

Air Pollution: The Role and Limits of Consent

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A top-forty singer croons to his girl friend: “All I need is the air that I breathe and to love you.” Like love, air is an essential human good: wherever we go and whatever else we do or care about in life, we all must breathe. And like love, air is found everywhere: in a dimly lit bar, on a stroll in the park, on the factory assembly line, in the office copy-machine line, in cities, suburbs, farms, wilderness.

But, along with love and air, air pollution, too, turns up in all these places. In bars and restaurants, at work and at home, nonsmokers inhale what nearby smokers exhale: one cancer epidemiologist warns that breathing other people’s cigarette smoke may bring early death to as many as 2,000 nonsmoking Americans every year. Airborne contaminants in the workplace (offices as well as factories) are responsible for the largest share of the 100,000 to 200,000 occupational disease fatalities in the United States every year. Even otherwise pristine wilderness is not untouched: the Office of Technology Assessment has estimated that “acid rain” currently threatens 9,500 lakes and 60,000 miles of streams. Some 50,000 deaths annually in the United States and Canada may be attributable to the effects of outdoor air pollution.

What moral judgment can we pass on air pollution in these different cases? On one common and persuasive moral view, it is simply wrong to cause a serious harm to another person without his consent, whatever the benefits — to you, to society generally, even to that person — of so doing. To cause disease or death, or

to destroy another's property, is on this view to violate a moral right. Peter Railton, Associate Professor of Philosophy at the University of Michigan, fleshes out this "Lockean" view with the image "of moral space as akin to a map at a registrar of deeds. Individual entitlements determine a patchwork of boundaries within which people are free to live as they choose so long as they respect the boundaries of others. To learn one's moral obligations one need only consult the map. Would a given act involve crossing another's boundary? If so it is prohibited; if not, permitted." Are pollution-caused injuries to persons or property, then, flatly ruled out?

The answer usually given is that such injuries may be permitted if those injured can be said to have given their consent to the polluting activity. Consent, as it were, opens up boundaries so that a border-crossing is no longer a moral offense. How adequate is this response in our three cases cited above — secondhand smoke, airborne hazards in the workplace, and outdoor air pollution? Can we say that the victims in these cases consented to the harms that befell them? What role does the notion of consent play in legitimizing, or condemning, current levels of air pollution — how much weight can we place on a consent requirement in setting our societal standards for air quality, and in deciding how these standards should be implemented? And where can we look instead if the concept of consent in some cases fails us?

Secondhand Smoke

Nonsmokers have always complained about having to breathe other people's smoke, but only in the past few years has the link between secondhand smoke and lung cancer been established. Suddenly the complaints have acquired a new seriousness. Most "passive smokers" don't actually contract cancer, of course, but are

While the smoker may have a right to smoke alone in her room, cheerfully contracting cancer if she likes, her right to smoke, like her right to swing her arm, ends where someone else's nose begins.

"merely" placed at a higher risk of contracting it. But risk levels are raised, Railton notes, because "some actual physical change has been wrought by [the smoker] in [the nonsmoker's] person or property. . . . each time I send some of my tobacco smoke your way you suffer some small physical change, not for the better." This counts as a harm, albeit a small one. And on the Lockean view what matters is whether or not a boundary was crossed, not the magnitude of its consequences: shoplifters have been arrested for stealing a pack of chewing gum. Nor can the smoker's alleged "right to smoke" be placed in the balance here. While

the smoker may have a right to smoke alone in her room, cheerfully contracting cancer if she likes, her right to smoke, like her right to swing her arm, ends where someone else's nose begins.

But doesn't the nonsmoking wife consent to the risk imposed upon her by marrying a smoker and staying married to him? If she can't take the smoke, she can pack her bags and head for Rio. It can be argued, more generally, that the nonsmoker bothered by someone else's fumes is at liberty to walk away. But according to Rutgers University philosopher Mary Gibson, "this will not do. He or she must work, travel, eat, attend classes and meetings, and so on, like everyone else.

. . . the more voluntary the association, the stronger the case for saying that the nonsmoker consents to the risk he undergoes. But we need to look long and hard at how voluntary the association really is.

. . . In a society in which a substantial proportion of the population smokes, avoiding involuntary exposure by eschewing all 'voluntary' associations where one might encounter secondhand smoke would make it impossible to lead anything like a normal life." She agrees that the more voluntary the association, the stronger the case for saying that the nonsmoker consents to the risk he undergoes. But we need to look long and hard at how voluntary the association really is.

In this first case, it seems, then, that the presence or absence of the nonsmoker's consent is critical in determining how much pollution the smoker is morally permitted to impose on those around him. Our societal goal should be to minimize the harms suffered by non-consenting bystanders, to zero if possible.

How should this goal be achieved? Clifford Russell, an economist at Resources for the Future, identifies several dimensions on which we can compare different strategies for implementing air quality goals: how efficiently the goal is achieved; how achievement is monitored and enforced; what incentives polluters are given to reduce pollution still further; and whether the implementation plan is itself satisfactory on moral and political grounds.

To achieve our air quality goal in the secondhand smoke setting, Russell recommends outright prohibition of smoking in public places or the provision of segregated smokers' and nonsmokers' sections. Since "no social good is served by [smoking], and it is certainly not an inevitable result of any activity that does produce a social good," the only cost of prohibition is the discomfort experienced by the habitual smoker asked to refrain. Such discomfort can be intense, however, so where segregation can be inexpensively provided, it may be the preferred choice.

