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Educating Our Children: Whose Responsibility?

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

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In this issue:

Everyone seems to agree that America’s schools are not doing their job, but disagreement is rampant over what should be done about it. Should responsibility for education devolve to families, as under proposed voucher plans? Or is increased state- and even federal-level centralization the answer? . . . p. 1

Can programs of preferential treatment for blacks, women, and ethnic minorities be justified? Wm. Bradford Reynolds and Richard Wasserstrom give two very different answers. . . . p. 6

A workable plan for imposing a mandatory pro bono requirement on lawyers — and it’s moral, too. . . . p. 10

Should we feel uncomfortable when genetic engineers apply for — and get — patents on new forms of life? . . . p. 13

A spring workshop on teaching philosophy and public policy and two new working papers series are announced. . . . p. 15

When the National Commission on Excellence in Education sounded the alarm two years ago that “the educational foundations of our society are presently being eroded by a rising tide of mediocrity,” most Americans felt vindicated rather than surprised. The commission’s report, “A Nation at Risk,” merely gave official voice to doubts long expressed by many, that America’s schools are not doing their job. As demand for highly skilled workers in technically challenging fields is accelerating, test scores are just now bottoming out of a two-decade decline. The average achievement of high school students on most standardized tests is lower today than it was when Sputnik was launched, nearly three decades ago. On many international comparisons of student achievement American students trail the rest of the industrial world. If the current state of affairs in education had been plotted by a hostile foreign power, the report concluded, we would call it an act of war.

The question is what to do about it, and critics of the Reagan administration charge that it is lavish with rhetoric decrying the problem, but sparing of any federal initiatives toward a solution. The administration counters that education is constitutionally the responsibility of the states. Far from heightening the federal government’s role in education, it proposes to retrench it still further, by reducing federal aid to public schools, loosening federally enforced anti-discrimination regulations, and questioning the need for a cabinet-level Department of Education.

Traditionally responsibility for education has belonged to each local community. With the demise of the little red

schoolhouse, however, has come a steady trend toward state-level centralization. Local contributions to school revenues have dwindled from more than 80 percent in the 1920s to about 42 percent in 1983, with the state's share rising from less than 20 to a full 50 percent. Recent years have also seen a trend toward imposition of statewide standards of educational achievement that all students — and increasingly teachers as well — are required to meet. While many welcome these developments, others resist what they see as sterile homogenization. They would like to see responsibility for a child's education devolve to the level of the individual school, or the family.

But responsibility for education has many dimensions. Before we decide who should be responsible, we need to ask: responsible for what? Who should set the curriculum? Certify teachers? Decide how much to spend on public education relative to other goods? Pay the bills? In each case, we have a choice of authorities — parents, school, local community, state, federal government, or even the child. Our answers to these questions will be guided in part by what interests we take education to serve, by what we take the purposes of education in a democracy to be.

The Voucher System

If the education of adults were at issue, one might well decide that the final responsibility for any person's education should rest with the person himself. Insofar as one central purpose of education is to contribute to individual human flourishing, decisions about the nature and scope of education should be left to the individuals in question, as the best judge of their own best interests. But children are not adults. Children, at least young ones, cannot make their own decisions on how they should be educated, since a chief goal of education is precisely to enable them to make such decisions wisely.

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A natural, though today quite radical, answer to where responsibility for a child's education should, then, be lodged is: with the parents. The claim is that parents are, of all possible surrogates, best placed to determine what is in the best interests of their children. Thus John E. Coons and Stephen D. Sugarman, writing in *Education by Choice: The Case for Family Control*, argue that: (1) "Beyond the broad generalization that it is good for children to be educated," there is no clear consensus on what constitutes the best interests of children generally. (2) The process of deciding what constitutes the best interests of any particular child "should always incorporate the child's own voice expressed within a decision-making community that is knowledgeable and caring about him." (3) The family

most nearly meets these conditions: "In its unique opportunity to listen and to know and in its special personal concern for the child, the family is his most promising champion."

How is familial responsibility for education to be translated into public policy? Almost no one suggests that the family should assume full financial responsibility for their children's education, perhaps because education is a public good that benefits all members of a society, perhaps because the resulting inequalities would be too extreme to tolerate. Nor do most proponents of parental authority call for a complete abdication of responsibility on the part of the state. Instead, what Coons and Sugarman propose, following the early lead of economist Milton Friedman, is

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a "voucher" system, which would turn over to parents some portion of the public education budget with which they could purchase what they determine to be the best schooling for their children's particular needs — be it in competing public schools, private schools, or less traditional alternatives. While some governmental standards would remain, they would be far more attenuated than at present, to encourage the maximum diversity in educational offerings. The qualifications of teachers, the content of the curriculum, and the degree and direction of moral education provided would be left to the choices of parents among competing options in a free market. Regulations could be introduced, endorsed by Coons and Sugarman (although not by Friedman's original plan), to combat racial discrimination and to equalize the amount spent on each child's education. But the driving aim of the voucher system is to facilitate parental control.

Two questions arise regarding the voucher system, and the desirability of such broad parental authority over education. First, is such a system in the best interests of the child? And, second, are the child's and the family's interests the only relevant ones, or does the community have a legitimate and independent interest of its own — one that would be better served by some other division of educational responsibility?

On many views, a central way in which education benefits children is by developing their autonomy — their ability to assess intellectual and moral options and to make genuine choices among them. A liberal, pluralist society provides its citizens with a range of options; education enables them to enjoy this range to its fullest. Political philosopher Amy Gutmann, currently in residence at the Center for Philosophy and Public Policy, argues, "The same principles that require a state to grant adults freedom to choose their own conception of the good life also commit it to assuring children an education that makes choice both possible and meaningful in the future."

Education enhances individual autonomy. But, according to Michael Walzer, Professor of Social Science at the Institute for Advanced Study in Princeton, it is also "a program for social survival." Walzer quotes Aristotle, that the purpose of education is to reproduce in each generation the character suited to the "constitution" of the society in question. In a democratic society this means, again, educating citizens to be autonomous choosers, since the legitimate exercise of government rests on their choices. It also means educating them to be tolerant of the choices of others. Without a deep-seated commitment to toleration, a pluralist society cannot endure.

