

Surrogate Motherhood

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“Surrogate” motherhood dates back at least as far as Genesis, that is to say, to the earliest generations of recognizably human families. There Abraham’s long-barren wife, Sarah, sends her husband to “lie with” the slave girl Hagar, in the hopes that through her she can “found a family.” Jacob’s wife, Rachel, makes a similar arrangement with her slave girl, Billah, “so that she may bear sons to be laid upon my knees.” Despite the intense and bitter controversy surrounding contemporary cases of surrogate parenting, there is nothing particularly novel about the practice of one woman bearing a child for another.

But in the late twentieth century two dimensions to this practice *are* new. First, medical advances now allow for cases of what has been called “high tech” or “full-fledged” surrogacy, in which the surrogate is implanted with both sperm and egg drawn from an infertile couple; the genetic material for the fetus is contributed entirely by the receiving couple, with the surrogate “loaning” her womb to carry the fetus to birth. Second, recent years have seen the advent of commercial or contract surrogacy, childbearing for a fee. Contract surrogacy emerged in the mid 1970s; by the end of 1986 some 500 children had been born of such arrangements. The most famous, of course, is *Baby M*, the object of the landmark custody case that ensued when surrogate mother Mary Beth Whitehead refused to relinquish the child she had conceived and carried to term in a surrogacy contract for William Stern. *Baby M*’s custody battle riveted public attention for months,

posing in the starkest terms troubling questions about the very nature of parenthood.

The legal system's response to surrogacy can range across the spectrum from criminalizing it outright to upholding surrogacy contracts on a par with any others. Both of these extreme positions seem unpalatable alternatives. The problem with the first is that we are reluctant to ban *all* surrogacy, for sometimes one woman (a sister, or a friend) offers to bear a child for another purely out of love or a disinterested desire to relieve suffering. At most, then, we would consider banning surrogacy-for-a-fee, on an analogy to legislation against baby selling.

The other extreme, treating surrogacy contracts as standardly enforceable, has some support in public opinion: a majority of Americans polled about the trial court's decision to enforce the surrogacy contract in *Baby M* believed that surrogate mothers should be bound by the contracts they sign. But, as the New Jersey Supreme Court later ruled, overturning the trial court's decision, this response is poorly grounded in the law. In other contexts personal service contracts are usually not held to be enforceable by "specific performance," that is, by forcing the reneging individual actually to perform the promised service. Even contracts to marry are not held to be legally binding, and in an adoption situation, no state in this country binds a mother to give up her child because of a contract with prospective adoptive parents executed before the child was born. Thus the viable policy options involve either prohibiting commercial surrogacy altogether or else making surrogacy legal but unenforceable over the objection of the birth mother. This latter alternative is attractive to those who worry about the abuses that might attend black-market surrogacy, and so prefer the regulation of surrogacy to its criminalization.

The central question in deciding among policy options is whether we as a society want to encourage or discourage this form of child-bearing, and how strongly. To answer this we must look in turn at the concerns of the would-be receiving parents, of the contract mother, of the child herself, and of society more generally.

The Desire for a Biological Child

Prospective receiving parents usually come to a surrogacy arrangement after long and desperate years of infertility, when all hope of medical intervention has been reluctantly abandoned. According to the most recent data, from 1982, some 3.5 million couples — one in six couples of child-bearing age — are considered infertile. Insofar as surrogacy is seen as a way of responding to the anguish of childlessness, it may seem to serve a worthy end. Yet surrogacy would hardly seem the first-choice solution to childlessness in a society where so many existing children languish in institutional care. Why surrogacy rather than adoption?

Adoption, however, is easier said than done. The number of adoptions declined from 82,000 in 1971 to

50,000 in 1982, a 38-percent drop. In 1984 two million couples competed for the 58,000 infants placed for adoption; these couples experienced a waiting period of three to seven years. Of course, while the demand for healthy, white babies far exceeds supply, many minority babies, and certainly those with physical or mental disabilities, remain in need of loving homes. Yet it is understandable that prospective parents might not be willing to take on the challenge of a severely handicapped child or might be reluctant to cross racial lines in forming a family, given the entrenched racial prejudice of American society. Some agencies have gone so far as to remove children from homes in which they were thriving in order to avoid an interracial family.

But even if adoption were more readily available, the lure of surrogacy would remain, for it promises what many parents plainly desire: a genetic link to their children. Is such a desire worthy of respect or should it be rejected as narcissistic or egoistic? Martha A. Field, professor of law at Harvard Law School, cautions that "a desire to reproduce oneself is never the healthiest motivation for wanting to have a child." This is especially true in the surrogacy situation, for "the father in the surrogacy arrangement is focused upon only half the genes that will make up his child." The importance of the paternal genetic endowment is emphasized; that of the maternal genetic endowment is all but ignored. Yet, Field writes, "It seems odd that the couples using surrogacy should pay so little heed to the other half of the genetic material, since they are almost necessarily believers in the importance of the genetic tie."

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Mary Gibson, a philosopher at Rutgers University, suggests that contract motherhood is attractive to receiving parents because of a narrow and rigid notion of the family, "consisting of breadwinning father, nurturing mother (now possibly also a career woman/super-mom), and their genetic offspring (preferably, first a boy, then a girl) conceived, carried, and born the old-fashioned way. . . . Contract motherhood, if the contract mother is excluded, allows infertile couples to come as close as possible for them to the 'norm' and even appear to represent it." The desire for a child of one's "own" in such a context should have no special claim to our respect.

The desire for a genetic bond can perhaps be seen as well, however, as the expression of the need for some deep and non-arbitrary link to a child. The desire for a child of one's "own" might come down to a longing for a bond somehow stronger and more enduring than

those of marriage or friendship, one that can survive, as so many other ties do not, through sickness and health, good fortune and bad, grounding a lifetime of commitment. But Robert Wachbroit, research scholar at the Institute for Philosophy and Public Policy, remains skeptical about this characterization of the longing for a genetic link, doubting both how natural it is and how noble. After all, he points out, the ancient Romans placed no importance on genetic ties; the emphasis on "blood," and its "thickness" relative to water, is hardly universal. Wachbroit sees the desire for a "special" gene-linked bond as a cousin to concerns with racial purity, and so as morally questionable.

In any case, this kind of irrevocable link is ironically just what surrogacy in practice ends up undermining. Because of the commercial nature of the exchange, as we will see below, the child conceived in this way is particularly likely to be viewed as a commodity, special-ordered to fit the parents' preconceived idea of what a child of their "own" should be.

The Contract Mother

The motivations for agreeing to be a contract mother vary. They may involve an altruistic desire to help relieve the pain of childlessness in others or a yearning to work out some past psychological trauma; but certainly the desire to earn money is almost always central. In a January 1987 Gallup poll, 15 percent of the women questioned said they would consider becoming surrogates for the standard \$10,000 fee. After all, working class women still face bleak employment options.