Better still would be for smokers to kick the habit

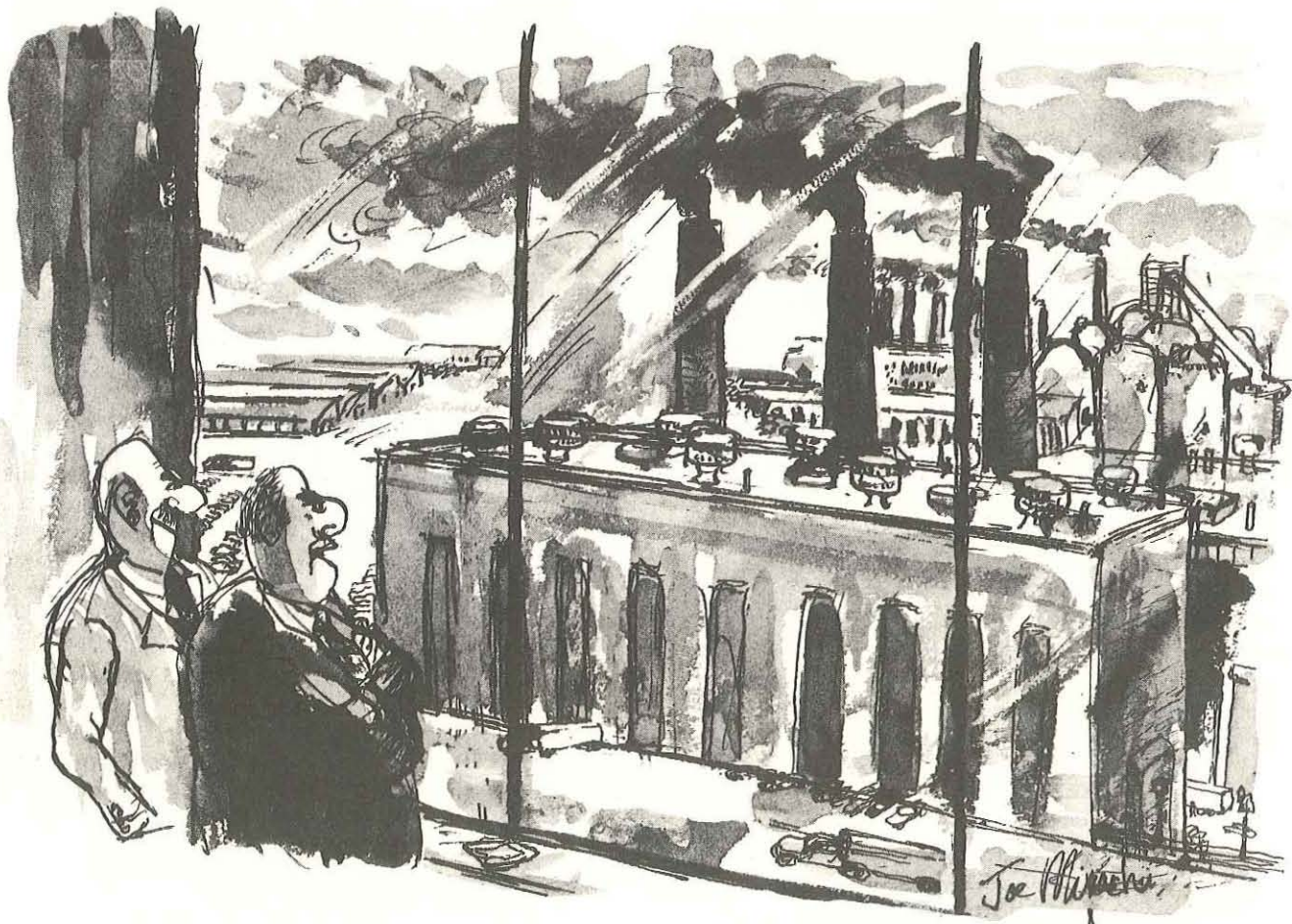
altogether. The strongest anti-smoking incentives seem to be provided by growing public disapproval (fueled by Brooke Shields commercials calling smokers "losers"). Hefty taxes placed on cigarettes, to provide a financial disincentive to smoke, run into ethical objections, on Russell's view. "Any implementation system based on a tax . . . runs squarely aground on the distributional objection that the rich can pay to pollute. . . . The burden of achieving the social goal would be shifted to the least well off rather than shared on some appealing basis such as the initial contribution to the problem."

Workplace Air Pollution

It may seem more persuasive to argue that workers exposed to airborne contaminants on the job have consented to the risks they bear, particularly if they are paid additional wages in exchange for the additional risk. Gibson points to evidence, however, that a "wage premium" for risky work exists "in otherwise relatively desirable jobs, i.e., those that are relatively highly paid, secure, and unionized, but not in those jobs characterized by low pay, insecure employment, and lack of

unionization." She concludes, "Inferring consent from labor-market behavior presupposes that workers are fully informed of the hazards they face before accepting (and while working at) jobs, that they have reasonable alternatives available to them if they find the risks unacceptable, and thus that they are satisfied with the wage/risk packages they currently get. Each of these assumptions is subject to serious question."

If we insist that airborne harms may not be imposed on workers without their consent, then in many cases workplace air quality will have to be considerably cleaned up, and at considerable expense. Enforcement of the consent requirement has a great deal more bite here than in the secondhand smoking case, since real social benefits derive from keeping production costs low. But our current societal consensus seems to be that workplace air pollution violates workers' rights. The Occupational Safety and Health Act mandates that permissible exposure levels for any toxic substance present in the workplace must ensure that "no employee will suffer material impairment of health or functional capacity," and this insistence on protecting worker health despite steep costs was upheld by the U.S. Supreme Court.



Drawing by Joe Mirachi; © 1985
The New Yorker Magazine, Inc.

"Where there's smoke, there's money."



These two photos of Herten Castle in the industrial Rhein-Ruhr region of West Germany were taken in 1908 (left) and 1969 (right) respectively. Stone decay caused by air pollution explains the difference.

Photographs from *Stone: Properties, Durability in Man's Environment* by E. M. Winkler, Springer-Verlag, 1973



If we can achieve this same standard more cheaply, of course, so much the better. Russell believes that the most efficient route to attainment is for the regulator "simply to announce to each industry or plant the required ambient standard and then arrange to monitor its observance. . . . A simple announcement of the standard can bring about the least-cost solution, since each firm can be presumed to minimize its cost of compliance." A less efficient alternative is to specify, not a standard to be met, but a particular technology for meeting it, since this provides a firm with no incentive for developing cheaper and better means of pollution control. Some efficiency may be sacrificed, however, for ease of monitoring and enforcement. Russell notes that it is much easier to check that a certain piece of equipment is in place than to measure constantly fluctuating air quality. On the other hand, "installation does not guarantee operation, much less proper operation." In any case, the presence of the workers themselves, who can assume some on-the-spot monitoring responsibilities, makes enforcement less of a problem.

Implementing a workplace air quality standard through regulation backed with penalties for noncompliance also sends a clear message that we as a society morally condemn the practice of endangering worker health for corporate profits. Promulgation of the regulation itself, together with the rhetoric that accompanies it, signals that workplace health and safety have a high priority on the nation's agenda.