Is parental control of education a good way to develop autonomy within an ongoing pluralist society? On Walzer's view, the voucher system restricts rather than

an escape route from the dreary sameness of today's public schools, with their emphasis on noncontroversial views and their endorsement of majoritarian social and political norms — a sameness reinforced by the bland standardization of American mass culture: "Today the danger is not that the child will learn nothing of the world and its normalities; it is that he will learn nothing else." The voucher system, according to Coons and Sugarman, is pluralism in action: a veritable smorgasboard of options laid out for the choosing.

Gutmann observes, however, that the pluralism of the voucher system is in an important respect "illusory" — the larger society is pluralist, but it might as well not be as far as the actual educational experiences of individual children are concerned. The children themselves do not sample at



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widens children's horizons: "The voucher plan would guarantee that children go to school with other children whose parents, at least, were very much like their own. . . . For most children, parental choice almost certainly means less diversity, less tension, less opportunity for personal change than they would find in schools to which they were politically assigned." Gutmann argues that autonomy and toleration are fostered when children are taught "to understand and evaluate ways of life different from those of their parents." The voucher system, instead, seems likely to trap children within one parochial point of view.

Coons and Sugarman reply that a parental choice system is in fact the best way to promote autonomy and pluralism. Autonomy is better promoted, they argue, when children are exposed to intense moral commitment than to shoulder-shrugging "neutrality." Moral sensibilities must first be engaged before they can spread and deepen. And the voucher system promotes pluralism by providing

will from the tempting feast of options the voucher system makes available; they are bound to the one dish preselected by their parents. The diversity the voucher system offers turns out to be "an ornament for onlookers": it is not a felt source of enrichment in the children's own lives.

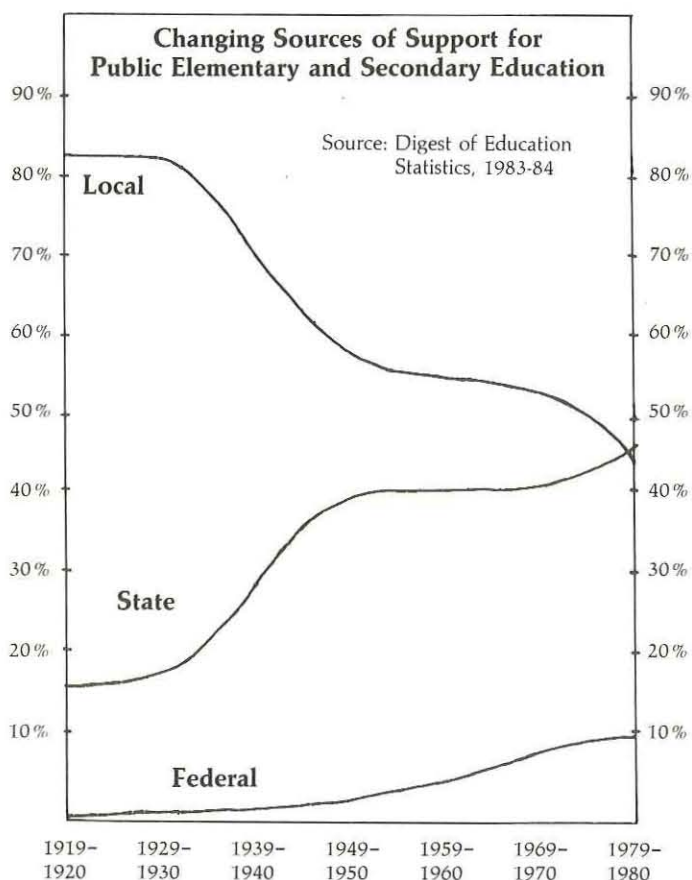
Walzer suggests, furthermore, that the voucher system can be seen as actually antithetical to democratic politics. Democracy is premised on the need for citizens to work together to achieve, out of their diversity, common goals. The voucher system issues an invitation to citizens not to work together, but to walk away. Citizens avoid the necessity for debate and compromise by bailing out of the cooperative effort altogether.

Advocates of the voucher plan point out that the affluent have always been able to walk away; they aim only to provide the same freedom for all citizens. But the social effects of defection by a small minority are very different from the sweeping change in our attitude toward public

education that the voucher plan would entail. Walzer maintains that we should tolerate the recourse to private and parochial schools "so long as its chief effect is to provide ideological diversity on the margins of a predominantly public system." We should be troubled, however, when our shared commitment to a strong public system and a democratic culture is threatened. We also might wonder whether the benefits of wise parental choice in most cases would outweigh the tragic costs in some cases of parental ignorance and neglect. Gutmann also advocates that non-public schools should be a good deal more public-spirited than many are now; *all* schools should be required to educate their students in the moral principles essential to any democratic society, such as tolerance and respect for the rights of others. That much is within the state's prerogative "in securing its own future and the future freedom of its citizens."

Local, State, or Federal Control?

What we need is a public education system that responds to parental leverage, but allows for a democratic society's interest in educating future democratic citizens. These two concerns have combined to produce our once traditional arrangement of local democratic control: school budgets are determined by local referenda and raised by local property taxes; the content of the curriculum is determined largely by a popularly elected board of education.



Local democratic control is both more effective and more flexible than state-level control.

Policy analysts Denis Doyle and Chester Finn, Jr., note that bureaucracy is less intractable at local levels, and that local control leads to greater variety among educational offerings, allowing "some responsiveness both to community priorities and to the yearning of individual families to select the kind of education that their children will receive."

Few would suggest, however, that local school boards be given a blank check to write out educational policy; the underlying purposes of education in a democracy contain within them restrictions on how much authority democratic majorities, at any level of government, should be

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free to wield. No school board should be free to flout the basic purpose of enabling all children to make meaningful choices among good lives and to participate as equals in the democratic process. Gutmann suggests that this underlying purpose entails three restrictions on democratic control: education must be funded at a minimum threshold level, in order to meet its objectives; the objectives must be met for *all* children; and the content of the curriculum must indeed expose children to the range of different, morally acceptable options open to them in our society and teach them the principles that make us a democratic nation.

These three conditions place clear limits on the discretion allowed to any democratic decision-making body — local, state, or federal. But they usher in special questions about local democratic control, particularly local responsibility for educational funding.

One reason for centralizing financial responsibility for education is that without outside assistance many poorer communities simply cannot afford to educate their children to the threshold level. State or federal funding is thus needed, on Gutmann's view, to ensure that the democratic threshold is met for all children.

