

Public Support of the Arts

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

* * *

In this issue:

A move to bar federal subsidies of “obscene” art raises questions about whether government should subsidize the arts at all p. 1

A retributivist defense of punitive damages, along with a rough-and-ready yardstick for assessing them p. 6

The physician owes a duty of confidentiality to the patient—but with advances in genetics and medical technology, we must reconsider just who is the patient p. 9

Should family life be governed by love? Or is justice more important? Arguments on both sides, and a tentative answer p. 12

“But is it art?” That question, so often voiced by anxious museumgoers, plainly reveals our collective state of aesthetic confusion. We may congratulate ourselves on living in artistically exciting times, or we may secretly envy our ancestors, who worried mainly whether what they were viewing was good or bad art, and not whether it was art at all. Only on rare occasions does our characteristically modern anxiety take on an air of urgency. Yet urgent it became in September when members of the U.S. Senate debated, and finally rejected, Senator Jesse Helms’s proposal to bar federal funding for “indecent” or “obscene” art works.

At the eye of the storm stood the National Endowment for the Arts, surrounded by a collection of highly controversial photographs. One, by Andres Serrano, showed a plastic crucifix immersed in urine. Upon learning last May that NEA funds had gone to a North Carolina arts center, which in turn gave a grant to Serrano, Senator Alfonse D’Amato denounced the endowment for subsidizing “filth.” Soon afterwards Representative Dick Armey discovered that NEA funds had also gone to the Philadelphia Institute of Contemporary Art, which organized a traveling exhibition of (now notorious) photographs by Robert Mapplethorpe.

The Mapplethorpe show included pictures that some called “homosexual” and “sodomasochistic.” Armey’s description was far less restrained. In June he fired off a letter to the NEA declaring that “the interpretation of art is a subjective evaluation, but there is still a very clear and unambiguous line that exists between what

can be classified as art and what must be called morally reprehensible trash."

Like-minded critics rejected Mapplethorpe's pictures as "pornography." Serrano's photo of the crucifix was attacked as "blasphemy." On the other hand, Senator Daniel Patrick Moynihan, Representative Sidney Yates, and many other members of Congress were quite prepared to regard the photographs as art. The pressing question for them was not "Should government subsidize morally reprehensible trash?" but "Should government censor the arts?" At its most general, the debate ranged beyond censorship into freedom of expression. Now that the dust has settled, let's take a closer look at this dispute.

A Red Herring: "Is It Art?"

In the first place, "Is it art?" was never the heart of the matter. Whether the unsettling photographs were judged good art, bad art, or merely so much tasteless sensationalism, the sticking point was public money. If our tax dollars are going to support the arts, it stands to reason that we, or at least our elected representatives, should have some say in determining just where those dollars go. This is the basic assumption of the Helms proposal. And whatever objections might be made to its wording—whatever potential for abuse one might see lurking in such vague notions of obscenity and indecency—there is still a certain bedrock of common sense in the Helms proposal.

On the surface, though, there remains ample room for objection. More than a few of our elected representatives saw the proposal as a dangerous attempt to censor the arts. Artists naturally agreed: the flame of creativity would be extinguished if the Helmsian threat weren't stopped. As one might expect, the news media made capital of the censorship angle. "Should Congress censor art?" ran a particularly blunt headline in *U.S. News & World Report*.

Those familiar with the NEA's history must have watched this storm of protest with a sense of *deja vu*. In 1985 Congressman Armey and several colleagues charged the endowment with subsidizing both pornography and politically offensive poetry. They wanted to bar NEA funding for any work "patently offensive to the average person." The wording of that proposal was just as vague, and just as worrisome in its vagueness, as the wording of the recent Helms proposal.

Of course, congressional opponents didn't cry "Vagueness!" They cried "Government censorship of the arts!" The charge of censorship worked its usual magic. After impassioned political debate, the proposal to stop NEA funding of "offensive" art was defeated.

Another Red Herring: "Censorship!"