Outside Air Pollution

Perhaps there is no one who is not adversely affected by outdoor air pollution. Even those who live in low-risk regions have reason to care when wilderness lakes and forests are rained upon by showers with the pH

of household vinegar, for wilderness — and, indeed, the air itself — is a shared resource owned jointly by all of us. Once again, in the absence of near-universal consent to current pollution levels, the "you stay within your boundaries and I'll stay within mine" view seems to entail very tight restrictions on polluting activity.

But this conclusion here seems unacceptable. In the previous two cases, it looked both feasible and fair to insist that no one be harmed by secondhand smoke or workplace air pollution without her consent. Where consent could not be obtained, pollution could not be justified. But how would one even begin to go about obtaining the actual explicit consent of every single individual affected by pollution in outdoor air? Nor does an appeal to "implicit" consent seem to be of any help, for what might initially appear instances of implicit consent — such as buying a home in a polluted area — do not hold up under scrutiny. Railton maintains, "Someone who voluntarily moves into a high-crime (or high-grime) neighborhood may have acted unwisely, but he has not laid down his rights."

More crucially, an insistence on actual unanimous consent, even if feasible, seems unreasonably — and unfairly — strict. Should one individual, perhaps only marginally affected, be entitled to veto any polluting activity, however much it may benefit others? We may feel more inclined to scrap the consent requirement than to shut down all polluting industry. It seems that in the outdoor air pollution case, we have reached the limits of consent as a tool for setting air quality standards.

At this point Gibson suggests that we stop and ask ourselves what it was about consent that struck us as so important and look to this more basic, underlying notion to guide our policies. On her view, what lies behind consent requirements is a concern for autonomy,

for self-determination, a concern "that one's life be one's own." Railton identifies the motivating factor behind the Lockean view as the Kantian idea of respect for persons as ends, not merely as means. If we look beyond consent to autonomy, or respect for persons' control over their own lives, what can we say about outdoor air pollution?

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Gibson draws this conclusion: "There can be no substitute for actual, direct, informed, and meaningful participation in the formation, adoption, and implementation of public policy concerning air pollution by the persons whose lives, health, and values are potentially at risk." In particular, she rejects technocratic solutions that appeal to notions of "hypothetical consent" — speculations on the part of economists and bureaucrats as to what rational, well-informed individuals *would* consent to if they were consulted. "What we need, if we are to respect and promote autonomy," she argues, "are not more sophisticated algorithms for making decisions, but better ways of involving those whose lives will be affected by those decisions in making them." There is no magic formula, no neat cost-benefit analysis, for determining how much pollution we as a society can tolerate, given the clearly intolerable costs of achieving zero pollution. Gibson thus looks to democratic institutions and procedures to help us arrive at some kind of societal consensus.

Railton also sees the solution as lying in a process of social balancing and compromise. For him, the failure of the notion of individual consent to guide our public policies on outdoor air pollution shows that the Lockean conception of morality "that pictures individuals as set apart by property-like boundaries" cannot do justice to "the fact that we find ourselves situated in, and connected through, an environment." A workable policy on air pollution will not come from a rigid and narrow focus on individual rights, but from a fundamentally social dialogue.

Once we have arrived through democratic processes at a societal standard for outdoor air pollution — as we have through the Clean Air Act — by what strategy should it be implemented? The current approach, following the strategy for workplace pollution, again simply promulgates the standard, with penalties for noncompliance. But Russell argues that stronger incentives for technological innovation are provided by systems that, rather than flatly forbidding any pollution that exceeds the standard, set a charge or price on any excess discharges: "for any particular source, an incentive system that puts a fee on the discharge remaining

after control will create a greater incentive to change than will a regulation specifying that same level of discharge." He believes there is little to choose between the two approaches as far as monitoring and enforcement are concerned, since accurate measurements are needed to assess both charges and fines.

The idea of emission charges has met with political resistance. It is felt that polluters already have a good enough reason not to pollute: that it's wrong. We don't let litterers pay to toss beer cans out of their cars; instead we post signs saying, "Littering is filthy and selfish so don't do it!" "By making pollution into an activity that one can pay to engage in," Russell explains this objection, "the charge approach implicitly judges it to be ethically neutral — like buying a shirt. Those who judge pollution to be wrong in itself, as a crime against other persons, do not approve of that result."

On the Lockean view, of course, any amount of pollution, however small, is a wrong to which a clear moral stigma should be attached. But part of the reason for moving away from that view is the realization that a certain amount of pollution is inevitable in any production or consumption process. The fact that we set non-zero levels of pollution, Russell argues, sends the same ethical message as establishing a charge. So a case can be made for a charge approach, if it can receive democratic endorsement from those who will in the end be affected by the policy chosen.

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Conclusion

Air pollution, as Railton concludes, makes us take seriously the fact that we exist, not as isolated entities secure behind our fences, but as fellow creatures in a shared and threatened environment. While in some settings — when looking at secondhand smoke or workplace hazards — we can insist that individual consent remains fundamental, in others we may have to look beyond consent to autonomy and beyond the individual to a deeper sense of community. If anything is our birthright, it is the air that we breathe. The fervent outpouring of public support for the Clear Air Act suggests that we are serious about doing something to protect it.

The information in this article, and the quotes from Peter Railton, Mary Gibson, and Clifford Russell, are taken from essays in *To Breathe Freely: Risk, Consent, and Air*, edited by Mary Gibson, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Allanheld, 1985). To order, see page 15.

Should the U.S. Intervene in Nicaragua?

Some hope that support for Nicaragua's anti-communist rebels can prevent "another Cuba"; others fear that it will precipitate "another Vietnam." Here a

philosopher and a lawyer each examine current American policy toward Nicaragua, offering very different arguments to reach very similar conclusions.

* * *

Intervention and International Justice

The rights and wrongs of U.S. intervention in Nicaragua are not easy to determine. It is a general assumption of much public debate on this matter that if the Sandinista government is bad, or strongly pro-Soviet, then those who resist them, even with arms, are good and, consequently, support for them is good. Conversely, if the Sandinistas are themselves good, or at least no worse than many other regimes, then armed resistance to them is unjustified and likewise support for it. Accordingly, one side in the debate supplies evidence of human rights violations by the Sandinistas and of a growing Marxist-inspired tyranny, while the other documents its literacy campaigns, health-care programs, and the brutal conduct of the Contras who oppose it.