Considerations of equity also suggest a move away from local funding. Doyle and Finn observe, "There is little relationship between the value of property in a given community and the educational needs of the children who live there." They cite one particularly egregious example of the inequities that obtained in California before the courts mandated financial reform: one poor school district reported an assessed property valuation of \$100 per child; another, oil-producing district boasted for each of its handful of children an assessed valuation of one million! Such extreme differentials in the resources devoted to children's

education make us rightly uncomfortable, when they are based on the accidents of wealth alone and not on any variation in parental and community attitudes toward the value of education.

But even when it is corrected for inequities, local school funding, as Gutmann points out, does not provide an effective means for parents and citizens to express the value they place on education. Local citizens can decide how much to spend on schools, but they are not in a position to determine the relative priority to be given to education over comparably expensive goods such as transportation, health care, and national defense. The size of state and federal budgets, and priorities within those budgets, are matters over which local citizens have little control. Citizens who feel themselves overtaxed may end up voting against school budgets, not because they place a lower value on good schools than on highways or aircraft carriers, but because that is their only effective recourse. Gutmann concludes: "Local control over educational funding may therefore be less rather than more democratic than state control because it presents citizens and their representatives with a considerably more constrained choice."

We need, finally, some state, and even national, standards to ensure that the content of education is properly pluralist and that future American citizens are being prepared to participate in the American political process. "Delegating to local school boards full control over . . . education," Gutmann argues, "would reduce the United States to a collection of democratic city-states, totally neglecting our collective interest in a common moral education." The policies of local school boards, she believes, should be subject to national standards of two central kinds: "standards that are essential to any good democratic society and ones that serve to unite and distinguish us from other democratic societies." This much standardization ensures that we will pass on to our

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children a common heritage. But within these broad guidelines lies considerable scope for local districts to exercise their own authority in determining how they should be implemented.

These concerns give grounds for welcoming the current shift toward state-level control of education. Why not go all the way and endorse centralization at the national level? One reason for encouraging the federal government to assume greater financial responsibility in this area is, according to Gutmann, that "federal funding would have the considerable advantage of placing education on the same level as defense, and thereby facilitating the trade-off

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between better minds and better missiles." But opposing considerations outweigh this advantage: "complete federal funding of education would probably entail an equally significant decrease in its diversity, a consequence that we have good reason to fear for education, but not for defense. . . . States are small enough to preserve a degree of diversity and large enough to permit trade-offs between education and other goods." To the federal government, however, is properly assigned responsibility for ensuring equal access to an adequate education for all children. This responsibility justifies the federal government's intervention in school desegregation; Gutmann argues that it also provides a reason why the federal government should take up the often extremely expensive burden of financing special programs for the handicapped and other severely disadvantaged students.

Conclusion

"Education," Walzer writes, "expresses what is, perhaps, our deepest wish: to continue, to go on, to persist in the face of time." In a democratic society, education is the responsibility of democratic citizens. The sober discussion following upon the warnings issued by the president's commission is one hopeful sign that we may be willing as a nation to make a new effort to assume these responsibilities together.

The sources quoted in this article are John E. Coons and Stephen D. Sugarman, Education by Choice: The Case for Family Control (Berkeley and Los Angeles: University of California Press, 1978); Amy Gutmann, Democratic Education (forthcoming); Michael Walzer, Spheres of Justice (New York: Basic Books, 1983), Chapter 8 — Education; and Denis P. Doyle and Chester E. Finn, Jr., "American Schools and the Future of Local Control," The Public Interest, no. 77 (Fall 1984).

Two Views of Affirmative Action

For two decades now, the principles and practices of affirmative action have been hotly contested in every branch and at every level of government. In what follows, Wm. Bradford Reynolds, Assistant Attorney General for Civil Rights in the U.S. Department of Justice, and Richard Wasserstrom, Professor of Philosophy at the University of California at Santa Cruz, present opposing views on how far and on what basis programs of preferential treatment

for blacks, women, and ethnic minorities can be justified. Their debate is drawn from papers they presented at a conference on "The Moral Foundations of Civil Rights Policy," held at the University of Maryland on October 18-20, 1984, sponsored by the Center for Philosophy and Public Policy. The full text of their papers is available as a Center working paper. (For information on ordering, see page 15.)

I.

Two predominant competing values drive the debate on affirmative action in our society today: the value of equal opportunity and the value of equal results. Typically — to the understandable confusion of almost everyone — "affirmative action" is the term used to refer to both of these contrasting values. There is, however, a world of difference between "affirmative action" as a measure for ensuring equality of opportunity and "affirmative action" as a tool for achieving equality of results.

In the former instance, affirmative steps are taken so that all individuals (whatever their race, color, sex, or national origin) will be given the chance to compete with all others on equal terms; each is to be given his or her place at the starting line without advantage or disadvantage. In the latter, the promise of affirmative action is that those who participate will arrive at the finish line in pre-arranged places — places allocated by race or sex.

Unfortunately the promise of equal results is a false one. We can never assure equal results in a world in which individuals differ greatly in motivation and ability; nor is such a promise either morally or constitutionally acceptable. This was, in fact, well understood at the time that the concept of "affirmative action" was first introduced as a remedial technique in the civil rights arena. In its original formulation, that concept embraced only non-preferential affirmative efforts, in the nature of training programs and enhanced recruitment activities, aimed at opening wide the doors of opportunity to all Americans who cared to enter. No one was to be afforded a preference, or special treatment, because of group membership; rather, all were to be treated equally as individuals based on personal ability and worth.

This administration's commitment is to this "original and undefiled meaning" — as Morris Abram, Vice Chairman of the Civil Rights Commission, calls it — of "affirmative action." Where unlawful discrimination exists, we

see that it is brought to an abrupt and uncompromising halt; we ensure that every identifiable victim of the wrongdoing receives "make whole" relief; and we require affirmative steps such as training programs and enhanced recruitment efforts to force open the doors of opportunity that have too long remained closed to far too many.

The criticism, of course, is that we do not go far enough. The remedial use of goals and timetables, quotas, or other such numerical devices to achieve a particular balance in the work force has been accepted by the lower federal courts as an available instrument of relief, and it is argued that such an approach should not be abandoned.

Our first response is a strictly legal one; it rests on the Supreme Court's recent decision in *Firefighters Local Union v. Stotts*. At issue in *Stotts* was a district court injunction ordering that certain white firefighters with greater seniority be laid off before blacks with less seniority in order to preserve a certain percentage of black representation in the fire department's work force. The Supreme Court held that this order was improper because "there was no finding that any of the blacks protected from layoff had been a victim of discrimination." It ruled that federal courts are without *any* authority under Title VII of the Civil Rights Act to order a remedy that goes beyond enjoining the unlawful conduct and awarding "make whole" relief for actual victims of the discrimination. Quotas are by definition victim-blind: they embrace without distinction nonvictims as well as victims of unlawful discrimination and accord preferential treatment to both. Accordingly, whether such formulas are employed for hiring, promotion, layoffs, or otherwise, they must fail under any reading of the statute's remedial provision.