"Censorship" alone is a powerful accusation. We Americans are justly proud of our freedom of speech, and proposals to limit that freedom should certainly be regarded with suspicion. "Censorship of the arts" is an even more powerful accusation. If the First

Amendment cannot protect artistic expression from government control, how can it possibly safeguard our right to political protest? If any form of expression should be unfettered, it must be artistic expression. Better to permit offensive or obscene art than to open the door to blacklists and Big Brother.

The argument, then, is that any conditions attached to public funding of the arts amount to, or at least can easily lead to, government censorship. But the argument is a bad one. To say that the government may refuse funding for certain kinds of art is not to say that the art may not be produced and even publicly exhibited. It is only to say that the production and exhibition will not be supported by public money. "The people giveth and the people taketh away," observes William A. Galston, research scholar at the Institute for Philosophy and Public Policy. "The idea that the First Amendment protects not only personal expression but also public approval—in this case, in the form of federal funding—is ridiculous on its face."

To say that the government may refuse funding for certain kinds of art is not to say that the art may not be produced and even publicly exhibited. It is only to say that the production and exhibition will not be supported by public money.

If charges of censorship can be justified, they can only be justified by an appeal to consequences. Say, for example, that the government's refusal to support an artist's work makes that artist anathema to gallery directors, so that her work will no longer be exhibited. Or say that the impressionable American public inevitably follows its government's lead, so that even if the work is exhibited, the exhibition will go unattended. Say, too, that American artists aren't stupid: knowing the disastrous effects of a government rejection, they drift gradually towards *self-censorship* and so become less creative.

If these apocalyptic visions had any foundation in fact, the refusal of government funding might indeed work to restrict free expression, and we might well fear that the flame of American creativity would ultimately flicker and die. In reality, though, the refusal of government funding has no such repercussions. The Mapplethorpe show is a case in point. When the exhibit was dropped by Washington's Corcoran Gallery, it was picked up by the Washington Project for the Arts. Washingtonians reacted to the flap on Capitol Hill and the flurry of media interest just as most Americans would—by going in droves to view the forbidden photographs.

Congress ultimately did approve legislation barring NEA funding of "obscene" materials. What counts as obscene, however, was left to the agency's own judgment. The NEA is prohibited from supporting only

those works it believes that, "when taken as a whole, do not have serious literary, artistic, political, or scientific value."

The closest approach to censorship was a provision added by the Senate Appropriations subcommittee but omitted from the bill that eventually became law. The subcommittee wanted a five-year ban on federal funding of the two institutions that sponsored the Mapplethorpe and Serrano exhibits. While that ban would not have constituted censorship, it could have had some of the same effects. To impose such heavy penalties on institutions, rather than simply refusing to support specific projects, is a step in the direction of blacklists that Congress was wise to resist.

To Pay or Not To Pay

The idea that conditions on NEA funding invariably threaten First Amendment rights should, therefore, be dismissed. What remains is a far more difficult issue: whether our government has any business funding the arts in the first place. The claim that "if government subsidizes the arts, it may rightly attach conditions to the funding" still leaves open to question whether government should be subsidizing the arts at all. Does the expenditure serve some public purpose or promote some public good? Even if it does, is the subsidy necessary?

Though subsidies of the arts might well produce some public benefit, it doesn't follow that public expenditures are necessary, for the same public benefit might conceivably be secured through private expenditures. Public expenditures in this area might even be worse than unnecessary. If public funding of the arts turns out to violate principles of justice, or to do more harm than good, then it hardly matters what public benefit it produces. Under such circumstances, the subsidies would best be stopped.

The question of public purpose is especially ticklish, for some of the arts' strongest supporters embrace the doctrine of "art for art's sake." That doctrine suggests that art's sole purpose is to give us aesthetic experience. At any rate, so says Edward Banfield, who contends that the NEA only makes people more confused about the nature of art than they would be otherwise. In *The*

Democratic Muse Banfield writes: "Public funding encourages arts agencies to emphasize activities that have little or nothing to do with art properly understood: instead of making aesthetic experience more accessible, they turn attention away from it in order to present art as entertainment, psychotherapy, material for historical studies, and so on." The obvious conclusion: government should stop subsidizing the arts.