Argument of this sort is inconclusive, however, because *all* the parties involved emerge (from such independent inquiries as have been made) in varying shades of gray rather than the black and white which the argument requires. We may be certain now that President Reagan's descriptions of Nicaragua as a "totalitarian dungeon" and of the Contras as "the moral equivalent of our Founding Fathers" are, at the least, inaccurate. But neither is post-revolutionary Nicaragua the paradise some have suggested, as its emigrants testify.

A second source of inconclusiveness arises from the possibility of drawing different inferences from agreed facts. All are agreed that increasing numbers of people are leaving Nicaragua. Some see in this evidence of the increasing unpopularity of the Sandinista regime, others concede the unpopularity but attribute it to the conscription made necessary by the continuing activities of the Contras, while the Sandinista government itself describes it as "a normal and natural problem in any revolution" when those who are robbed of opportunities to exploit their fellow citizens set off in search of easier pickings elsewhere. Again, all are agreed that the Sandinistas have sought and obtained the help of

Cuba and the Soviet Union, but to some it is proof positive of Sandinista commitment to Soviet-backed communism, to others proof of the counterproductive character of U.S. policy in forcing Nicaragua into the arms of the enemy.

Third, and perhaps the greatest cause of inconclusiveness in the argument commonly used, is conflict of political ideals. The argument depends upon the concept of "good government," but there are deep differences between the contending parties as to what the mark of this might be. The abolition of private property, for instance, will constitute the violation of a basic right for the traditional liberal, while protection of private property will constitute a defense of entrenched privilege and an obstacle to social justice for the socialist. Similarly, disregard of the rule of law in order to promote "revolutionary justice" will appall the liberal democrat, whose "rule of law" on the other hand will appear as just another instrument of oppression in the eyes of the revolutionary socialist.

Plainly what is needed if there is to be any assessment of the rights and wrongs of the conflict which has any chance of commanding the assent of both sides is an argument which transcends rather than foment these differences. One possibility is recourse to international law, whose function just is to arbitrate between sovereign authorities. But the effectiveness of law in adjudicating disputes between sovereign nations is conditioned by the willingness of the parties subject to it to recognize its authority, and the United States, in an unprecedented action, has suspended recognition of the International Court of Justice and refused to take further part in legal proceedings because the court found in favor of Nicaragua.

Self-Determination

Another possibility lies with the doctrine of self-determination. Many U.S. citizens take the view that, however objectionable the regime in Nicaragua may be

to democratic observers, each country has the right to determine its own constitutional arrangements, and no other country has the right to interfere in its doing so.

The doctrine of the self-determination of peoples arouses much sympathy, but against it some have argued that no value we attach to self-determination can be absolute, and that if violations of human rights become extreme enough, as in Bangladesh in 1974 or Cambodia in 1980, intervention by neighboring countries is not only permissible but obligatory. If so, in any given case we must decide whether the conduct of the government of the country in question is bad enough to justify intervention. It may reasonably be doubted whether Nicaragua can be compared with Pol Pot's Cambodia, but the chief point to be made here is that,

that thieves and their victims, if they are of one nationality, should be left to sort things out for themselves.

Just War Theory

Neither appeal to law nor to the principle of self-determination, then, can persuade opposing parties that intervention in Nicaragua is right or wrong. Some third way of transcending claim and counterclaim is needed. Such is to be found in the theory of the Just War, developed by Christian theologians precisely to govern those cases in which conflicts arise between sovereign powers each of whom considers itself to be in the right. I want to examine three of its core principles for the light they shed on the justice of military and quasi-military intervention in the affairs of another

Photo credit B. Lynne Barbee



Nicaraguan women serving on guard duty.

if self-determination is overridable in this way, we have returned to the strategy of claim and counterclaim that we have seen to be inconclusive.

In fact, though, the appeal to self-determination can be dismissed in a more devastating fashion by asking what reason there is to respect it at all. The assumption that the self-determination of nations or peoples is to be respected flows from its association with individual self-determination. But it is an error to assume that the self-determination of peoples invokes the same sort of value as the moral autonomy of the individual. A people comprises a multiplicity of persons, each the bearer of basic moral rights, and it is these that command our respect. A nation or people is not a moral subject in this sense. When a country is described as "tearing itself apart" the reflexive form of the expression is misleading — it means that fellow citizens are fighting one another. And some may be doing so unjustly. It is often said that Nicaragua should be left to sort things out for itself, but there is no more reason to accept this principle of restraint than the principle

country. These, adapted for the purposes of intervention, are:

1. Intervention must be in a just cause.
2. Those who intervene must have a reasonable hope that their intervention will be successful.
3. The evil and damage which the intervention entails must be judged proportionate to the harm which it is designed to remedy.

The first of these principles is as contentious as anything in the argument with which we began. Bringing down a communist state is itself a just cause in the understanding of many Americans, whereas building up a communist state is a just cause in the eyes of many Sandinistas. So it is the second two principles that must do the work. But this, I believe, they can do very effectively.

It is a characteristic of intervention that it does not aim at conquest. It aims to alter the regime of another country, but acknowledges that the other country should and will remain independent. As such,

however, the control of the intervening state is greatly lessened. In this case, whatever effect U.S. Marines might have in Nicaragua, in carrying out the aims of the United States, the Contras can be relied upon less. Similarly, even if U.S. Marines were employed, the same argument would apply at another level. Whatever good might be accomplished by direct U.S. rule (i.e., conquest) in Central America, there is much less reason to expect any native government that might be installed by the United States to be able to do as much. In fact, case after case shows that the effectiveness of third parties as instruments of policies of intervention is extremely low. In South Vietnam the government was incapable of sustaining the advantages given to it by American might and fell to communism within hours of U.S. withdrawal. In Cambodia, the protection of individuals which formed part of the reason for Vietnam's overthrow of Pol Pot was short lived, and the Heng Samrin government is now not only ineffectual as an independent authority; it also presides over wholesale abuse of individual rights. Likewise in Uganda, and even in Bangladesh, where intervention has been an instrument of policy, its success has been slight.