There are equally strong policy reasons for coming to this conclusion. The remedial use of preferences has been justified by the courts primarily on the theory that they

are necessary to cure "the effects of past discrimination" and thus, in the words of Justice Blackmun, to "get beyond racism." This reasoning is twice flawed.

First, it is premised on the proposition that any racial imbalance in the employer's work force is explainable only as a lingering effect of past racial discrimination. Yet equating "underrepresentation" of certain groups with discrimination against those groups ignores the fact that occupation selection in a free society is determined by a host of factors, principally individual interest, industry, and ability. It simply is not the case that applicants for any

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given job come proportionally qualified by race, gender, and ethnic origin in accordance with U.S. population statistics. Nor do the career interests of individuals break down proportionally among racial or gender groups.

Second, and more important, there is nothing *remedial* — let alone *equitable* — about a court order that *requires* the hiring, promotion, or retention of a person who has not suffered discrimination solely because that person is a member of the same racial or gender group as other persons who were victimized by the discriminatory employment practices. The rights protected under Title VII belong to individuals, not to groups, as was affirmed in *Stotts*. As indicated, remedying a violation of Title VII requires that the individual victimized by the unlawful discrimination be restored to his or her "rightful place." It should go without saying that a person who is *not* victimized by the employer's discriminatory practices has no claim to a "rightful place" in the employer's work force. According preferential treatment to nonvictims in no way remedies the injury suffered by the actual victims.

Moreover, racial quotas and other forms of preferential treatment unjustifiably infringe on the legitimate employment interests and expectations of third parties, such as

incumbent employees, who are free of any involvement in the employer's wrongdoing. To be sure, awarding retroactive seniority and other forms of "rightful place" relief to individual victims of discrimination has some of these same consequences. However, legitimate claims of identifiable victims warrant the imposition of a remedy that places some burden on those innocent employees whose "places" in the work force are the product of unlawful discrimination. Restoring the victim of discrimination to the position he or she would have otherwise occupied merely requires incumbent employees to surrender some of the largesse discriminatorily conferred upon them. *But* an incumbent employee should not be called upon as well to sacrifice or otherwise compromise legitimate employment interests in order to accommodate persons *never wronged* by the employer's unlawful conduct.

Proponents of class-based preferences note that the effort to identify and make whole all victims of the employer's discriminatory practices will never be 100 percent successful. While no one can dispute this unfortunate point, race- and gender-conscious preferences simply do not answer this problem. The injury suffered by a discriminatee who cannot be located is in no way ameliorated by conferring preferential treatment on other, randomly selected members of his or her race or sex.

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Proponents of judicially imposed numerical preferences also argue that these are necessary to ensure that the employer does not return to his or her discriminatory ways. But far from *preventing* future discrimination, imposition of such remedial devices *guarantees* future discrimination. Only the color or gender of the ox being gored is changed.

The inescapable consequence of *Stotts* is to move government at the federal, state, and local levels

The Origins of Affirmative Action

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such *affirmative action* as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

— Section 706(g), Title VII,
Civil Rights Act of 1964

"The contractor will not discriminate [and] . . . will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."

— Section 212, Executive Order 11246, 1965,
as amended by Executive Order 11375, 1968

* * *

noticeably closer to the overriding objective of providing all citizens with a truly equal opportunity to compete on merit for the benefits that our society has to offer. The use of race or sex in an effort to restructure society along lines that better represent someone's preconceived notions of how our limited educational and economic resources should be allocated among the many groups in our pluralistic society necessarily forecloses opportunities to those having the misfortune — solely by reason of gender or skin color — to be members of a group whose allotment has already been filled. Those so denied, such as the more senior white Memphis firefighters laid off to achieve a

more perfect racial balance in the fire department, are discriminated against every bit as much as the black Memphis firefighters originally excluded from employment. In our zeal to eradicate discrimination from society, we must be ever vigilant not to allow considerations of race or sex to intrude upon the decisional processes of government. The simple fact remains that, in the words of Judge Rehnquist, wherever it occurs, and however explained, "no discrimination based on race [or sex] is benign. . . . no action disadvantaging a person because of color [or gender] is affirmative."

— Wm. Bradford Reynolds

II.

I take programs of preferential treatment to be ones that make relevant the race or sex of individuals in the sense that the fact that an applicant for admission, a job, or a promotion is nonwhite or female constitutes a relevant, although not a decisive, reason for preferring such an applicant over one who is white or male. Here I will consider only programs concerned with racial preferences, but I take what I have to say to be applicable to comparable programs where members of other ethnic or minority groups, or women, are concerned.

The positive case for such programs begins with the following claim, namely, that we are still living in a society in which a person's race is a socially significant and important category. To be black is to be at a disadvantage in terms of most of the measures of success or satisfaction — be they economic, vocational, political, or social. If this claim about the existing social reality of race is correct, then two further claims seem plausible. The first is that there is in place what can correctly be described as a system of racial oppression. It is one both in virtue of the systemic nature of the unequal and maldistributed array of social benefits, opportunities, and burdens, and in virtue of the way things are linked together so as to constitute an interlocking, mutually reinforcing system of social benefits, burdens, ideology, and the like, which, when tied to race as they are, make it a system of racial disadvantage and oppression. Second, even if the intentions and motivations of those occupying positions of relative power and opportunity are wholly benign and proper, it is likely that the system will perpetuate itself unless blacks come to occupy substantially more positions of power and authority within the major social institutions.

The case for programs of preferential treatment can thus be seen to rest upon the claim that they do succeed in introducing more blacks into these kinds of vocations, careers, and institutional positions than would have otherwise been present. The programs have worked and do work to produce, for example, black judges, lawyers, and business executives where few if any existed before. And changes of this sort in the racial composition of these institutions have mutually reinforcing consequences that play an important role in dismantling the existing system of racial disadvantage.

The main ground of principled opposition to such programs has to do with the charge that they are themselves substantially unjust. The first argument commonly raised against these programs is this: if it was wrong to take race into account when blacks were the objects of racial policies of exclusion, then it is wrong to take race into account when the objects of the policies differ only in their race. Intellectual consistency requires that what was a good reason then be a good reason now.