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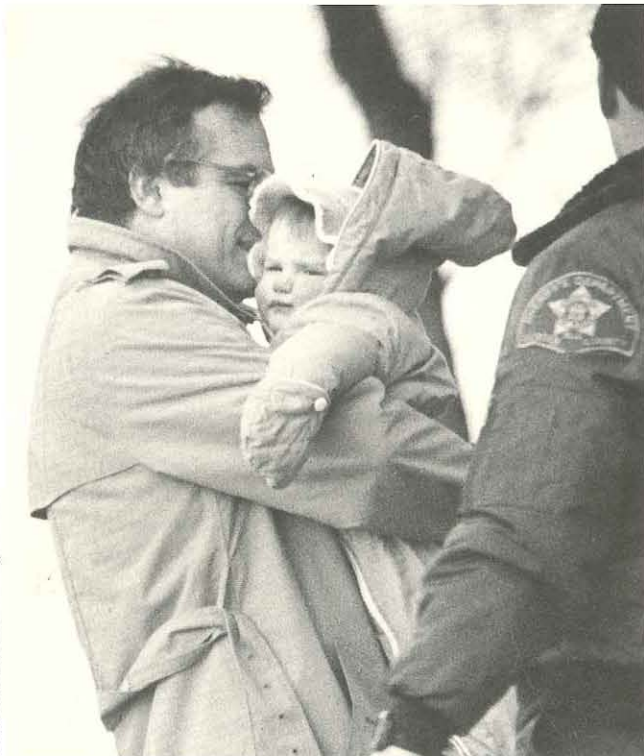


Mary Beth Whitehead

Pregnancy is work they can do either at home while caring for their other children or as the ultimate in moonlighting from another, likely low-paying, job. Some would argue that women should be as free to take on surrogacy "jobs" as any other employment; we no longer favor labor laws that, under the guise of protecting women from the rigors of the workplace, only limit their freedom to work. As Peter Schuck, professor of law at Yale Law School, argues, "A community that cherishes a woman's freedom and individuality should accord a high degree of respect to her choices, and should override them only when her decision is plainly uninformed or offends deeply and widely held social values."

Is the decision to become a contract mother fully informed and voluntary? While Schuck maintains that "the available data contradict the view that surrogates are members of an 'underclass,'" the paucity of the other options facing them undermines the claim that the choice of surrogacy is a fully voluntary one. And, voluntariness aside, we might nonetheless charge that the terms of the contracts are exploitative, that is, the receiving couple takes unfair advantage of the contract mother's willingness to serve or her straitened financial circumstances. The terms of Mary Beth Whitehead's contract with William Stern, for example, were appallingly disadvantageous to her. For her \$10,000 fee Whitehead was obliged to "assume all risks, including the risk of death, which are incidental to conception, pregnancy, childbirth, including but not limited to postpartum complications," with no compensation whatsoever in the event of a first-trimester miscarriage,

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William Stern and Baby M

and a mere \$1000 if she were forced to submit, on Mr. Stern's demand, to an abortion. Is such a contract fair to Mrs. Whitehead? Does a society like ours want to endorse it?

This poses a dilemma, however, for the better the terms of a surrogacy contract, the more its voluntariness is called into question: higher fees make surrogacy arrangements harder to resist for women who have few other means of livelihood. But Gibson points out, "If decent pay would constitute an undue inducement, it appears that the job of contract mother cannot be offered on morally acceptable terms: it will involve either direct economic exploitation or undue induce-

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ment." She concludes, "Some kinds of jobs cannot be made good jobs, and a decent society won't countenance them even if there are people willing to do them. I suggest that contract motherhood is such a job."

The Interests of the Child

Arguments in favor of or against surrogacy on behalf of the child yet-to-be-conceived have an odd ring to them, for there is as yet no person who can be either benefited or harmed by the arrangements made. Arguments that it is good for an unborn child to be conceived, if taken seriously, would encourage a veritable population explosion in the purported interests of all those potential people clamoring to be born. Arguments that it is bad for an unborn child to be conceived, on the other hand, face the objection that unless the child's life is particularly miserable, life on any terms seems preferable to no life at all. We do better here to step back from inquiring whether surrogacy is in the interests of the actual children born in such arrangements and ask simply what special problems, if any, they face.

According to Schuck, far from facing special problems, such children are especially fortunate, to be so wanted that their parents would go to such lengths to bring them into the world. Field points out that children produced through "unusual arrangements" can grow up feeling secure and loved, as can adopted children. One pities Baby M not because she was born of a surrogacy contract, but because of the bitter battle waged for her custody. Thus Field cautions that "if we start generalizing what kind of families or situations it is detrimental to children to be born into, and make rules accordingly, we start down a long road fraught with peril for our civil liberties."

But if Baby M suffered from being a too-wanted child, a greater peril is posed to contract children who end up being unwanted, like Christopher Ray Stiver, conceived through a surrogacy arrangement between Judy Stiver and Alexander Malahoff. The baby was born with a smaller-than-normal head, usually indicative of mental retardation. Both parents renounced care of the baby; Mrs. Stiver agreed to accept him only when paternity tests revealed that her husband, and not the sperm donor, was the biological father of the child.

Of course, any child can be born with a handicap and face possible parental rejection. But Judith Areen, professor of community and family medicine at Georgetown University Law Center, argues that surrogacy increases the risk that less-than-perfect children will be abandoned at birth by both biological parents: "One parent in any surrogacy arrangement is supposed to view the child as a mere commodity, one that is to be transferred (abandoned) at birth. . . . If the child is physically or mentally handicapped, there is a real danger that both parents will view the child as a commodity, and thus abandon the infant emotionally and — if permitted by the law to do so — physically and financially. The surrogate mother will do so because that is what she is supposed to do; the father (and his spouse, if any) will do so because he is likely to feel that as a purchaser he has the right to reject 'damaged goods.' Treating children as commodities, as surrogacy does, thus poses significant risks to the children conceived." At least in the exceptional case, surrogacy can prove tragic for the children it creates.

The Interests of Society

While surrogacy has the potential to provide benefits to infertile couples and perhaps to contracting mothers, it is not clear that it promises any benefits to the rest of us. As Field points out, "we in this country, now at

"Treating children as commodities, as surrogacy does, . . . poses significant risks to the children conceived."

least, are not suffering from inadequate population; as a society we do not need more babies. There are no affirmative reasons for the state to promote surrogacy arrangements other than to fulfill the wishes of individuals who wish to use them." Does surrogacy, then, pose any dangers to society, or threaten, in Schuck's words, "any deeply and widely held social values?" It seems that it may.

One danger concerns surrogacy's possible impact on the prevalence of adoption. Some of its proponents may have done their cause a disservice by predicting that in time surrogacy will come to replace adoption,

Drawing by John Lawrence, from *The Blue Fairy Book* (Viking Press, © 1975)

Rumplestiltskin demands that the miller's daughter honor her contract

for it does not seem that the interests of society would be well served if surrogacy contributed to the neglect of existing children. But it is doubtful that its impact on adoption would be significant. How many of those to whom surrogacy is attractive would choose to adopt a baby with special needs if surrogacy were unavailable? One suspects only a few. Moreover, Field argues, "although it benefits society more for [infertile couples] to adopt an existing child than to conceive a new one, the same is true for fertile couples, who nonetheless are permitted to reproduce without any restriction by the state."

