the idea that there is something specially morally important about human beings needs justification. I am of two minds about this demand for justification. I think it can be met but I'm not sure that it has to be. There are various ground floor considerations in ethics as in any other enterprise—for an animal liberationist such things as the "intrinsic good" of pleasure and the "intrinsic evil" of pain are usually ground floor. No further justification is given for them, or needed. It is not clear to me that member-

ship in the human species does not function in a similarly fundamental way in ethics so that there is as much absurdity, if not more, in asking "Why does it matter morally that she is human?" as in asking "Why does it matter morally that she is in pain?" Nonetheless, since justification is preferable to intuition where it can be given let me try to do so.

Before trying to provide such a justification let us be clear what it involves. We need some characterization, not necessarily a very precise one, of what it is about humankind that makes it worthy of more moral consideration than other known kinds such as ants, dogs, pine trees, a strain of flu virus, or a type of rock. What we would thereby show, if successful, is that what environmentalists, such as the Routleys, call "the greater value assumption"—the assumption that human beings are of greater value, morally, than individuals of other species—is no mere assumption. We would also perhaps then vindicate a "human-centered ethic" in some sense of that confusing phrase.

A further caution is in order about what the task involves. We are trying to exhibit features of humankind that show that the human species is morally distinctive, but these need not be such as to show that no moral respect or even duty is owed to other species. The assumption to be vindicated is a greater value



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assumption, not an exclusive value assumption. An exclusive value assumption would entail an attitude to nature that sees no value at all in either the animate or inanimate environment except insofar as it subserves rather narrowly conceived human interests.

Intrinsic Values in Nature?

The issue of whether there are intrinsic values in the non-animate world has become a point of serious division between the environmentalists and the animalists because the former object to the latter's emphasis on pain, pleasure, and associated interests as the sole or primary deposit of value. The environmentalists object either that sentience is not a precondition for having interests or that it is not a precondition for having value. They accuse animal liberationists like Peter Singer of the dastardly sin of "sentientism." The Routleys and others are fond of producing examples our responses to which are supposed to show that there are intrinsic values to non-animate nature. Let me cite just a few.

(i) The last man example. This concerns the last man on earth, sole survivor of the collapse of the world system, who sets to work eliminating (painlessly) every living thing, animal or plant, and perhaps defacing mountains as well. If we think he has acted wrongly, presumably we are recognizing intrinsic value in non-human and even in non-animate entities.

(ii) The river example. This is to illustrate the idea that natural phenomena can be damaged independently of any human or animal related damage in a way that calls for compensation. The idea is that pollution of a river involves more than damage to the humans affected by it so that compensation requires restoration of the river to its unpolluted state and not merely monetary compensation to any people affected.

(iii) The noise in the forest example. This concerns an objection to "making unnecessary and excessive noise" in a forest. It is held that the believer in the new ethic's intrinsic values will avoid such noise even if no other humans are around to hear and he will so act "out of respect for the forest and its non-human inhabitants." Adherents of the traditional ethic will feel free to shout and howl as the mood takes them.

Before I leave these examples for your judgment let me comment briefly on (ii) and (iii) because I have certain dissatisfactions with them. The river example is defective, as it stands, in placing so much weight on monetary compensation, since the people affected may need to have an unpolluted river in the future so that they do not suffer further damage and they may in any case prefer the appearance of a beautiful, clear, unpolluted stream in which they can catch healthy fish. If we remove these features by paying the people so much that they can move to the banks of another, clean river and then so arrange things (non-coercively) that no humans or even animals are affected by the state of the river, is it so obvious that some moral wrong has been done by continuing to pollute the stream in a good (human) cause? In the forest example we must, I think, exclude noise that might actually cause damage to a wild animal by, say, bursting its eardrums, but if we set that aside can it seriously be claimed that a moral issue about the noise arises?

Speciesism Vindicated

Let me now return to my defense of the greater value assumption. Insofar as the Routleys and other advocates of a new ethic rely upon the deliverances of intuition about the morality of shouting in the forest, the last man on earth, and so on, it seems to me that man's

*Dinner with
Andre*

vs.