The right way to answer this objection is, I think, to agree that the practices of racial exclusion that were an integral part of the fabric of our culture, and which are still to some degree a part of it, were and are pernicious. Yet, one can grant this and also believe that the kinds of racial preferences and quotas that are a part of contemporary preferential treatment programs are commendable and right. There is no inconsistency involved in holding both views. A fundamental feature of programs that discriminated against blacks was that these programs were a part of a larger social universe in which power, authority, and goods were concentrated in the hands of white individuals. The complex system of racial oppression and superiority that was constituted by these institutions and the ideology that accompanied them severely and unjustifiably restricted the autonomy and happiness of members of the less favored category.

Whatever may be wrong with today's programs of preferential treatment, the evil, if any, is simply not the same. Blacks do not constitute the dominant social group. Programs that give a preference to blacks do not add to an already comparatively overabundant supply of resources and opportunities at the disposal of members of the dominant racial group in the way in which exclusionary practices of the past added to the already overabundant supply of resources and opportunities at the disposal of whites.

A related objection that fares no better has to do with the identification of what exactly was wrong with the system of racial discrimination in the South, or with what is wrong with any system of racial discrimination. One very common way to think about the essential wrongness of racial discrimination is to see it as consisting in the use of an irrelevant characteristic, namely race, to allocate social benefits and burdens.

I am far from certain that that is the central flaw at all. Consider, for instance, the most hideous of the practices, human slavery. The primary thing that was wrong with that institution was not that the particular individuals who were assigned the place of slaves were assigned there arbitrarily in virtue of an irrelevant characteristic, i.e., their race. Rather, the fundamental thing that was wrong with slavery was the practice itself — the fact that some human beings were able to own other human beings. And a comparable criticism can be made of many of the other practices and institutions that comprised the system of racial discrimination even after human slavery was abolished. The fundamental wrongness in taking race into account in the way these practices did has to do, perhaps, with arbitrariness, but it is the special arbitrariness attendant upon using race in the constitution and maintenance of a system of oppression so as to make that system a system of racial oppression. Whatever may be true of contemporary programs of preferential treatment, they can hardly be construed as consigning whites to the kind of oppressive status systematically bestowed upon blacks by the dominant social institutions.

A third very common objection is that the category of race is too broad in scope for programs designed to promote equality of opportunity and of political and social status. The relevant characteristic, instead, is disadvantaged socio-economic status. This objection, too, rests on a mistaken conception of the social realities. While socio-economic status unquestionably affects in deep and pervasive ways the kinds of lives persons are able to fashion and live, in our society it is not the sole, or even the primary, locus of systemic oppression. Blackness is as much a primary locus of oppression as is socio-economic status. Socio-economic status is an indirect, imperfect, and overly broad category by which to deal with the phenomenon of racial disadvantage, in precisely the same way in which race is an indirect, imperfect, and overly broad category to take on the phenomenon of socio-economic disadvantage.

A final objection concerns the claim that these programs are wrong because they take race into account rather than the only thing that does and should matter, namely, an individual's qualifications. And qualifications, it is further claimed, have nothing whatsoever to do with race.

The primary thing that was wrong with [slavery] was not that the particular individuals who were assigned the place of slaves were assigned there arbitrarily in virtue of an irrelevant characteristic, i.e., their color. Rather, the fundamental thing that was wrong with slavery was the practice itself. . . .

First, it is important to establish what the argument is for basing selections solely on qualifications. One argument is that the most qualified persons should always be selected for a position because the tasks connected with that position will then be done in the most efficient man-

ner. Now, there is nothing wrong in principle with appealing to the good results that will be produced by selecting applicants solely on the basis of their qualifications. But it may be impermissible for opponents of preferential treatment programs to use *this* argument, if it was an analogous appeal to the good results likely to be produced by programs of preferential treatment that they thought was wrong in the first place with justifying these programs in this way.



THE undersigned wishes to purchase a large lot of NEGROES for the New Orleans market. I will pay \$1200 to \$1250 for No. 1 young men, and \$850 to \$1000 for No. 1 young women. In fact I will pay more for likely

NEGROES,

Than any other trader in Kentucky. My office is adjoining the Broadway Hotel, on Broadway, Lexington, Ky., where I or my Agent can always be found.

WM. F. TALBOTT.

LEXINGTON, JULY 2, 1853.

1853 sale poster

But there is still the argument that the most qualified deserve to be selected because they are the most qualified. If they do, then to refuse to select them is to treat them unjustly. I am skeptical, however, that a connection of the right sort can be made out between being the most qualified in this sense and deserving to be selected. The problem is that being the best at something does not, by itself, seem readily convertible into a claim about what someone thereby genuinely deserves, given the difficulty of connecting the mere possession of abilities with things that the possessor can claim any credit or responsibility for, and given the alternative plausibility of claims of desert founded upon attributes such as effort or need.

In sum, therefore, preferential treatment programs are presumptively justifiable in so far as they work to dismantle the system of racial oppression that is still in place, and their justifiability is rendered more secure once it is seen that they are not unjust either in themselves or as constitutive elements of any larger system of racial oppression.

— Richard Wasserstrom

A Workable Plan for Mandatory Pro Bono

You've heard the joke before. Jones calls her three best friends — a doctor, an engineer, and a lawyer — to her death bed. She gives each of them \$10,000 and says: "We've stuck with each other through thick and thin. So that you can remember the loyalty of our friendship, I'm asking each of you to throw this \$10,000 into the open grave at my funeral, to be buried with me."

After Jones's funeral the three bereaved friends meet for a somber drink. Finally the doctor breaks the melancholy silence and says, "I've got to get something off my chest. I brought the \$10,000 to the burial, but when the moment came I couldn't do it — I threw in an empty envelope." The engineer, relieved, says, "Thank heaven you said that! I did the same thing." The lawyer looks at them aghast and says, "I'm ashamed of you! Where's your conscience? I tossed in a check for the whole amount."

When the early drafts of the new ABA code of ethics were privately circulated in 1979, it became widely known that they contained a requirement that each lawyer perform 40 hours a year of "pro bono" — free public interest — work. The requirement was quickly dropped in the face of intense opposition on the part of the bar; it was replaced, in the first discussion draft, by a requirement that lawyers perform *some* pro bono work each year (amount unspecified). Even this met with severe opposition. As it finally stands, Rule 6.1 commends pro bono work but requires none.