A greater danger is that surrogacy commercializes what we may feel should not be commercialized. We may cleave to the conviction that, as Field puts it, "there are some types of things that our society does not want to see measured in terms of money. Society may want to do what it can to help people keep these in a personal sphere that is distinct from the commercial; indeed it may even compel them to do so, to the extent that it can." She cites laws against prostitution and the sale of human organs — as well, of course, as laws against baby selling — as examples of our societal refusal to establish markets in certain intimate areas of life. But Schuck reminds us that we permit commercial markets in sperm and egg donation, and in child care services, although these, too, involve deeply private spheres. Our attitudes about the commercialization of child-bearing will depend in part on which group of analogies seems to us more apt.

Policy Conclusions

Surrogate motherhood is unlikely to disappear as long as there are couples who want babies and women willing to produce them for a fee. But the laws and regulations we establish may go some way toward encouraging or discouraging its spread. While Schuck, a staunch supporter of surrogacy, calls for legal measures to facilitate surrogacy arrangements, on balance it seems that there is no compelling reason for society to encourage surrogacy and considerable reason to discourage it. Gibson thus recommends that "commercial contract motherhood should be expressly prohibited. Commercial brokering should be a criminal offense. Paid private contracts should be void and unenforceable." Areen, too, would deny recognition to surrogacy contracts on the grounds that their legal recognition would in essence give a societal seal of approval to the practice.

For Wachbroit, the fundamental question to ask in setting policy here is whether and to what extent "underground" or black market surrogacy is worse than legalized surrogacy. Reasoning along these lines, Field would make surrogacy contracts legal (but unenforceable over the objection of the mother), because "it is possible that criminalizing surrogacy and thereby driving it underground would do more harm than good." This would open the way for regulation on such issues as compensation, access to surrogacy, and screening of potential surrogates. Wachbroit, however, doubts that the dangers in illegal surrogacy are great enough to outweigh the affront to human dignity posed by its legalization.

Surrogacy may be here to stay, but Gibson stresses that we should work both to address controllable causes of infertility (such as venereal disease, environmental and workplace toxins, and economic pressures to postpone childbearing) and to make surrogacy increasingly less attractive as a response to infertility. She argues, "Many of the features of our society that make contract motherhood, as a response to infertility, so very attractive to many people are the same features that make it so morally and politically troubling." If working class women had brighter employment options, if pervasive racism did not erect a bar to interracial adoptions, if we had a richer notion of what it is to be a family, surrogacy would hardly be as attractive as it is today. This is the moral paradox of surrogacy: "If there were a society in which contract motherhood would not be morally objectionable," Gibson concludes, it would also be a society in which "the practice would probably not exist."

The sources quoted in this article are: Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Cambridge, Mass.: Harvard University Press, 1988); Mary Gibson, "The Moral and Legal Status of 'Surrogate' Motherhood," invited address at the winter meeting of the American Philosophical Association, December 1988; Robert Wachbroit, interview; Peter H. Schuck, "Some Reflections on the Baby M Case"; and Judith Areen, "Baby M Reconsidered," *The Georgetown Law Journal*, vol. 76, no. 5 (June 1988).

The Obligation to Play Political Hardball

Do politicians have an obligation to play hardball? This sounds like a very odd question. It is natural to view politics as a realm where morally questionable means are particularly prevalent, and moral qualms particularly unavoidable. Hardball — the use of questionable, qualm-producing means — might be thought permissible in certain circumstances, but how can it be obligatory?

These ordinary opinions are hardly groundless. Nonetheless, I want to argue that the notion of an obligation to play hardball, far from being outlandish, is in fact implicit in a sound understanding of political practice. The basic argument is this: in most circumstances, a politician does not stand alone, but rather acts on behalf of others, or acts in ways that affect others, in pursuit of certain ends that others have good reason to expect him to pursue. To become a politician is in most circumstances to say to others that you take seriously the acquisition and maintenance of power and its employment to further the goals you share with them. You take upon yourself the responsibility to act effectively, which not infrequently entails the obligation to use the kinds of tactics I am calling "hardball."

The 1988 Campaign

To understand my motivation for posing the hardball question, let me reflect briefly on the 1988 presidential campaign. There is, I think, a general agreement that Michael Dukakis failed to campaign effectively. I want to argue that this and other such failures are more than tactical blunders. To the extent that they are rooted in certain erroneous conceptions of political practice, they represent a moral failing and a failure of responsibility.

Dukakis didn't want to conduct the campaign on the terrain defined by Bush, either by defending himself against Bush's charges or by responding with charges of his own. He wanted to be affirmative, not negative; he wanted to talk about what he regarded as real issues, not phony ones; and he wanted discourse to be rational, not emotional or demagogic. These are understandable desires. But my contention is that they reflected a kind of recoiling from the rigors of the combat Dukakis had willingly entered. The party that nominated him had every right to expect that he would do what was necessary to maximize his chances of winning, shaping his tactics in relation to the world as it was, not as he wanted it to be.

This may strike you as the easy part of the question.

What about George Bush? Did he have an obligation to campaign as he did? I am a partisan, activist Democrat, but I am compelled to answer that question in the affirmative. In accepting his party's presidential nomination, he took on the same responsibility for effectiveness that Dukakis had earlier assumed. In discharging this responsibility, moreover, he had to work within a context largely created by others; in particular, he had to overcome the "wimp factor" by projecting guts and strength. And he succeeded.

I would be the first to concede that the spectacle wasn't exactly edifying. But a reasonable person surveying the terrain in July of 1988 could well have come to the conclusion that nothing else was likely to work: the electorate was in no mood to hear a serious discussion of the long-term problems facing the country, emotional issues such as drugs and crime dominated the agenda, and the media were determined to focus on tactics and personalities.

Given our founding tradition of populist suspicion, it is natural for us to blame our leaders for these ills. I think the truth lies elsewhere. George Bernard Shaw once defined democracy as the only form of government in which the people get exactly what they deserve. Our politicians will lose all incentive to employ negative advertising when it stops being effective. They will talk to us seriously about serious things only if we give them good reason to believe that they will be rewarded — or at least not punished — for it. It has been a long time since that last happened.

Means and Ends

As posed, the question of playing hardball is a subset of a larger issue — the relation between ends and means in politics. To add some particularity and bite to the hardball question, let me offer the following specifications.

First, the question as I wish to address it arises only if we assume the legitimacy of a particular politician's end or cause. We are not, for example, talking about brutal repression, mass enslavement, or genocide as policy goals to be implemented.

Second, I will make the anti-utilitarian assumption that (at least) some acts, considered in themselves, above and beyond their "consequences," have intrinsic moral properties that render them distasteful or objectionable, the sort of thing that a decent person would regard with aversion and hesitate to do.

Third, I want to make the anti-absolutist claim that in certain circumstances it is at least permissible to perform acts that, considered in themselves, must be judged morally distasteful.

Fourth, to say that a "politician" has responsibility to perform such acts is not to say that nonpoliticians have that (same) responsibility, or even that it would be permissible for a nonpolitician to act in that way. That is, for the purposes of this argument I will make the familiar but by no means uncontroversial assumption that social roles affect moral rules.