The virtue of this position is its distinction between art and the various uses we make of art. There are even more potential uses than Banfield lists. In fact, one argument for public funding of the arts is that theater, opera, art museums, and such like are all sound investments. By attracting tourists and enriching the leisure industry they produce an economic payoff.

There is, however, a weakness in Banfield's argument. It assumes that when public funding of the arts does anything beyond making aesthetic experience more accessible—say, by presenting art as entertainment—the public becomes confused about the nature of art. Moreover, that confusion supposedly shows the public to be ill served by subsidizing the arts. But what evidence do we have that the NEA and like agencies have muddled the public mind? Even if there were such confusion, wouldn't it be better, rather than worse, that publicly funded art produce benefits above and beyond aesthetic experience?

Public Benefits

Beneficial side effects should not be discounted, for they might turn out to be just what we aim at in supporting art. In other words, we might distinguish between the purpose of art itself and our purposes in subsidizing art. Public expenditures could be justified because art, or rather increased public access to art, produces. . . what? What public benefits can be claimed?

At this point, advocates of subsidies for the arts can easily win the battle but lose the war. If they cite public benefits entirely extrinsic to art, their opponents will reply that government support for the arts is not needed to produce those benefits. We can find another, more cost-effective way of producing the same benefits.

Entertainment, for example, is a side effect of art that some might count as a public benefit. But if the point

We're Changing —

Improving, we hope. Beginning with the next issue, you'll see a new cover, a new title, and some other, less noteworthy differences.

Please be watching for us in the winter of 1990.



of funding art is to provide American citizens with more entertainment, why not subsidize rock concerts and football games? A poll of the general public would surely prove those to be more popular forms of entertainment than opera and ballet.

The same sort of objection can be made to other publicly beneficial side effects of increased public access to art. If what's wanted is a boost to the tourist trade, why not demand government subsidies for amusement parks? A first-rate amusement park would attract tourists, provide the American public with entertainment, and yield a good return on investment. Why not subsidize amusement parks as well as the arts? Why not subsidize amusement parks instead of the arts?

Because art helps make a society worthy of the pride of its citizens, answers Amy Gutmann, professor of politics at Princeton University. Americans view art as an important part of their common, cultural heritage, and public subsidies are justified because they help make that cultural heritage accessible to a greater number of citizens. (Of course, amusement parks, rock concerts, and football games may be as American as apple pie, but they don't need subsidies.)

Another defense of government-supported art, inspired by David Hume, takes culture to be essential to a thriving democratic society. Widespread reasonableness, temperance, and moderation in public debate (the argument goes) are not acquired in isolation from the general level of culture in society. This cast of mind is developed in concert with the refinement of sensibilities in feeling produced by appreciation of music, art, drama, and literature. The reason for supporting (say) orchestras is thus the same as the reason for sup-

porting schools. Both aim at sufficient liberal learning, including continued learning in adulthood, to fit citizens for self-government.

Opponents of publicly funded art could challenge both Gutmann and Hume on several grounds. The most obvious objection is economic. Even if increased access to our cultural heritage produces such public benefits, why spend taxpayers' money on it? Private patrons would do more for the arts if the flow of government funds were cut off. Besides, private support would free art from the strings that might be attached to public funding.

While the case against subsidies sounds persuasive, its claims are impossible to prove. No one knows whether private contributions would fill the gap if government funds were withdrawn. By the same token, the danger of government control might be no greater, and could well be less, than the danger of control by a coterie of well-heeled private citizens.

A more thoughtful criticism of Gutmann and Hume is this: in neither case is there obvious reason for government to support the creation of new art works. When we speak of increasing public access to our cultural heritage, we mean established art works. The same rationale would extend to new productions only if subsidies were needed to keep our culture alive and flourishing.

The Question of Justice

We turn at last to charges that cultural subsidies are unjust. There are three grounds for the accusation: (1) The subsidies operate like Robin Hood in reverse. Since Archie Bunker keeps watching the ball game while yuppies troop off to the opera, Archie's tax

Drawing by Lorenz; ©1989
The New Yorker Magazine, Inc.