The ABA House of Delegates, it seems, tossed in a check for the whole amount. (It could be worse: the engineers and doctors haven't even written the checks.)

The ABA response is symptomatic of the problem of pro bono. Nobody denies that pro bono work is morally commendable. Nobody doubts that there are worthy clients who will never obtain needed representation unless some lawyer is willing to do it for free. A pro bono obligation has been advocated across the political spectrum as an essential response by the bar to the plight of the under-represented poor. Like the weather, everyone talks about mandatory pro bono.

There are reasons for doing nothing about it; objections both moral and practical have been raised to the pro bono obligation. The main moral objection is that it would be unfair to compel lawyers to provide a service that is really the entire community's responsibility. The practical objections I have heard lawyers raise are these:

(1) Mandatory pro bono is inequitable and regressive, falling with a heavy hand upon the economically marginal practitioner and the harried associate, neither of whom has forty hours a year to spare.

(2) It would lead to incompetent law practice: a specialist in corporate tax is not qualified to handle tenants' rights or welfare or child-custody cases.

(3) Enforcing it would require an elephantine bureaucracy to read and assess half-a-million pro bono reports a year; the reports themselves might at any rate be better candidates for submission to a short-story contest than to a committee of the bar.

(4) It is probably false that a pro bono obligation would lead to more poor people being represented: instead it would result in more lawyers giving self-promoting speeches to church groups and lodge meetings, and more free legal work being done for in-laws and attorneys' country clubs.

I want to propose a plan that would meet *all* of these objections.

The Coupon Plan

The basic idea of the plan is this: A poor person with a legal problem goes to an office established by the bar (the "Pro Bono Office") with documentation of his or her poverty status. The Pro Bono Office has a list of practicing attorneys; it gives the poor person the names of (say) two attorneys — in case the client has an objection to the first — and a coupon worth one hour of consultation. If the attorney and client decide that there is a real legal problem requiring representation, the attorney contacts the Pro Bono Office and the client is issued additional coupons to "pay" the attorney for the number of hours the representation is estimated to require. To avoid padding, there is a fixed schedule of hours for certain standard categories of typical cases; if a case turns out to need more time, the attorney sends a simple form to the Pro Bono Office, describing the complication and requesting additional coupons. At the end of each year, an attorney simply sends in forty hours' worth of coupons to the office, and the pro bono obligation is discharged.

If an attorney does not have forty hours' worth of coupons, he or she must "buy" the shortfall at a reasonable hourly rate slightly below rates charged by attorneys at that level of the profession. The proceeds are used to finance the Pro Bono Office. Let me call this the *Buyout Feature* of the plan.

The Buyout Feature serves other functions as well. Some cases require more than forty hours. If that occurs, an attorney has four options. First, the attorney can simply finish the case because it is a good thing to do. Second, he or she can proceed with the case and obtain credit against future years' pro bono. Third, if the client is agreeable and

the representation would not be prejudiced by doing so, the case can be transferred to another attorney for the latter's pro bono. Last, the attorney can proceed with the case and obtain compensation from the "buyout" fund at its slightly deflated rate.

Three other features of the Coupon Plan are very important.

First is the *Graduation Feature*: certain categories of lawyers are partly or wholly exempt from the pro bono obligation. For example, one might require no pro bono of an attorney in the first five years of practice, or of practice in a new locale; associates in large law firms might be

A pro bono obligation conscripts lawyers to work below their market rate and is thus an unfair "conscription tax" to supply the poor with legal representation. "No representation without compensation — it's unjust taxation!" is the argument.

given a reduction in their obligation until they make partner or leave the firm. And any attorney should be able to be excused from pro bono if he or she can document severe financial or health problems.

Next is the *Substitution Feature*. Some lawyers should not be required to represent individual poverty clients. Attorneys working on a pro bono basis on public-interest cases that do not involve poverty clients can obtain coupons for this work (though the bar would have to limit and specify the class of such cases that would qualify). Judges or government attorneys who might have conflict-of-interest problems if they represented private clients can obtain their coupons for law-reform activities or educational activities, particularly one kind of educational activity which I shall call Continuing Legal Education in Pro Bono (CLEPB).

CLEPB is part of the *Education Feature* of the Coupon Plan. Attorneys can, and initially must, discharge a portion of their pro bono obligation by obtaining training in areas of poor people's law. Such continuing education could take place in various formats. Seminars could be conducted by full-time poverty lawyers in order to discharge their pro bono obligations. Attorneys could help out in legal aid offices and obtain their CLEPB training "on the job." Or a CLEPB legal aid office could be established on the model of law school clinical programs, with full-time poverty law "teachers."

These features of the pro bono plan resolve all the practical problems I enumerated earlier. (1) The Graduation and Substitution Features eliminate the problem of inequity. (2) The Education Feature eliminates or at least alleviates the problem of incompetence. (3) The simplicity of the monitoring and coupon distribution systems would make a bureaucracy manageable. (4) The fact that coupons may be obtained only from poor clients, selected substitutions, and CLEPB programs guarantees that pro bono work will reach the poor population and not the country club.

The Moral Objection

No doubt it is morally worthy to engage *willingly* in pro bono work. Many people argue, however, that it is morally impermissible to *require* lawyers to engage in it. They do not deny that the community has the obligation to offer all its citizens meaningful access to justice, and the right to obtain from its members the means to do so. But they argue that if the community wants to meet the legal needs of the poor, it should use tax money to fund legal aid or compensate private attorneys. That way the entire community bears the cost of meeting a community need. A pro bono obligation conscripts lawyers to work below their market rate and is thus an unfair "conscription tax" to supply the poor with legal representation. "No representation without compensation — it's unjust taxation!" is the argument.

This is a powerful argument, and the obvious reply, "The community can't afford the market rate," merely invites the obvious counter, "It has no right to demand services for free." Wouldn't it be wrong for the community to require grocers to feed the hungry "pro bono," if it is unwilling to tax itself to feed the hungry?

Nor will it suffice to argue (as some courts have) that the lawyer's license is a grant of the state, to which the state may attach a pro bono string (or any other string it desires). Grocers are also licensed, yet it would be morally pernicious to palm off an obligation of the whole community — to feed its hungry — onto the grocers, as a con-



Drawing by Joe Azar

dition of licensure. Grocers run their businesses to make their livings, and it is iniquitous to treat the license needed to make one's living as a mere perk granted by the state under whatever conditions it chooses to impose.