Doesn't this entangle me in Aristotle's distinction between the good man and the good citizen, or (even more starkly) in Machiavelli's dictum that leaders must often choose between their fatherland and their souls? I don't think so, because I believe that a decent human being can remain decent while playing hardball if required by circumstances to do so. But (someone might retort) wouldn't it be better to avoid altogether the circumstances that continually test our sense of where to draw the line and tend over time to corrode our conviction that the line exists? I don't think that's correct either, because the effort to lead others toward legitimate goals is always permissible, and sometimes obligatory. I believe, for example, that George Washington had no choice but to accept the presidency of the infant republic and then to act effectively in that capacity.

How, then, are we to understand the nature and limits of what I have been calling "hardball"? As the term suggests, sports analogies may be illuminating.

In sports, there is a three-fold distinction: hardball is understood in distinction from softball, but also from

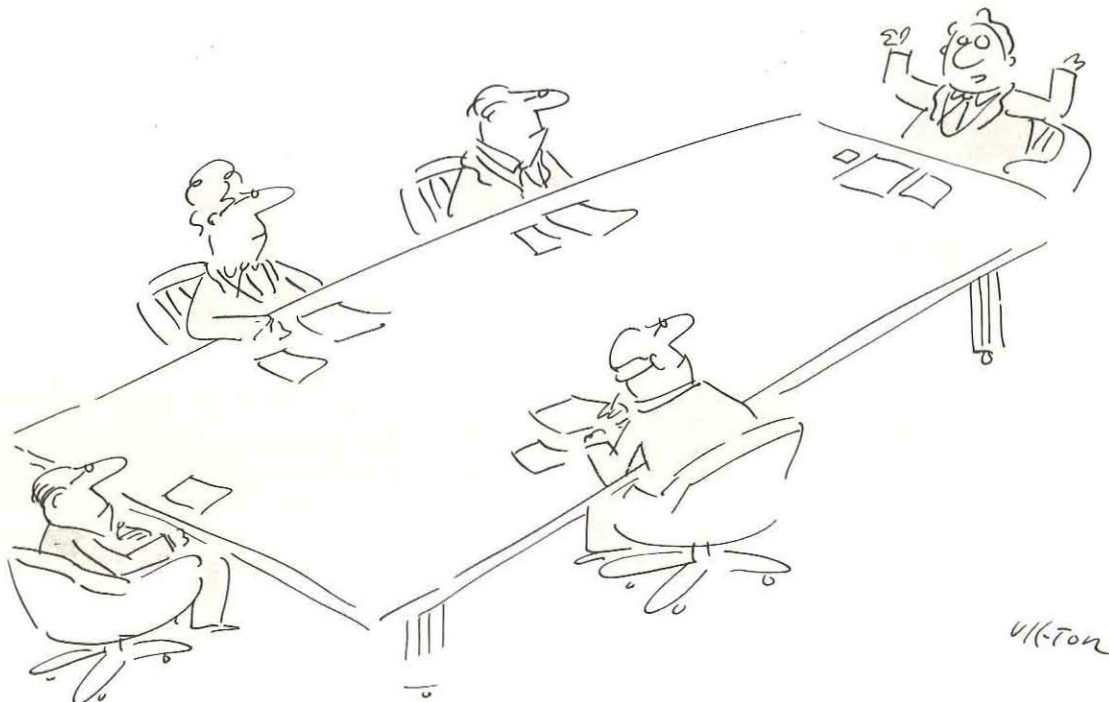
dirtyball. Consider an example from baseball. Hardball means sliding into the second baseman to break up a double play; softball means sliding around the second baseman to avoid potentially injuring him; dirtyball means sliding into him spikes up with the intention of knocking him out of the game.

It is possible to express the political import of this example in a quasi-Aristotelian formula: playing hardball requires the political virtue of toughness, which is flanked by the opposing vices of squeamishness and brutality or cruelty. It is possible also to give an account of the vices in Machiavellian terms. Squeamishness invites the victory of evil — that is, more of the evil from which it averts its gaze. For example: the failure to apply force vigorously when necessary may open the door for greater disorder, doing greater damage or necessitating more force than would earlier have been the case. Brutality or cruelty, on the other hand, involves inflicting pain and injury beyond the minimum needed to attain an appropriate objective. At its most perverse, it can even become a kind of pleasure or end in itself. A decent political act, by contrast, is one that a morally serious and responsible person with adequate knowledge of the facts could perform in the specific circumstances in which the decision must be made.

Static Rules vs. Fluid Rules

This rough and ready characterization of political hardball suggests two very different kinds of cases in which it must be employed.

First: within static sets of rules to which all adhere, you have a responsibility to play hardball as necessary.



"This might not be ethical. Is that a problem for anybody?"

Yes, the decision to use a brushback pitch on the other team's leading hitter appreciably raises the odds that you will hit him, a prospect you understandably view with distaste. But if you don't use the pitch, you will raise the odds that the slugger will make solid contact, and you have a responsibility to your teammates to minimize those odds, within the framework of the tactics generally specified as acceptable.

Let me offer another example from the late unlamented presidential campaign. Well before the Iowa caucuses, there surfaced a now-famous "attack video," which graphically drew the press's attention to the remarkable similarity between some of the speeches of Sen. Joseph Biden, a candidate for the Democratic nomination, and orations previously delivered by Neil Kinnock, the head of the British Labour Party. These revelations drove Sen. Biden from the race. They also led to the resignation of John Sasso, the manager of the Dukakis campaign, who had masterminded the release of the fatal videotape.

A strong case can be made that Sasso in fact did nothing wrong. After all, the video did not lie: it represented hardball but not dirtyball. Why then was Sasso compelled to resign? Early on, Dukakis had forsworn negative campaigning and had pledged to crack down hard on any member of his campaign caught indulging in it; Dukakis was thus forced to expel Sasso from his campaign to honor his own — misguided — pledge. I want to suggest that the Dukakis pledge, the refusal to play hardball, represents an instance of the political vice I have called squeamishness.

The second kind of hardball case involves circumstances in which the political rules are fluid rather than static. If your adversary systematically and intentionally crosses the line separating hardball from dirtyball, the location of the line may be said to shift, and you may now have a responsibility to consider the use of previously forbidden tactics, either to give your adversary an incentive to return to the status quo ante or to maintain competitive effectiveness in the circumstances your adversary has unilaterally altered to his advantage. Thus in current circumstances, for example, to forswear negative advertising, especially if one's opponent is determined to use it, is to heighten unacceptably the risk of defeat.

Where Do the Limits Lie?

At this juncture, I anticipate an anguished and perhaps angry outcry. How far can the requirements of efficacy drive us? Are there no limits? Doesn't a healthy and proper regard for our own decency at some point lead us to say, enough is enough?