*Breakfast with
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greater moral importance over animals, ecosystems, trees, or whatever is far more obvious than any of the intuitions of the new ethic. Consider a small child being attacked by a rat. It is perfectly obvious to anyone not unbalanced by theory that it is morally right to injure or kill the rat if that is necessary to save the child. It makes no difference that the rat may be very smart (for a rat) and the child backward or that the child provoked the attack. Anyone who hesitated to act because of such considerations would be a moral idiot. Normally, at the level of intuition, serious human welfare clearly outweighs that of animals. I do not know how much we can rely on appeals to intuition, but they seem inescapable in these debates and I think one should be wary of being bluffed out of one's pro-human intuitions. One should be particularly suspicious when marginal intuitions are used to construct an argument which is supposed to disenfranchise more robust intuitions.

As for a characterization of the superiority of the human species, my view is that we should not seek to uncover just *one* characteristic such as rationality (though plainly rationality is important) but rather highlight a cluster of interconnected characteristics. So

The wildest claims on behalf of Washoe, the talking chimpanzee, do not really establish him as an even moderately boring dinner guest.

one could cite, in addition to rationality, the capacity for artistic creation, the capacity for theoretical knowledge of the universe and of oneself, the capacity for love including love of one's enemies, and very centrally the capacity for moral goodness. This last provides a crucial distinction between the inanimate, plant, and brute creation on the one side and humanity on the other and makes talk of a moral community among humans, mountains, trees, lakes, fish, and kangaroos a bit one-sided. I should add that I do not here propose a particularly optimistic view of the human species since I recognize that it is an essential concomitant of the capacities listed that they can be abused and that they imply the capacity for irrationality and wickedness. This is what human freedom, which is involved in all these characteristics, typically allows. Nonetheless, that man has this complex of features makes him as a species more morally significant than the non-human world as we know it.

Objections Answered

There is a strategy employed by the Routleys and also by Peter Singer against claims of the form mine has taken. For any quality that is suggested as giving humans moral superiority the strategy is to declare: (a) that some non-human object or process or creature has

it, too; (b) that not all humans have it; or (c) that some humans have it in different degrees to others. So in the case of rationality, for instance, we are told that some animals have it, that some defective or immature humans lack it, and that Einstein has more of it than others. In the case of the cluster of properties I have proposed, however, it seems clear that our species is marked by these qualities, and being marked by them is deserving of moral respect, and it is merely delusional to suppose that the cluster is exhibited by any species in the non-human world as we know it. The wildest claims on behalf of Washoe, the talking chimpanzee, do not really establish him as an even moderately boring dinner guest. The passion to denigrate the human world has led to very extravagant and ill-founded claims for the linguistic and related achievements of chimpanzees and dolphins. Washoe's exploits have recently been subjected to much more sober and critical scientific assessment than they received at the hands of the original investigators with alarmingly deflationary results.

As to the second and third parts of the strategy, it is of course true that there are immature, senile, and defective members of the species, but only an inordinately individualistic ideology can hold that such members should be given treatment that takes no account of their species membership. We have a vital interest in the immature, the retarded, and the defective of our kind since, apart from anything else, we normal adults have been immature and may become damaged or handicapped. The focus of moral concern upon isolated individuals and their present attributes rather than upon species, groups, kinds, and types is not the only or, one might think, the sanest stance possible for moral theory. As to those members of the species who possess the featured capacities to an outstanding degree, several responses are possible. One is to note that it is very unlikely that many will possess the *complex* to a degree that raises problems of differential respect; a second is to distinguish issues to do with law, politics, and generally civil justice from those that concern other areas of morality—there are well-known reasons for not having legal and political inequalities, but these reasons do not necessarily apply in other areas of moral interest. Perhaps the saint is worthy of special moral respect and even more.

A final point about chauvinism. I wonder whether it wouldn't be appropriate to say something here on behalf of artifacts and machines. Are the new ethicists in danger of sliding into a form of nature chauvinism?

—C.A.J. Coady

C.A.J. Coady is Reader in Philosophy at the University of Melbourne, Australia. This discussion is condensed from an unpublished longer paper which was given to a conference sponsored in Melbourne by the magazine *Meanjin*. Peter Singer's theories may be found in his books *Animal Liberation* (Avon, 1977) and *Practical Ethics* (Cambridge University Press, 1979). A good account of the "new ethic" from a wider, more radical environmentalist perspective can be found in the chapter by Richard and Val Routley in *Environmental Philosophy*, edited by D. S. Mannison et al. (Ridgeview, 1980).

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