Yet this argument from the grocer analogy reveals the analogy's shortcomings. The grocery business could exist without state participation; the state's licensing function is used only to regulate the business for consumer protection. Lawyers, by contrast, retail a commodity manufactured by the state: law. They have, moreover, been granted a monopoly on it — not only through regulations forbidding nonlawyers from practicing law (which the bar

Lawyers . . . retail a commodity manufactured by the state: law. They have, moreover, been granted a monopoly on it — not only through regulations forbidding nonlawyers from practicing law . . . but through-and-through. . . . The community has made the law to make the lawyer indispensable.

zealously enforces despite their lack of support from the consumers they ostensibly protect), but through-and-through. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted to be intelligible to the legally trained. Court regulations, and indeed the adversary system itself, are predicated on the monopoly of lawyers.

This is the difference between the lawyer and the grocer: the lawyer's lucrative monopoly would not exist without the community; the monopoly, as well as the product it monopolizes, is an artifice of the community. The community has made the law to make the lawyer indispensable. The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose.

For the system of law-retailing has a legitimate purpose, and indeed only one: equal justice under law. Without equal justice under law, the system has no legitimacy, and the legal profession's lucrative monopoly on retailing law should be broken.

For law practice is not a victimless pastime. It is an adversarial profession, and those who can't afford it are often damaged by those who can. One day in housing court, watching lawyers winning default judgments or evictions against poor people who may have had a defense if only they had a lawyer, can convince anyone of that. Even an office practice that on the face of it has no adversaries may harm the poor. When lawyers secure wide-ranging legal advantages for their clients, they help to set up a network of power and privilege from which the poor are excluded; and this exclusion itself intensifies the pariah status of the poor.

This is a second way in which the grocer analogy breaks down. The grocer does not make the hungry worse off by selling to the cash customer; grocery-retailing is not an adversarial profession. But law-retailing is.

These, then, are the moral sources of the lawyer's pro

bono obligation (more precisely: of the community's right to impose a pro bono obligation on lawyers when it is necessary). It should be seen as a reshaping of the lawyer's professional role (1) to fulfill the very social purpose that gives the role its point, that makes it worth the community's while to create it; and (2) to guard against third-party harms created by the business-as-usual of that role inflicted upon the unrepresented.

Conclusion

The Coupon Plan can make a big difference in the legal fates of our least fortunate citizens. There are over thirty million poor people in the United States today, over twenty million adults. At an extremely conservative estimate, they each encounter one legal problem per year; as one welfare rights lawyer put it, poor people are constantly bumping into sharp legal things as they move from one bureaucracy to another. How are these 20 million legal problems to be addressed? If half the bar performs its forty hours a year of pro bono service, we would get 12 million hours of legal aid. It would make a sizeable dent in the problem.

At present, the bar is not shouldering its burden. As the Legal Services Corporation has fallen on hard times, a few responsible law firms and many individual lawyers have stepped up their pro bono efforts. But overall it is becoming more difficult, not less, to find attorneys willing to take on pro bono cases.

Why is this? Recently newspaper columnist Ellen Goodman wrote that where in years past we sympathized with the poor as victims, we now seem to regard them merely as losers. "In our political landscape," Goodman writes, "we may ask the government to lend a hand to victims, but not to waste handouts on losers. The 'needy' may elicit guilt and help from more affluent neighbors. But losers get only scorn. . . . We used to call this blaming the victim. Now we call it winning."

The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose. For the system of law retailing has a legitimate purpose, and indeed only one: equal justice under law.

I would hate to think this is true, for if it is it shows a meanness of spirit that is unworthy of a civilized nation. There is no better way for the bar to commit itself to equal justice under law *for all*, and thus to a concept of community richer and more generous than the Society of Winners and Losers, than to take upon itself an effective pro bono obligation.

— David Luban

This is a shorter version of an article by David Luban that will be appearing in a forthcoming issue of the Michigan Bar Journal.

Patenting Life

The inventiveness of the human spirit knows few limitations, but the patentability of its inventions is carefully regulated by certain key provisions of patent law. Any "process, machine, manufacture, or composition of matter" awarded a patent must be useful for some purpose and must be a genuine, non-obvious innovation. It must be truly human-made and not a "law of nature" or a "product of nature." In addition, the invention must lend itself to a precise, written description. Within these confines, patents have been awarded to millions of innovations, ranging from the neutrino reactor to purified vitamin B-12. But in the last few years controversy has arisen over whether patent protections should extend to tinkerers who create, not a new gadget, but a new form of life.

The question of whether existing statutes do allow at least some life forms to be patented was settled in 1980, when the Supreme Court upheld a patent awarded to geneticist Ananda Chakrabarty for a new strain of bacteria particularly suited for cleaning up oil spills. The Court ruled that Chakrabarty's discovery "is not nature's handiwork, but his own. . . the relevant distinction [is] not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions." In a similar case, *In re Bergy*, a lower court was even blunter: "the fact that microorganisms . . . are alive is a distinction without legal significance." The Chakrabarty decision, however, was a narrow ruling based on arguments about Congress's intent in drafting the relevant legal provisions. The question remains open: should current law be amended to bar the patenting of life?

Opposition to patenting life forms can arise from two distinct objections to it (among others). One is that even the lowliest of life forms has a dignity that should render it unpatentable. The second is that patenting lower life forms will lead to far more serious tampering with the workings of nature, which we would do well to resist while we can.

The Sacredness of Life

Activist Ted Howard, coauthor with Jeremy Rifkin of *Who Should Play God?*, inveighs against the Bergy decision for its denial that life has any sacred status. He charges that the court, in calling a living microorganism "a useful industrial tool," in essence pronounced that "life does not have to be treated as life at all." The claim seems to be that life itself, even at its lowliest, is invested with a sanctity that the patent process defiles.

What does this claim amount to? Certainly whatever sacredness is ascribed to life has to be squared with the fact that human beings are permitted to own all manner of in-

dividual (nonhuman) living things — and even to kill most of them, as wantonly as we please. With every step we take legions of microorganisms perish, and we are not judged the worse for it.

At issue here, however, are not individual creatures, but whole species. Does this make matters better or worse for the defender of life's sanctity? Philosopher Bryan Norton cautions that it is very difficult to argue that species as such have any intrinsic moral worth, since most moral systems are based, at bottom, on respect for the rights and interests of *individuals*: "to apply the concepts of rights and interests to species as collectives radically alters their very logic." Yet we do reserve special moral condemnation for genocide, the deliberate extermination of a *group*, as a worse evil than the random killing of the same number of isolated individuals. And we do have policies aimed at preserving species. So there may be some special worth attaching to a life form that is not possessed by its individual members.