To illustrate this tension between moral self-regard and responsibility to others, let me offer a somewhat less charged example from my own life. My wife and I bicker, more or less amicably, whenever we encounter two lanes of traffic merging into one. Some people zip along the disappearing lane until the last possible moment, then wedge themselves into the surviving

lane, obtaining a significant advantage over drivers who wait their turn. My wife frequently wants me to do the same thing, but I refuse. I would like to be able to say that I'm employing the categorical imperative and recoiling in horror from the world of vehicular anarchy my own lane-jumping would implicitly endorse. But in fact that's not what's going on. What really holds me back is my desire to be able to say to myself, I'm not the kind of person who engages in that kind of unfair, self-aggrandizing behavior. Because I regard the rules as fair and sensible, I want to be able to see myself as a person whose character is defined/expressed by adherence to them, even at some cost.

At least in the limit case — if I am in the car by myself, driving for personal pleasure or on some personal errand — this behavior seems morally unobjectionable. The focus on my desire to view myself in a certain way becomes steadily less defensible, however, as my responsibility to others escalates. In a case at the other extreme: if I were rushing my son to the hospital, it would be almost unimaginable to impede my progress by refusing to breach some rules of the road.

In politics (and perhaps elsewhere as well), the morality of using intrinsically attractive means is circumscribed by the ability of the political system — and in a democracy that means the people — to respond affirmatively to them.

Note also that our judgment is shaped by assumptions about the nature and status of the rules. Some are purely conventional, in two senses: there is no compelling moral reason why they couldn't have been different (driving on the right versus driving on the left); and the fact that there is a general propensity to obey them is a necessary condition of their being binding on me. Other rules are quite different in both respects: we assent to them because we regard them as rationally or morally correct, and the behavior of others may not be a necessary condition of bindingness for me, even though others' violations may impose costs on me.

Now clearly, the rules demarcating hardball from dirtyball are of the second sort. We quite properly regard an appeal to public ignorance, prejudice, or passion as wrong in itself and not merely by agreement. We would try to resist as long as possible the conclusion that such appeals by others have left us with the unpalatable alternatives of retiring from the fray or responding in kind. Nevertheless, we may ultimately be driven to confront just such a choice.

For example, in the midst of the 1984 North Carolina Senate race between Jim Hunt and Jesse Helms, the Senate took up legislation to create a national holiday honoring Martin Luther King. Helms went all out

against the bill; Hunt knew that supporting it would cost him severely, but he felt he had no other morally acceptable course. One of Hunt's advisors is reported to have said to him at the time, "If the election is about race, if that's what you've got to do to win, we just won't win, and just be prepared to accept that."

Hunt's decision strikes me as defensible, for two reasons. First, it might be argued that his responsibility to his supporters was not only to win, but also to represent certain values about which they cared deeply. If the price of victory was the public abandonment of one of those values, then his victory could well be thought to lose much of its point. Second, race was not just any issue. A decent politician — and particularly a southerner — had ample reason to believe that compromise on race would be unconscionable.

Still, the result of Hunt's decision was the defeat of an intelligent and honorable man at the hands of one

of the most unreconstructed race-baiters in American politics today, someone beyond the pale on a wide range of issues. If trimming on the holiday bill could have secured Helms's defeat, I believe that a decision on Hunt's part to do so would have been morally permissible. In politics (and perhaps elsewhere as well), the morality of using intrinsically attractive means is circumscribed by the ability of the political system — and in a democracy that means the people — to respond affirmatively to them. For whatever else the endeavor to pursue and exercise power may be, it is surely not a suicide pact.

— William A. Galston

This article was adapted and condensed from "Do Political Candidates Have an Obligation to Play Hardball?" a talk given at the Institute for Philosophy and Public Policy's Workshop on Philosophy and Public Policy, held at Catholic University, June 21-23, 1989.

What's Wrong with Entrapment?

Police are often tempted to use deceptive tactics in investigative work — and indeed are sometimes justified in doing so. Many offenses could not be successfully prosecuted without the use of deceptive tactics — e.g., white collar crime, organized crime, and crimes, such as blackmail and extortion, where the victims are inhibited about reporting. In all these cases, the traditional reliance on testimony of the victims is likely to be inadequate, and evidence needs to be gained in other ways. Unless deceptive tactics are used to detect crimes like these, criminal charges are likely to be concentrated on crimes more commonly associated with the poor and minorities, giving the criminal justice system a class bias. And even for more commonplace crimes, the use of deceptive tactics may be an efficient means of collecting evidence and ensuring the conviction of wrongdoers, given opposition to the excessive use of coercion in law enforcement and constitutional constraints on the gathering of evidence by the police.

In the United States, entrapment constitutes a legal limit on the use of deception in investigation. It is a defense which, if established, will result in the acquittal of a person charged with a criminal offense. But it is not always clear what makes for entrapment or why it ought to function as a defense.

What is entrapment? Why does it constitute a defense against criminal accusations?

The Subjective Approach

Discussions of entrapment have generally taken the form of a comparison between "subjective" and "objective" approaches.

The subjective approach places the emphasis on the defendant's mental state — on whether or not, prior to the inducements offered by state officials, the defendant was disposed to commit a crime of the particular type with which he or she is charged. Thus, in *U.S. v. Russell*, Justice Rehnquist argued that the defense of entrapment can be made out "only when the Government's deception actually implants the criminal design in the mind of the defendant." What lies behind the "subjective" approach is a desire to protect innocent defendants. The purpose of the defense, according to Chief Justice Warren, is to draw a line "between the trap for the unwary innocent and the trap for the unwary criminal." Where the "disposition" to commit the alleged offense has been "implanted" in the mind of an "innocent" person, the line separating permissible deception and entrapment has been crossed. The defendant is no longer culpable.

But what is involved in "implanting," such that it should diminish culpability? Suppose Abel would be reluctant to commit a crime of a certain type, say, to embezzle funds; however, Agent Baker plays on Abel's sympathies and persuades him to undertake the embezzlement. On the subjective approach this counts

as entrapment, for Agent Baker “implants” the intention to embezzle in Abel’s mind. Now suppose Abel has a general inclination to embezzle, but has not formed any specific intention to do so; Agent Baker gives Abel the opportunity to embezzle, and Abel responds affirmatively. In the latter case, the subjective approach claims that Baker does no more than provide the water that will determine whether or not the fertile seeds of criminal conduct are already there.

However, if the issue is one of *culpability* for the crime, isn’t Abel just as culpable in both cases? Suppose in the first case Baker had been a private citizen rather than a government agent. Then Abel could not claim in his defense that Baker “implanted” the intention in his mind, rendering him non-culpable. At the very most what Baker did would be a mitigating factor. So the issue does not seem to be a simple one of culpability. Why should the fact that Baker is a government agent make all the difference? This the “subjective” approach fails to explain.

The Objective Approach

In contrast to the “subjective” approach, the “objective” one focuses on the character of the state’s involvement in the commission of the offense with which the defendant is charged. As the court in *Russell* put it, “The question is whether — regardless of the predisposition to crime of the particular defendant involved — the governmental agents have acted in such a way as is likely to instigate or create a criminal offense.” Or, again in the words of Justice Frankfurter, the question “is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.”