"Damn! There goes our funding."

dollars only go to support those who least need them. (2) Government has no business funding art exhibits while many Americans remain homeless. Public funding of the arts must wait until basic needs for food and housing are met. (3) High-minded arguments for culture mask an antidemocratic paternalism. A liberal state would not favor Puccini over Prince, Shakespeare over Spielberg, or any set of personal preferences over any other.

The first charge ignores an important fact: Archie has greater access to the opera than he would without government subsidies. He may choose not to attend, just as many choose not to attend government-supported educational institutions; but Archie's preferences don't establish that the benefits produced by arts subsidies are reserved to a select few. What they do suggest is that cultural preferences tend to reflect one's income bracket.

We cannot make the audience at the opera more representative of the general population without making our society more economically egalitarian. Scrapping government art agencies won't help. As Gutmann points out, "Poverty is the most common source of cultural discrimination, and the source least amenable to correction by cultural institutions. Lowering the already modest admissions prices to museums is unlikely to increase attendance by the poor. Lowering the substantially higher ticket prices of concerts, theater, and opera is more likely to increase middle-class attendance, an important but incomplete accomplishment."

The second charge of injustice can be seen as a variant of the first. If funds now appropriated for the arts would otherwise be devoted to the poor, reverse Robin Hoodism might again be in evidence. Of course, the arts subsidies can be defended on purely practical grounds. We may doubt, for example, that the poor would actually benefit from the small amount of money saved on arts subsidies. Even if the funds were pumped directly into public assistance programs, they would be the proverbial drop in the ocean. The gain to the poor would be miniscule, the loss to the arts substantial.

The related policy question is whether public support of the arts should be postponed until all citizens' basic needs are satisfied. On the one hand is the seriousness of basic needs; on the other is the social cost of entrusting our cultural heritage to the free market and private philanthropy. The public benefits of funding the arts, along with the social costs of not funding them, do not prove that justice requires arts subsidies. They do prove that justice permits them.

We reach at last the charge of antidemocratic paternalism—a rallying cry for liberals convinced that the state must be neutral regarding conceptions of "the good life." In practice this means that all personal preferences are created equal; and, in the eyes of the state, equal they should remain. The government, then, would seem to have no business subsidizing opera but not rock concerts.

Leading liberal theorist Ronald Dworkin, professor of jurisprudence at Oxford and professor of law at New York University, offers an intriguing argument purporting to show that a liberal state *can* support art without committing the crime of paternalism. We need only accept the thesis "that people are better off when the opportunities their culture provides are more complex and diverse, and that we should act as trustees for the future of the complexity of our own culture."

In other words, a liberal state can and should increase the range of cultural options. It should *not* favor any particular preferences regarding those options. For that reason Dworkin recommends aid "in the form of indiscriminate subsidies, such as tax exemptions for donations to cultural institutions rather than as specific subsidies to particular institutions.... When discriminations are made, they should favor forms of art that are too expensive to be sustained by wholly private, market transactions."

This doggedly nonpaternalistic program may succeed in disguising its values, but the values are there nonetheless. Why fund art museums but not drive-in movie theaters? Drive-ins are a cultural institution now threatened with extinction. If steps are not taken to preserve them, our future culture will be less diverse. Both art museums and drive-ins represent actual preferences. The difference between them is merely the difference between high and popular culture.

Conclusion

The truth is, public funding of the arts is paternalistic, and nothing is gained by pretending otherwise. Because government cannot support all citizens' preferences, it must decide which are most valuable to society as a whole. It must choose those aspects of our culture most worthy of being preserved.

This paternalism remains harmless so long as it operates through the usual political processes. As long as politicians must debate publicly which aspects of our culture to subsidize, and as long as they must convince constituents that their decisions are sensible, paternalism poses no threat to democratic society. As Galston argues, "Politics is not just purposive or instrumental; it is also expressive, both on the collective and on the individual level. Through it we express our conception of who we are and who we want to be."

If we take collective pride in our cultural heritage—if we want our children and grandchildren to share in that heritage—we should go on subsidizing the arts. And Congress should go on debating which conditions, if any, our tax dollars will carry with them.