This conclusion is of the utmost importance because, according to the second principle above, success is not merely a matter of political prudence, but of justice itself. If we have little reason to expect success, intervention is not only foolish, but unjust. This is not a simple matter of cost/benefit analysis. It does not say that the end must be of greater value than the means, but that the infliction of any costs in a hopeless cause, however worthy, is unjust. And in the case of Nicaragua, the conclusion must be that intervention is unjust, partly because of past experience of U.S. foreign policy, where at best it is only intervention against narrowly based regimes which has been successful to any degree, but chiefly because the sorts of measures proposed by the present administration cannot ser-

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iously be said to have a reasonable chance of altering the political structure of Nicaragua. A few million dollars of aid to the ill-assorted and poorly trained Contras who have had no significant military successes is *most* unlikely to do more than cause a modicum of death and suffering. My guess is that current policy is more likely to bring about the opposite of that at which it aims, namely the creation in Nicaragua of another Cuba, than it is to bring about an allied democratic society. But even if this is not so, it is sufficient to show that the declared aim of the policy is an un-

likely effect of it, and hence to show that U.S. intervention in Nicaragua as currently conceived is unjust.

It might be supposed that this argument leads to an undesirable conclusion, namely, that indirect intervention should give way to direct conquest. One should ask, of course, why this would be an undesirable conclusion. If the creation of free and democratic institutions for the people of Nicaragua is really so important, then we ought to make them participants in

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the free and democratic institutions of the United States, if this is the best way to accomplish it. Many will believe, of course, that this would *not* work, but still more will think, plausibly, that the cost in lives and long term commitment is not warranted by the end. If this is so, and I think it is, it follows that direct action of this sort is ruled out by the third principle given above. From which in turn it follows that the United States has no just way in which it can engage in the conflict between the Sandinistas and those who oppose them.

It is of the greatest importance to remember that this conclusion follows regardless of one's view of the merits or demerits of the Sandinista government, of the status of the International Court of Justice, or of the doctrine of self-determination of peoples. The only possible source of dispute is the probability of actually effecting some specific change in the government or constitution of Nicaragua. Most will agree, I think, that the chances are slight. Some will contend that the purpose is not the implementation of specific changes, but rather "keeping pressure" on the Sandinistas. Such indeterminacy is also outlawed by the theory of just intervention I have been elaborating, since it merely disguises with metaphor the maintenance of pain and death for no very clear, and thus for no just, purpose.

The great advantage of employing just war theory in the way it is used here is that it brings together the ethical and pure policy questions. It shows, in short, that the unwisdom of a policy is its injustice, and thus bridges any gap which political "realists" might like to open up between their own opinions and those of the so-called "moralist."

— Gordon Graham

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Intervention and International Law

On May 1, President Reagan declared a trade embargo against Nicaragua. In early June, the House reversed itself and joined the Senate in approving millions of dollars in aid for forces — the “Contras” — fighting to overthrow the government of Nicaragua. Two weeks later, the House approved the use of U.S. troops in Nicaragua under a number of circumstances, including the appearance of “sophisticated fighter planes” in the country. While the economic and military impact of these measures remains unclear, their legal effect is apparent. The United States has shown itself to be an unreliable treaty partner. It has shown that it will not recognize the force of international law when it conflicts with its political objectives. This is a position that America cannot lightly assume at a time when its own national security and economic well-being depend heavily on the observance of treaty obligations.

• That the present administration would disregard international law in its dealings with Nicaragua should surprise no one in light of its recent decision to walk out of the proceedings at the International Court of Justice. Even before that case was filed, the United States tried to escape from its treaty obligations to participate in proceedings before the court. When that failed, it tried to persuade the court that it had no jurisdiction to decide the case. When the court rejected that argument, the United States simply walked out. It did not even attempt to provide a legal justification for this abandonment of its international legal obligation to respect the jurisdiction of the court.

But in its recent actions, Congress has joined the administration in ignoring both the rule of international law in general and the jurisdiction of the court in particular. The whole issue of the legality of support for the Contras is presently before the court; Nicaragua has asked the court to declare that all U.S. support for the Contras violates international law. In a preliminary decision, the court ordered the United States both to cease mining Nicaraguan harbors and to respect the sovereignty of Nicaragua. Obviously, renewing support for forces dedicated to the overthrow of the legitimate government does not constitute respect for the sovereignty of Nicaragua.

Neither would a U.S. invasion of Nicaragua simply in response to the acquisition of certain weapons — including aircraft — by Nicaragua be permissible under international law. Except in response to an armed attack by Nicaragua, introduction of U.S. troops would constitute a clear violation of the charters of both the United Nations and the Organization of American States (the “OAS”). More fundamentally, however, the House has approved in principle the concept that the United States may decide for itself when and if direct military action against Nicaragua is required. This

totally disregards the elaborate post-war treaty structure, which was largely the result of U.S. efforts, that places the decision to use force within the sole competence of multilateral institutions.

Similarly, the trade embargo against Nicaragua, an action taken without consultation with Congress, violates U.S. treaty obligations. First, in 1956 Nicaragua and the United States entered a Treaty of Friendship, Commerce, and Navigation. That treaty is still the law (even though the United States has given notice that it will terminate one year from May). The treaty provides that “between the territories of the two parties there shall be freedom of commerce and navigation.” It further specifies that “neither party shall impose restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.”

In addition, both Nicaragua and the United States are members of the OAS and have thereby incurred treaty obligations toward each other. The OAS charter does not permit unilateral acts of economic aggression: “No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state. . . .” If the United States truly believed Nicaragua to be a threat to its national security, it was obligated to bring the issue before the OAS and seek economic sanctions through the multilateral decision mechanism within

Photo credit B. Lynne Barbee



Sandinista soldiers guarding site of Contra attacks.

that organization. But the Reagan administration has done no such thing, preferring to act without notice to, consultation with, or agreement of its allies. And, it is now clear, its allies disagree with the embargo and will not respect it.

Finally, both Nicaragua and the United States are signatories of the General Agreement on Tariffs and Trade ("GATT"), a multilateral trade agreement adopted after World War II to promote trade on the basis of reciprocity and nondiscrimination among nations. GATT does not permit discriminatory import restrictions. In fact, when the United States unilaterally cut Nicaragua's sugar import quota in May 1983, Nicaragua brought the matter before the GATT council. That council ruled that the United States had indeed violated its legal obligations under GATT.