This concern with the government’s conduct has manifested itself in a number of different ways. Sometimes the issue has been whether excessive persuasion was used to induce the defendant to commit the crime: not whether the persuasion was excessive in relation to the particular defendant, as in the subjective approach, but whether it was excessive in relation to some objective standard. As the California Supreme Court posed the question: “Was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?” Other times, what seems to have been at issue was the fact that the government had supplied something that was essential to the commission of that kind of crime. In all cases, there seems to have been a further, supervenient point of concern — that in acting as it did the government operated in an unseemly manner.

But if the subjective approach’s terminology of “implanting” was problematic, the objective approach’s talk of “creating” crime is no less so. For in what sense does the government create the crime in entrapment that it does not when it uses decoys or other methods of undercover detection? If the point is to charge the government with being the crime’s “precipitating cause” or *sine qua non*, then in any case where the

crime would not have occurred but for the government’s involvement, a defense of entrapment will be sustainable.

If the point is to charge the government with having made the crime “easier,” there does not seem to be any particular problem with the government’s action unless, in creating the opportunity, it has brought about the formation of a specific intent where none previously existed. And the objective approach eschews any concern with the defendant’s specific intent. If the point instead is to charge the government with having played “the major part” in the crime’s occurrence, then determining whether entrapment has occurred will again need to take account of the subjective factors that play a central role in the subjective approach. Otherwise, how could it be established that the government has played the major part? Since the objective approach explicitly excludes from consideration the mental state of the individual concerned, it is to be wondered whether it is seriously concerned with the issue of “creation” (i.e., causation).

An Alternative

The difficulties confronting both subjective and objective approaches should at least raise the possibility that they do not offer productive alternatives for characterizing entrapment. At the same time, the strong support that exists for each suggests that each captures something of importance.

To set up an alternative approach, it may be helpful to start with a major (though not exclusive) concern of the objective approach — a distinction between acceptable and unacceptable ways for governments to control crime. Proponents of both traditional approaches hold that it is unacceptable for governments to operate so as to induce defendants into committing crimes they would not otherwise have committed. It is only when the defendants are charged with offenses of a type that they would have committed without the government’s involvement that the government does not overreach itself. The point is not that the *particular* offense would have been committed had the government not been involved, but that an offense of *that kind* would have been committed had the government not been involved. (It would be much too demanding to insist, as a rule, that the particular offense would have occurred in the absence of government involvement — that would severely and unnecessarily handicap undercover work.) From this starting point, where the traditional approaches differ is over the means for determining when the government has behaved unacceptably. Subjectivists believe that if the person was predisposed to commit a crime of that particular type, the bounds of acceptability will not have been crossed. Objectivists believe that if the government has played too substantial a role in the crime’s creation the bounds of acceptability will have been crossed.

We may do better if we do not focus on whether this or that responsibility-establishing or responsibility-defeating factor is present, but on whether the situa-



Lucas Cranach, "Eva," 1531

*The serpent beguiled me,
and I did eat....*

tion has been such as to enable us to *tell* whether the defendant would have acted in some such way had the government not been involved in the way it was. Sometimes the government's involvement bulks so large that we may no longer be able to have any confidence that, absent its involvement, the individual

concerned would have committed an offense of the kind in question. When that is so, the defense of entrapment should be available to the defendant.

If, then, what makes for entrapment is the government's involvement in criminal activity in a manner which *either* draws into it those who would not otherwise have engaged in conduct of that kind *or* leaves it unclear whether those who engaged in it would otherwise have done so, we can resolve the stalemate between the subjective and objective approaches. The fact that a defendant was not — in some reasonably full-bodied sense — predisposed to criminal conduct of the kind charged will constitute a strong reason for believing that entrapment occurred. For it provides a fairly clear indication that without the government's involvement the defendant would not have engaged in that kind of criminal activity. This is the burden of the subjectivist approach. But even if the defendant is predisposed to engage in criminal conduct of the kind charged, a defense of entrapment may be available. For the government's involvement may bulk so large that it is no longer possible to tell, from the participant's behavior, whether he or she would otherwise have actually engaged in conduct of that kind. In recognizing this, we acknowledge a point emphasized by objectivists — the excessive involvement of government in the creation of crime.

What Is Wrong with Entrapment?

The position I have taken so far is that entrapment does not give us any reason for thinking that those entrapped are criminals. It is a structuring of circumstances such that the outcome possesses questionable evidential value. Justice Frankfurter, however, puts the point more positively and moralistically: "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and bring about the downfall of those who, left to themselves, might well have obeyed the law."

I think this is right, but overstates the objection to entrapment. Sometimes the effect of entrapment will be that crimes are committed that would not otherwise have occurred. But that will not always be the case. Sometimes a crime of that type would have been committed anyway; the problem with entrapment is that it leaves us without sufficient reason for knowing whether that would have been the case.

Behind Frankfurter's moralism lies the further belief that the government, in conducting itself in a certain way, offends the standards of decent behavior. But this, I would suggest, is an issue distinct from that of entrapment. Certainly sometimes the police engage in undercover tactics which, however successful, are so egregious, outrageous, or abhorrent that they should be outlawed by the courts and their evidential yields not be allowed to count. However, I am not convinced that the entrapment defense is what is required to outlaw such tactics. The entrapment defense is probably best left as is — as a defense that challenges the

connection between the defendant's involvement in a particular crime and the claim that the defendant would anyway have committed a crime of that type. The claim that certain government activities are in themselves improper should, I believe, be addressed as a separate issue — perhaps as a violation of due process.

However it is addressed, the issue of abhorrent government conduct is problematic. At what point does government conduct go beyond the pale? Does it vary with the kind of offense? Some objectivists argue that it becomes unacceptable when it is of a kind that would be sufficient to induce the average, normally law-abiding citizen to commit a crime. But this may be to pitch the limits too low — especially if it can be argued that more can be demanded of those in positions of great trust and responsibility than can be expected of the average, law-abiding citizen. A reasonable flexibility may be needed, not only to take account of the differing expectations we have of people, but also to avoid a situation in which the only criminals caught are inexperienced.

Gerald Dworkin offers a plausible test for determining when the government has overreached itself. The criminal law, he argues, is not a pricing system, which is indifferent to the choices made by citizens — whether they obey or choose instead to disobey and pay the penalty. It is meant to be obeyed. Government goes too

far when its actions have the effect of saying not "Do not do X," but "Do x." When it does the latter, it not only violates the *telos* of the criminal law, but also deals unfairly with citizens. It becomes a tester of virtue rather than a detector of crime.

In any case, my point is not to deny that in entrapment the government may be left with the stain of crime on its hands, but to deny that this is what makes entrapment a proper defense. What makes it a proper defense is its evidential bankruptcy. Entrapment is an inappropriate investigative technique, not only or primarily because it traps the innocent or manifests substandard behavior on the part of governmental agents, but because it leaves us without adequate grounds for establishing the guilt of those whom it succeeds in ensnaring. Those who are held guilty of crimes ought to possess the relevant dispositions, and they ought to have been placed to give those dispositions effect. Entrapment removes our basis for knowing whether both these conditions obtained.