The sources cited in this article are William A. Galston, interview; Edward C. Banfield, *The Democratic Muse: Visual Arts and the Public Interest* (New York: Basic Books, 1984); Amy Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1987); Ronald Dworkin, "Can a Liberal State Support Art?" in Dworkin's *A Matter of Principle* (Cambridge: Harvard University Press, 1985).

Two Cheers For Punitive Damages

Punitive damages are awarded to a plaintiff in a civil suit when the defendant's injurious behavior was not merely illegal but also morally offensive—when a tort was intentional, for example, or the defendant was negligent to the point of recklessness. The aim of such awards is explicitly to punish the defendant over and above compensating the plaintiff's present and future losses from the injury.

Many critics suspect that juries use punitive damages simply in order to pick deep corporate pockets, giving an undeserved windfall to plaintiffs. Such critics believe that this encourages unscrupulous plaintiffs' lawyers to bring weak or frivolous cases that don't belong in court; the result is a litigation explosion, increased insurance premiums, and a brake on innovative new technologies for fear that they will spawn expensive lawsuits. For this reason, many tort reformers propose capping or even eliminating punitive damages.

The evidence does not substantiate the charges, however. State courts—where 98 percent of litigation occurs—report that tort filings have grown only slightly faster than population over the last decade, and the most extensive study of punitive damages finds that they are awarded in a mere 1.5 percent of personal injury cases.

Critics also believe, however, that high punitive damages are unprincipled and indeed unconstitutional. "Let the punishment fit the crime" expresses the principle of proportionality, and punitive damages are often grossly disproportionate to compensatory damages. It is this criticism, based on philosophical principle, that concerns me here.

Last term the U.S. Supreme Court heard a case entitled *Browning-Ferris Industries (BFI) v. Kelco*. Kelco was an independent garbage hauler in Burlington, Vermont, which set itself up in competition with the only other garbage hauler in town, a subsidiary of BFI (a large Houston-based corporation). Kelco—owned by a man named John Kelley—soon attracted more than half the market, and BFI responded badly. A BFI executive ordered the local franchise to put Kelley out of business, using the expression "Squish him like a bug." BFI slashed its prices and soon won back a sizable portion of the market. Kelco sued for predatory pricing, and the jury awarded \$51,000 in compensatory damages. However, presumably impressed by "Squish him like a bug," it proceeded to impose \$6 million in punitive damages on BFI.

BFI appealed, claiming that punitive damages so far in excess of the compensatory damages amounted to

"excessive fines" prohibited by the Eighth Amendment along with "cruel and unusual punishment." The Supreme Court ruled seven to two in favor of Kelco, but based the decision on grounds having nothing to do with proportionality. The issue of proportionality is thus almost certain to arise again. I agree with tort reformers that unlimited punitive damages violate the principle of proportionality; but I also want to argue that there is nothing at all disproportionate about punitive damages that are orders of magnitude bigger than the injuries actually suffered by the plaintiff.

Norm Projection and Deterrence

First, let us consider the staple justifications of punishment: deterrence, retribution, incapacitation, rehabilitation. The latter two—incapacitation and rehabilitation—are unlikely to be at issue in punitive damage cases. Typically we think of rehabilitation as a process of retraining, education, therapy, or whatever, that occurs during a term in prison, and it's hard to imagine a corporate entity being "rehabilitated" by paying money. Similarly, incapacitation usually means prison, and arises in punitive damages cases only in the rare case when a jury decides to put the defendant out of business. Thus, discussion of punitive damages should focus on deterrence and retributivist theories.

Not only these two, however, for punishment may prevent offenses in other ways besides deterrence. Deterrence suggests that people will disobey the law unless they fear punishment. But this is a gross caricature of our political psychology. Many of us will willingly comply with law once we know that it is seriously intended; and sociologists point out that an important aim of punishment is to highlight in a public way the serious intent behind legal norms.

Having said this, let's look at the complaint about punitive damages raised by BFI. It claims that \$6 million is disproportionate because it so far exceeds the \$51,000 compensatory damages. BFI thinks that punitive damages should be scaled to compensatory damages, which measure the bad consequences of the tort to its victim. BFI's proposed scaling principle thus amounts to the idea of scaling punishment to the bad consequences of an offense. But, as we shall see, this idea makes no sense on any of the three remaining rationales for punishment—norm-projection, deterrence, and retribution.