Many people think that international law is not "real" law, that in the absence of an effective enforcement mechanism the rules of international law are not compelling and can be freely ignored. But until now, that has never been the position of the United States. Take, for example, the policies of the Kennedy administration in dealing with the genuine threat to national security posed by Cuba in 1962.

In October 1962, President Kennedy announced a naval blockade of Cuba. He simultaneously announced that the United States would immediately bring the issue of the Cuban missiles before the Security Council of the United Nations and the Organization of American States. The OAS is authorized by a multilateral treaty signed by all member states, including the United States, to decide upon "the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent." When the issue was brought before it, the OAS voted unanimously to authorize the quarantine of Cuba. Robert Kennedy later wrote, "It was the vote of the Organization of American States that gave a legal basis for the quarantine. . . . It . . . changed our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position."

International law . . . provides the standard by which all of us can measure our own government's behavior among the community of nations. By this standard, America has not performed well lately.

U.S. actions toward Cuba, in short, occurred within a legal framework of collective action. This alone provided the legal justification for the actions. The framework was one to which the United States was bound to adhere by virtue of its treaty commitments. Fulfillment of this obligation, however, was not simply a formalistic burden: The claim of legal legitimacy justi-

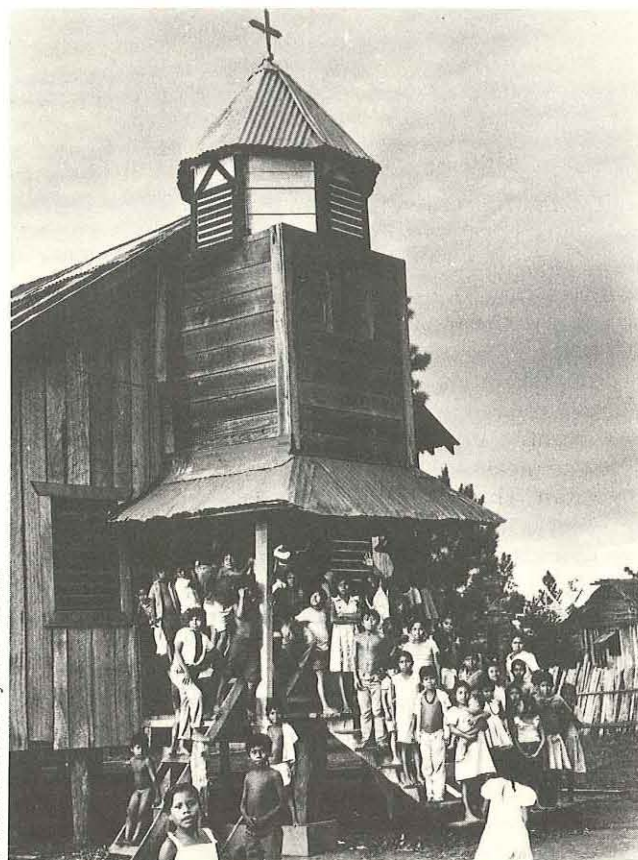


Photo credit B. Lynne Barbee

Nicaraguan children gather on the church steps.

fied international support for the actions of the United States. Again, as Robert Kennedy stated, "Our position around the world was greatly strengthened when the Organization of American States unanimously supported the recommendation for a quarantine."

The same international legal obligations exist today that existed in the early 1960s: The United States remains a member of the Organization of American States, as is Nicaragua. As such, the United States had a legal obligation to bring its allegations against Nicaragua before the OAS. Instead of doing so, it has chosen to rely upon its own economic and military power to take unilateral actions against Nicaragua.

No law — international or domestic — has any more substance than its ability to persuade the strongest members of the society to obey. But even where not coercive, law remains a standard by which we can judge the government's behavior. International law, in particular, provides the standard by which all of us can measure our own government's behavior among the community of nations. By this standard, America has not performed well lately.

— Paul W. Kahn

Paul W. Kahn is an associate professor at the Yale Law School. He is also a member of the Nicaraguan legal team at the International Court of Justice.

Should Public Schools Teach Virtue?

What role should public schools play in moral education? One answer is none: schools should leave character development and training in moral reasoning to families and voluntary associations (such as churches). As one popular authority put it, "Personally, Miss Manners thinks that the parents of America should offer the school systems a bargain: You teach them English, history, mathematics, and science, and we [their parents] will . . . look after their souls." An apparent attraction of this solution is that public schools would thereby rid themselves of all the political controversies now surrounding moral education and get on with the task of teaching cognitive skills and factual knowledge.

But children don't leave their souls behind when they go to school, and schools cannot escape looking after children's souls in many significant and subtle ways. Even if schools avoid all courses that deal explicitly with morality or civic education, they still engage in moral education by virtue of their "hidden curriculum," non-curricular policies that serve to develop moral attitudes and character in students.

Schools develop moral character at the same time as they try to teach basic cognitive skills, by insisting that students sit in their seats, raise their hands before speaking, hand in their homework on time, not loiter in the halls, be good sports on the playing field, and abide by the many other rules that help define a school's character. We become aware of some of the many ways in which schools shape moral character when we consider alternative school practices. Consider some common practices in Japanese elementary schools. Teachers routinely expect students who have mastered the day's lesson to help teach those who have yet to finish. Every member of the school, including the principal, shares in the chores necessary to keep the school building clean (schools have no specialized janitorial staff). These practices are lessons in egalitarianism that may never need to be taught in the curriculum if they are consistently practiced in the classroom. Most elementary schools in the United States teach different moral lessons, but they too engage in moral education simply by not doing what the Japanese schools do. The political choice facing us therefore is not whether schools should engage in moral education, but what sort of moral education they should engage in.

Nor would it be desirable for schools to forswear moral education, even if it were possible for them to

do so. Public schools in a democracy should serve our interests as citizens in the moral education of future citizens. Our parental interests are to some extent independent of our role as democratic citizens, and hence the emphasis of moral education within the family is likely to be quite different from that within schools. Parents acting individually and citizens acting collectively both have valuable and largely complementary roles to play in the moral education of children: the former in teaching children what it means to be committed to particular people and one way of life among many; the latter in teaching responsibilities and rights within a more heterogeneous community.