— John Kleinig

John Kleinig is a professor at the John Jay College of Criminal Justice. This article was condensed and adapted from his lecture materials on police ethics. His reflections on entrapment were greatly stimulated by Andrew Altman and Steven Lee, "Legal Entrapment," *Philosophy & Public Affairs*, vol. 12 (1983).

Fairness in Taxation

When Ben Franklin said that the only two certainties are death and taxes, he could not have been speaking of income taxes, which were all but unheard of in his day. A few city states in Italy had experimented with an income tax in medieval times, and Britain adopted a temporary income tax during the Napoleonic wars. But the income tax did not come into widespread use until the mid to late nineteenth century. Great Britain adopted an income tax in 1842, Japan in 1887, and Germany in 1891.

In 1894, the Congress established an income tax in the United States, only to have the Supreme Court overturn it a year later, on the grounds that Article I of the Constitution prohibits any taxation that is not linked directly to political representation. The Constitution states: "Representatives and direct taxes shall be apportioned among the several states according to their respective numbers." A "head" tax or a poll tax would be acceptable on this criterion; a tax levied on income would not. If people have an equal vote, they should

pay the same amount in taxes, or so the high court said.

The Sixteenth Amendment to the Constitution, ratified in 1913, cleared the way for the income tax. That Amendment reads: "The congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Debate about income tax policy usually centers on the question of fairness, that is, who ought to pay how much and why. Simple as this question may seem, attempts to translate fairness into practical policy raise a host of further questions. What should be taxed? earned income? total income? wealth? consumption? If we tax income, how much and what kinds of income should be exempt from taxation? We might want to exclude at least as much income as people require to meet their subsistence needs, or, perhaps, to maintain a "decent" standard of living. Present law also excludes from taxes income directed toward certain socially

legitimate or desirable ends, such as medical expenses, mortgage interest, and contributions to charities. The question that evokes the most controversy, however, concerns fairness in the way that taxation is distributed across income brackets. How much of the burden should fall upon the poor and on the middle class; how much of the burden should we expect the rich to bear?

The Principle of Equal Sacrifice

As income taxation became increasingly widespread, a lively debate developed among economists as to the form that the tax schedule should take. One of the more peculiar proposals came from the eminent economist Gustav Cassel, who took the view that subsistence needs, and hence the personal exemption, should increase with income. Cassel wrote: "It is simply impossible for a professional man to live as cheaply as a common miner. He has outlays for books, paper and correspondence, and if he has a family he cannot live and work in only one room. He cannot, in one word, discharge his function in society, and, economically speaking, continue to exist as the same person, if he is reduced to a standard that can be considered as a fair minimum for a common labourer." Accordingly, tax policy should take into account the larger "subsistence" needs of the well-to-do.

A more sensible criterion was put forward by John Stuart Mill in his *Principles of Political Economy* (1848). Mill argued that a fixed amount should be exempted from taxation to cover subsistence needs, and on the remaining income, the tax should be distributed so that it "bears as nearly as possible with the same pressure upon all." But this does not mean that everyone should pay the same amount in taxes. A person with an annual taxable income of \$15,000 would probably find a tax of \$1,000 quite onerous, while a person with an income of \$500,000 would scarcely feel it at all. In assessing the equity of a tax distribution, it is the loss of well-being that matters, not the sum of money itself. Mill stated the principle as follows: "Equality of taxation, as a maxim of politics, means equality of sacrifice. It means apportioning the contribution of each person toward the expenses of government so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his. This standard, like other standards of perfection, cannot be completely realized; but the first object in any practical discussion should be to know what perfection is."

The general implication of Mill's principle is that a rich person should pay more in taxes than a poor person. But precisely how much more? To translate equal sacrifice into a specific tax distribution requires making assumptions of a psychological nature, such as how the utility, or well-being, derived from each additional dollar of income diminishes as the level of income rises. In recent years, economists and psychologists have attempted to estimate the utility that the "typical" individual derives from additional income by observing the choices that people make under uncertainty,

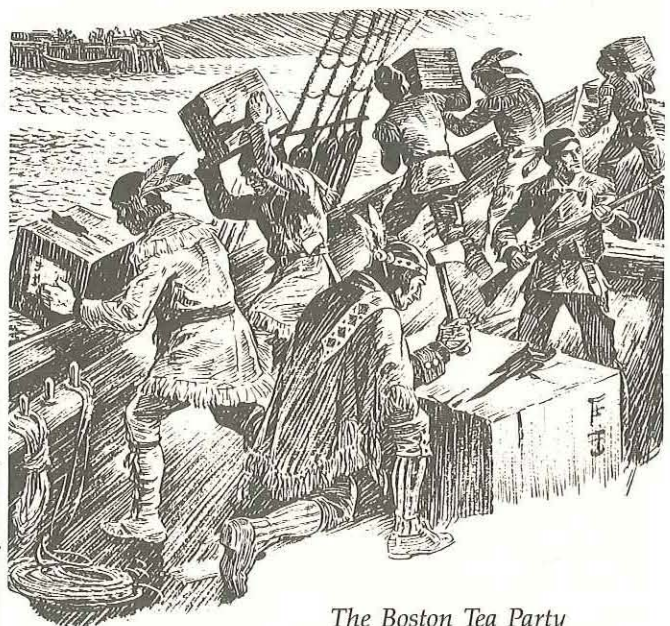
including their investment behavior. The details are too technical to go into here, but the general finding from these empirical studies is that the marginal utility of income decreases at higher income levels, and it does so at a fairly rapid rate.

In principle, of course, equal sacrifice should take into account the differences between people in their utility for income. But this seems impossible in practice, and even if it were possible, it would require an invasion of individual privacy that seems unwarranted. A more practicable approach is to estimate the utility of an "average" person, and to treat everyone as if he were average. Accordingly, everyone is judged by the same standard, a kind of "social" utility of income.

Three Interpretations of "Equal Sacrifice"

Mill made a quite simple assumption along these lines, namely, that each 1 percent decrease in disposable income implies roughly the same loss in utility at every income level. Accordingly, the equal sacrifice principle implies that after deducting a fixed amount for subsistence, the tax on the remaining income should be a fixed percentage. This is known as a "linear tax."

In 1889, the Dutch economist A. J. Cohen Stuart gave the idea of equal sacrifice a slightly different twist. He argued that the tax should be distributed so that everyone gives up the same percentage of his utility, that is, the happiness of everyone should be reduced in the same proportion. If we assume that a rich man has more total utility than a poor one, the former would have to sacrifice more utility in absolute terms to make his sacrifice comparable to that of the latter. Not surprisingly, the result is a more progressive tax than Mill's linear tax. If utility decreases by a fixed amount for each



The Boston Tea Party

Drawing by W. N. Wilson, from *Free Men Must Stand*,
Whittlesey House, © 1962

1 percent paid in tax (as Mill assumed), then Cohen Stuart's scheme implies a steeply progressive tax in which the marginal tax rate approaches 100 percent for the rich.