But wherein does the sacredness of life reside? Just how sacred is some all but invisible strain of slime? What is there about the sheer fact of being alive that matters so much? It is hard enough, some argue, to draw a line between living and nonliving, let alone to claim that the line, once drawn, is of any momentous moral concern. Thus an amicus brief filed by the University of California at Berkeley in *Bergy* asserts: "Recognition of the difficulty that skilled scientists are experiencing in drawing a bright line between life and its absence effectively destroys the argument that life itself is not only *the essential characteristic of any living being* . . . but *the one which* . . . precludes patentability." On this view, it would have to be some other, further characteristic that makes the real difference, such as being able to feel, or suffer, or care, or reason. But these characteristics are absent from lower life forms.

Others, however, see respect for lower life forms as respect for our own distant ancestors in a great, unbroken chain of life — theirs is the vital spark passed on to us through eons of evolution. Leon Kass, writing in *Commentary*, suggests that "reacquiring a respect for our relatives, the ever-changing living forms, could regain for us a much needed recognition and appreciation of the natural and unchanging source of all change."

At this point one might ask: is disrespect for life shown by taking out patents on new life forms, or does the real disrespect lie in performing the research that leads to their creation in the first place? The research itself is where we "play God"; the ensuing patent may seem so much frosting on the cake. But Douglas MacLean, director of the Center for Philosophy and Public Policy, points out that respect for sacred values is exhibited in a variety of social-

ly acknowledged ways. We show respect for the sanctity of human life, for example, by "forming conventions and ritualizing certain behavior and activities to transcend . . . the necessity of using and exploiting one another." These may take the form of taboos: collective societal decisions that there are some things we will not do. Refusing to patent life forms as so many more "industrial tools" may, then, be one way of expressing our respect for the value inherent in all of life. But it remains to be shown that prohibiting patents does in fact have this kind of social meaning.

After Microorganisms, the Deluge

A second group of objections is motivated by fear of what the patenting of lower life forms will bring in its wake. The possible adverse consequences cited are of two kinds: the nightmarish shift in our values and attitudes that might result one day in granting patents to the creators of genetically altered human beings; and the massive evolutionary disruption that might be wreaked once human beings dabble too far in God-playing.

In the dispute over patenting life, the question is repeatedly raised: if lower life forms are patentable, where will we draw the line? What meaningful distinction can be made to avoid extending the same patentability to higher forms of life? However, meaningful distinctions do not seem hard to come by, even if present law offers no grounds for making them. (As a matter of fact, the difference in complexity alone between microorganisms and higher animals makes it very unlikely that the latter will ever be capable of the "full, clear, concise, and exact" description currently required in a patent application.) If we believe that there is nothing in itself troubling about patenting microorganisms, but there is something in itself troubling about patenting species of higher animals, or ultimately human beings, we can point to whatever differences lead us to give a different answer in the two cases: differences such as sentience, consciousness, social relationships, reason. It may be difficult to pinpoint any precise break in the life continuum where we feel confident that all and only species to one side of that line deserve special protection. But that it is difficult to draw a precise line does not mean that it is impossible to make some rough, but workable, distinctions.

It is harder to answer the question: where can we draw the line to make sure that our genetic meddling doesn't have far-reaching and disastrous consequences? Jonathan Glover, Fellow in philosophy at New College, Oxford, thinks that this is the real worry behind the otherwise obscure charge that geneticists who create new life forms are "playing God." For if the prohibition on playing God "tells us not to interfere with natural selection at all, this rules out medicine, and most other environmental and social changes. [But] what makes [genetic engineering,] and not the others, objectionably God-like?" One answer may be, Glover suggests, that genetic changes may be both more drastic and less reversible than environmental ones, and we object to "a particular group of people, necessarily fallible and limited, taking decisions so important to our future."

Granted that fears of irreversible tinkering in the evolutionary process are valid ones, in what way are they addressed by a decision to place new limits on the patentable? The Supreme Court in *Chakrabarty* acknowledged the possible dangers of genetic research, but decided that "the grant or denial of patents on microorganisms is not likely to put an end to genetic research. . . . Legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides." Kass agrees: "denial of individual patent applications seems a poor way for society to decide questions about allegedly dangerous research and technology. . . . As they are instruments for encouraging innovation, they are poorly designed for regulating or controlling it."

"Our regulatory agencies are designed to protect the public from the harmful consequences of technological failure. With genetic engineering, our deepest fears seem to be directed toward the consequences of technological success."

How, then, should the pace and direction of technological change be regulated and controlled? Threats to health and safety posed by new technologies can be dealt with by the sorts of regulations promulgated by agencies like the Food and Drug Administration and the Nuclear Regulatory Commission. But Kass argues that this focus on health and safety unduly constricts the full measure of our concern: "We have few means of assessing and regulating with regard to the massive consequences of new technologies to our mores, institutions, and ways of life." MacLean adds: "Our regulatory agencies are designed to protect the public from the harmful consequences of technological failure. With genetic engineering, our deepest fears seem to be directed toward the consequences of technological success. We are concerned about the ultimate ramifications of increased knowledge, and its applications. Neither our current regulatory laws nor the agencies that enforce them seem well equipped to address these social issues."

Patent law in any form is certainly inadequate to acknowledge these deeper concerns. Our challenge is to design institutional mechanisms that will allow us to express our respect for whatever it is we take to be sacred about all life and to control the growth and direction of new technology in a way that will allow human life to flourish to its fullest.

Sources quoted in this article are: Ted Howard, "Patenting Life: A Major Corporate Breakthrough toward Genetic Engineering," *The Progressive*, vol. 43, no. 9 (September 1979); Bryan G. Norton, *The Spice of Life: Why Preserve Natural Variety?* (forthcoming); Leon Kass, "Patenting Life," *Commentary*, vol. 72, no. 6 (December 1981); Douglas MacLean, "Social Values and the Distribution of Risk," in MacLean, ed., *Values at Risk, Maryland Studies in Public Philosophy* (Totowa, N.J.: Rowman and Allanheld, 1985); Jonathan Glover, *What Sort of People Should There Be?* (Harmondsworth, England: Penguin Books, 1984); and court cases *In re Bergy* 563 F.2d 1031 (1977) and *Diamond v. Chakrabarty* 100 S. Ct. 2204 (1980).

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