Liberal Neutrality

How can public schools in a democracy best perform these functions of moral education? A popular position — which I call *liberal neutrality* — is that schools should teach the capacity for moral reasoning and choice without predisposing children toward any given conception of the good life. Just as a liberal state must leave its adult citizens free to choose their own good life, so must its schools leave children free to choose their own values. If public schools predisposed citizens by educating them as children, the professed neutrality of the liberal state would be a cover for the bias of its educational system. Liberal neutrality supports the educational method of "values clarification," which enjoys widespread use in schools throughout the United States. Proponents of values clarification identify two major purposes of moral education within public schools. The first is to help students understand and develop their own values. The second is to teach them tolerance and respect for the values of others. Values clarification is based on the premise that no teacher has the "right" set of values to pass on to other people's children.

Treating every moral opinion as equally worthy, however, encourages children in the false notion that "I have my opinion and you have yours and who's to say who's right?" This is not to take the demands of democratic justice seriously. The toleration that values clarification teaches is too indiscriminate for even the most ardent democrat to embrace. If children come to school believing that "Blacks, Jews, Catholics, and/or homosexuals are inferior beings who shouldn't have the same rights as the rest of us," then it is criticism, not just clarification, of children's values that is needed.

From STUART LITTLE by E. B. White



Moralist Positions

What I call *moralist* positions on moral education begin where this critique of liberal neutrality leaves off, with a conception of moral education whose explicit purpose is to inculcate character. Proponents of moralist positions, both liberal and conservative, seek to shape a particular kind of moral character through their educational methods, rather than trying only to facilitate free and informed choice. They recognize that public schools are appropriate institutions of moral education because good moral character is a social, not just an individual or familial, good.

Conservative moralists emphasize teaching children to respect authority. They defend educational programs which liberals often criticize as indoctrination or at least as unduly restrictive of individual freedom: patriotic rituals, dress codes, strict discipline within the classroom, and deference to teachers' opinions. Liberal moralists, on the other hand, generally identify autonomy as the goal of moral education: education should produce in children the desire and capacity to make conscious moral choices based on generalizable principles. They endorse non-directive methods of teaching similar to those practiced by proponents of liberal neutrality. I want to suggest that the most promising position lies between these two extremes.

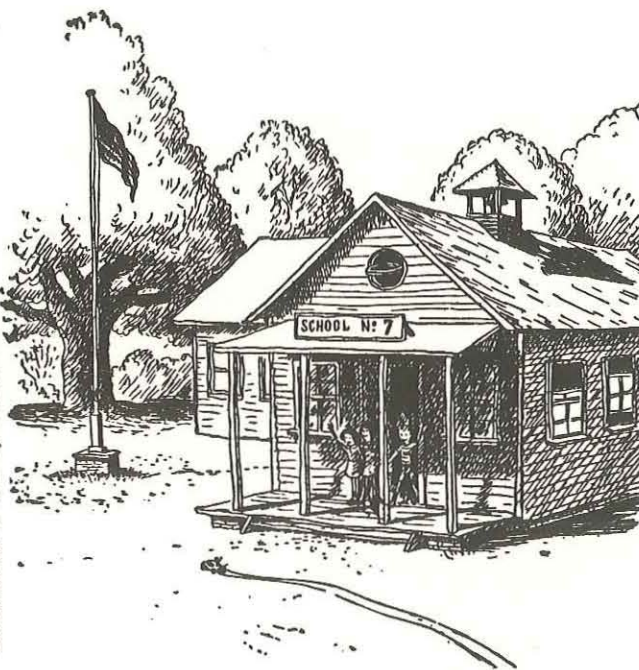
Guided by Piaget's work on moral development, John Rawls outlines a three-stage theory of liberal moral education that culminates in autonomy. Children begin to learn morality by following rules because their parents and other authorities issue them. Learning the "morality of authority" is an improvement over anarchy of desire. The second stage of moral development, the "morality of association," is characterized by an acceptance of rules because they are appropriate to fulfilling the roles that individuals play within various cooperative associations. Children learn that students, friends, and citizens obey moral rules because they thereby benefit the association of which they are a part, and are benefitted in turn. The final stage of moral development is the "morality of principle," a direct attachment to moral principles themselves.

Nobody, however, has yet discovered a way that schools can succeed in teaching the morality of principle. The most extensive research, conducted by Kohlberg and his associates, demonstrates that the best

schools (by Kohlberg's standards and using his own set of six stages) are most successful in moving children from the morality of authority to the morality of association. But very few sixteen-year-olds reach the morality of principle, and there is no evidence to credit schools with this rare accomplishment. Although it is possible that there is a way that schools can teach autonomy, we have yet to find it.

But from a democratic perspective, success in teaching the morality of association marks great moral progress over the morality of authority. Children who learn the morality of association can distinguish between fair and unfair, trustworthy and untrustworthy authorities. They learn to judge the commands of professional and political authorities, along with their own actions, according to whether they live up to the cooperative virtues of democratic association. Schools that teach children these virtues — fulfilling one's obligations, respecting and making good use of the rights of citizenship, criticizing unjust and untrustworthy authorities — are uncommonly successful. Such success may be compatible with the use (at least in early stages of schooling) of many of the pedagogical practices that advocates of liberal neutrality regard as indoctrination and that Kohlberg criticizes as the "Boy Scout approach to moral education." Just as children learn filial independence after they learn to love and respect their parents, so they may learn political independence after they become patriotic toward their country. The standards of patriotism and loyalty, like those of love and respect for parents, change as children learn to think critically about politics and to recognize that their civic duties extend far beyond voting and obedience to laws. Moral education begins by winning the battle against amoralism and egoism. And ends — if it ends at all — by struggling against uncritical ac-

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ceptance of moral habits and opinions that were the spoils of the first victory.

That schools are not terribly effective in teaching autonomy should not surprise us. Since moral autonomy means doing what is right because it is right and not because any authority or law requires it, some of the most effective lessons in moral autonomy may result from the opportunity to disobey commands that are neither perfectly just nor repressive. At least we cannot assume — nor does empirical evidence suggest — that autonomy is best taught by lessons that are planned to develop autonomy by those who teach them. Even if the morality of association is (as Rawls suggests) a subordinate philosophical ideal, it still may be a primary political ideal for democratic moral education within schools.