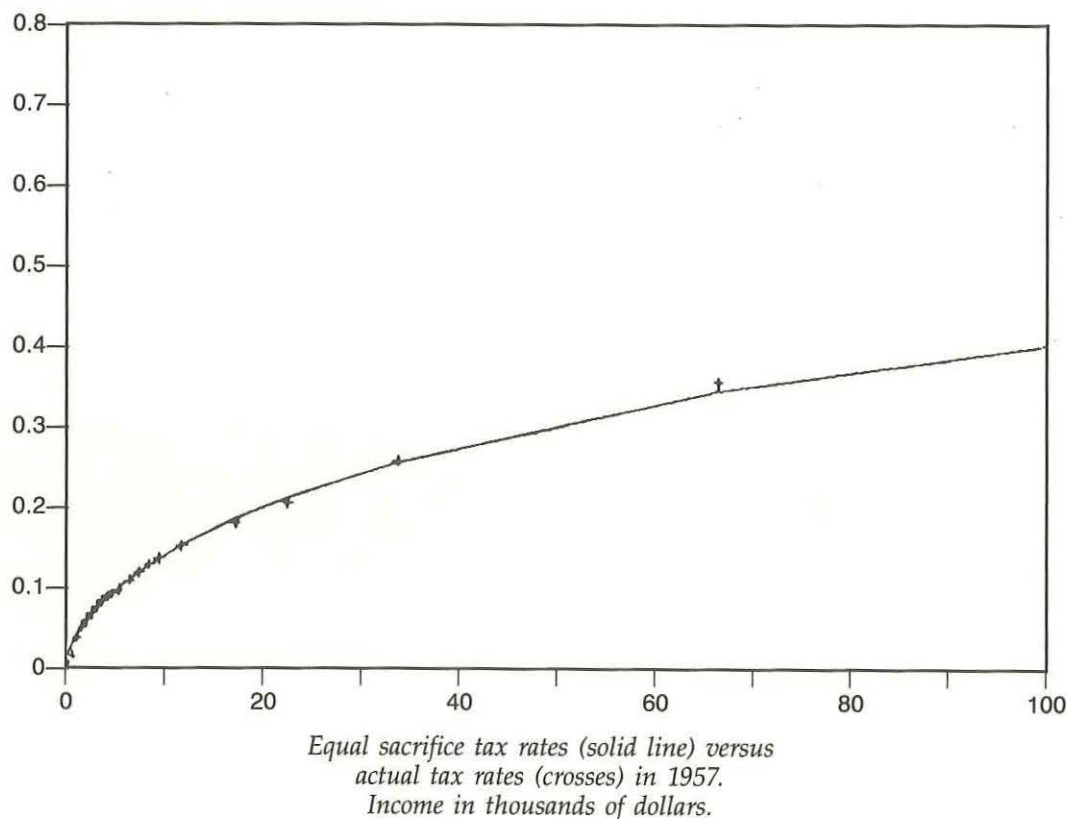
An even more radical interpretation of the equal sacrifice prescription was entertained, at least briefly, by the economist F. Y. Edgeworth. In 1897, Edgeworth, who believed that total utility should be maximized, argued that the tax burden should be distributed so as to minimize *aggregate* sacrifice. In other words, the total loss of utility due to taxation, summed over the entire taxpaying population, should be as small as possible. Assuming that the marginal utility of income decreases the larger one's income is, it follows that the next dollar of tax revenue should always come from the person with the most money. Accordingly, everyone with income above a certain threshold would be taxed at a marginal rate of 100 percent and everyone below the threshold would be subsidized. In the end, everyone would be left on a level field with exactly the same after-tax income. However, this visionary proposal runs afoul of another empirical observation, that people need the incentive of extra income to work harder. Taxing the wealthy at 100 percent to subsidize the income of the poor might result in a perfectly equitable society, but a remarkably poor one. The marginal gains to the utility of the poor of each added dollar might be greater than the loss per dollar to the rich, but this net gain might be more than offset by the total loss of wealth resulting from the loss of incentive to produce more.

Progressivity in Practice

Whether because of, or in spite of, these arguments, the settled policy of the United States, and indeed of most industrial countries, is to tax income progressively, but not so progressively as to choke off all incentive for people to earn more. It must be recognized, of course, that progressivity is not nearly as great as the published tax schedule would suggest. The true measure of progressivity is the effective tax rate, that is, tax paid as a percentage of full personal income (not allowing any exclusions or deductions). According to this measure, the U.S. federal income tax is only mildly progressive and has been getting less so over the past decade. And when we factor in other levies, such as sales taxes, property taxes, and corporate taxes passed on to individuals, the effective tax rate is about constant across income classes.

It remains true, however, that the federal individual income tax is mildly progressive. And in the past, even up through the 1960s, it was quite markedly progressive. Why do we continue to believe that some progressivity is appropriate? Is it possible that the progressive distribution of the federal tax burden is motivated by our feeling that the rich should pay more because they feel the bite less?

To examine this possibility, we analyzed the distribution of taxes by income class from the 1950s to the present. The data that we used were taxes paid as a percentage of Adjusted Gross Income, which is the closest measure that we have of the true effective tax



rate. We then asked how closely this distribution conforms with the idea that people sacrifice about the same amount of utility at each level of income. That is, we asked how closely we could fit the observed distribution of tax rates to the tax rates that would be implied by Mill's equal sacrifice model, assuming that marginal utility decreases in accordance with empirical estimates of "typical" utility functions.

We found that the actual distribution of tax rates in the 1950s, 60s, and 70s conformed very closely to an equal sacrifice distribution except at the upper and lower extremes of the income distribution (see the accompanying graph). The Tax Reform Act of 1986 represents a major departure from this pattern, however. The number of distinct tax brackets has been reduced to just three (actually four: 15 percent, 28 percent, 33 percent, then 28 percent). This small number of brackets, with an unsightly bulge for the upper-middle class, results in a choppy pattern of effective tax rates that does not fit the equal sacrifice model nearly as well as a gradually rising series of brackets.

Although we cannot draw definitive conclusions from such a limited set of data, it appears that equal sacrifice provides a reasonably accurate picture of how the U.S. federal tax burden has been distributed among

middle- and upper-middle-income taxpayers in much of the postwar period. A similar pattern has prevailed in other industrialized countries, including, for example, Italy, West Germany, and Japan.

Of course, obtaining a reasonably good fit does not prove causation. Nor do we have any direct evidence that legislators actually invoked equal sacrifice arguments in proposing the rate structures that we observe. It is conceivable, however, that intuitive notions of "relative sacrifice" and "ability to pay" are a factor in the way that legislators evaluate the fairness of tax proposals. And it does not seem too far-fetched to suppose that the aggregate of these intuitions, as expressed in a majority vote, might come close to an equal sacrifice tax. We suggest, then, that equal sacrifice may play a significant role in the way that people think about taxation, and that it needs to be taken more seriously as the "maxim of politics" that Mill claimed it to be.

— Peyton Young

Peyton Young is a professor of public policy in the school of public affairs at the University of Maryland and currently a guest scholar at the Brookings Institution. This article was adapted and condensed from "Equal Sacrifice and Progressive Taxation," which is forthcoming in the *American Economic Review*. The author is indebted to Joseph A. Pechman for helpful comments.

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