Moral education begins by winning the battle against amoralism and egoism. And ends—if it ends at all—by struggling against uncritical acceptance of moral habits and opinions that were the spoils of the first victory.

If by virtue we mean moral autonomy, then the role of schools in moral education is necessarily a limited one. We know of no way that schools (or anyone else)

can teach virtue in this sense. But democratic virtue can be taught in many ways — by teaching black and white students together in the same classrooms, by bringing all children up to a high minimum standard of learning, by respecting religious differences, by teaching American history not just as a series of elections, laws, treaties, and battles, but as lessons in the practice (sometimes successful, sometimes not) of political virtue. In these and other ways, schools can teach respect among races, religious toleration, patriotism, and political judgment — lessons which hold out the promise of bringing us closer to a more just democratic society.

— Amy Gutmann

Amy Gutmann is Associate Professor of Politics at Princeton University and was recently a Rockefeller Resident Fellow at the Center for Philosophy and Public Policy. This article is part of her forthcoming book entitled *Democratic Education*. The Miss Manners column quoted appeared in the *Washington Post* on October 21, 1984; the information on practices in Japanese schools is taken from William K. Cummings, *Education and Equality in Japan* (Princeton, N.J.: Princeton University Press, 1980); John Rawls's three-stage theory of liberal moralist education is outlined in *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); Kohlberg's studies are reported in Moshe M. Blatt and Lawrence Kohlberg, "The Effects of Classroom Moral Discussion Upon Children's Level of Moral Judgment," *Journal of Moral Education*, vol. 4 (1975) and Kohlberg and E. Turiel, "Moral Development and Moral Education," in G. Lesser, ed., *Psychology and Educational Practice* (Chicago: Scott, Foresman, 1971).

Why Life Is Disappointing

Everyone knows that life is disappointing. We learn this early and remember it long. Or as one cheerful pundit observed: "We are born crying, live complaining, and die disappointed." Why this should be is somewhat of a puzzle, however. Any explanation must focus, not on why things generally turn out badly, but why they generally turn out so much worse than we expected. Disappointment is the gap between expectations and reality, between hope, the thing with feathers that perches in the soul, and the egg that, more often than not, it lays.

The Bible seems to suggest that a routine confounding of expectations (the first shall be last, the last first, and so on) is useful in cutting man down to size, keeping him on his toes. The book of Job, which should have something to say about disappointment if anything does, pronounces that men are disappointed "because they were confident" (Job 6:20). Jehovah looks on Job's dashed hopes with a lofty satisfaction: "Behold, the

hope of a man is disappointed" (Job 41:9). The guiding principle seems to be that man appoints, God disappoints, a perpetual reminder of our place in the scheme of things. The New Testament allows human hopes, properly directed, a somewhat brighter outlook ("... and hope does not disappoint us" — Romans 5:5). But "hope against hope," that is to say, hope of the most apparently perverse sort, is the favored variety.

Enjoying a more worldly perspective, contemporary economists approach our question in a different framework. Why is it, they ask, that when we assess the projected costs and benefits of some undertaking, we end up overestimating the benefits so much more often than we end up overestimating the costs? Why do our cost-benefit analyses, measured against the subsequent unfolding of events, so often err on the side of optimism?

Harvard economists Richard Zeckhauser and

Herman Leonard suggest this answer. It's not that economists are a particularly starry-eyed lot. Instead, "the crucial realization is that we do not observe a random selection of all projects analyzed. Rather, we choose to go ahead only with those projects whose net benefits are estimated to be positive. This will include some projects whose true net benefits — which we observe on completing the project — are negative, but which we overestimated. On the other hand, some projects with true net benefits will have been estimated to yield negative net benefits and will have been scrapped." The only way to achieve parity between pleasant and unpleasant surprises would be to go ahead with *every* enterprise, whatever its initial promise. Most of the dismal-looking ones will indeed turn out dismal, but we'll end up with a greater percentage of sleepers, as some turn out to be not quite so bad as anticipated. Disappointment is avoided, but at the price of a general increase in sorry outcomes.

Disappointment is the gap between expectations and reality, between hope, the thing with feathers that perches in the soul, and the egg that, more often than not, it lays.

Psychologists speculate that life is disappointing not because our hopes are thwarted more often than they are fulfilled, but because we feel the former more keenly than the latter. Daniel Kahneman and Amos Tversky, studying the psychology of how people form preferences, found that "the threat of a loss has a greater impact on a decision than the possibility of an equivalent gain." In repeated experiments, people show themselves willing to take a considerable gamble to avoid a loss, but are less willing to take the same gamble to reap an analogous gain. In their terminology, "preferences between gains are risk-averse and preferences between losses are risk-seeking." Unexpected gains,

then, do not thrill in the same measure as unexpected losses gall.

The philosopher Schopenhauer explains this asymmetry by the gloomy postulate that "pleasure is only the negation of pain" and "pain is the positive element in life." In his view, "to live happily only means to live less unhappily. . . . The happiest lot is not to have experienced the keenest delights or the greatest pleasures, but to have brought life to a close without any very great pain." He joins with the stoics in offering this simple prescription for avoiding disappointment: "The safest way of not being very miserable is not to expect to be very happy."

But most of us would rather change the world than change ourselves. In this spirit, John Rawls offers a theory of justice motivated by the desire to produce a society that, whatever our expectations, will not disappoint us too deeply. He asks us to imagine that we are choosing the principles that will govern society — but without knowing what our own identity in that society will turn out to be. In such a situation, he proposes that we should use a "maximin" rule: rank alternatives by their worst possible outcomes, and pick the one whose worst possible outcome is least awful. In other words, design a society such that, whoever you are when you emerge from behind the "veil of ignorance," your disappointment will be least unbearable. The principle points to an egalitarian theory of justice, which makes some sense: disappointments are easier to bear if we are all disappointed equally.

Another alternative is to look on the bright side of disappointment, as a spur to run faster, stretch out our arms farther . . . Inevitable disappointment may be, but not necessarily without its redemptions. Mark Twain once wrote, "I believe that our Heavenly Father invented man because he was disappointed in the monkey": feminists joke (or is it a joke?) that God created Eve because he (he?) was disappointed in Adam. Even Schopenhauer saw disappointment as the path to the highest good of experience, insight, knowledge, wisdom. A disappointing harvest, perhaps, but what else, really, should one have expected?

— Claudia Mills



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