On the norm-projection rationale the purpose of punishment is to emphasize that the law against predatory pricing is a serious one. And I believe that

this can be done *only* if the punitive damages are grossly disproportionate to compensatory damages. Kelco lost \$51,000 worth of business to BFI because of its predatory pricing. If the punitive damages were roughly commensurable with compensatory damages—say, \$150,000—BFI might well be tempted to treat this as a mere cost of doing business and to play what is called the “enforcement lottery”: continue its predatory practices hoping that it will be successfully sued only one time out of four, so that it will still turn a profit.

That is, with lenient punitive damages companies will be more likely to treat the law not as a norm demanding compliance but merely as a kind of tax on predatory pricing. The difference is fundamental. A serious norm prohibiting conduct is *categorical*: it says “Don’t do X!” By contrast, a tax on conduct is *disjunctive*: it says “Either don’t do X or else pay,” thereby presenting the norm in merely optional form. My contention here is that only by imposing punitive damages of a different order from compensatory damages can a jury convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis. The point is to make the numbers on the balance sheet so ridiculous that the offender stops looking at the balance sheet.

Similarly, to fully deter would-be offenders from engaging in morally outrageous behavior, the price tag must be high enough to make playing the enforcement lottery an unattractive proposition. We have seen that this requires punitive damages that far outweigh the gains from committing the tort weighted by the likelihood of being sued successfully: the lower the chance of being caught, the higher the punitive damages. In the BFI case, BFI’s gains roughly equaled Kelco’s losses—the compensatory damages. Since

predatory pricing schemes are not easy to detect, deterrence requires setting BFI’s punitive damages well in excess of its gains, and thus well in excess of compensatory damages.

Retribution

The heart of my analysis lies in retributivist theories of punishment, and the basic point is simply stated. A retributivist scales punishment to the heinousness of the offense, and that is not measured by the magnitude of harm. A moment’s negligence behind the wheel, of the sort that each of us has been guilty of many times, may result in horrible consequences, while cold-bloodedly throwing a child out of a skyscraper window may result in very little harm because the child’s suspenders miraculously catch on a flag-pole.

The hard question is what scaling principles make retributivist sense, and to answer this, we must know what makes retributivism plausible. In *Forgiveness and Mercy* Jean Hampton explains that culpably harming another person or being culpably negligent expresses a false view of the wrongdoer’s value relative to that of the victim. Implicitly it says that the victim is a low person, the sort of person one can do this kind of thing to. Or it says that the wrongdoer is an especially valuable and high kind of person, the sort of person who is entitled to take liberties with the well-being of others. Or it says both.

It is crucial to Hampton’s analysis of retributivism that the wrongdoer has implicitly asserted a kind of undeserved mastery and superiority over the victim: in different words, the wrongdoer has expressed a falsehood about the world of value. The purpose of punishment is to reassert the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer. And the magnitude

Drawing by M. Twohy: ©1984
The National Law Journal



“We, the jury, find the defendant guilty and ask that we no longer be considered his peers.”

of punishment must reflect the magnitude and, if possible, the nature of the asserted inequality between wrongdoer and victim. A more heinous act expresses more contempt for the victim's value relative to the wrongdoer's, and so a more decisive defeat must be visited on the wrongdoer to reassert our public judgment of the victim's worth. If the punishment is too lenient, the society as a whole implicitly ratifies the view that the victim is the sort of person it's all right to do these things to. (Hampton offers a telling example: if sentences for forcible rape are low, the legal system is expressing a contemptuous view of the value of women relative to men.)

This still does not tell us how a retributivist will scale punitive damages. And of course there can be no formula for punitive damages, since heinousness cannot be assigned a straightforward dollar-value. But once we begin to focus on the requirement that the punishment express, as transparently as possible, the true

Punitive damages arise most often in the context of economically motivated wrongdoing. . . . High punitive damages hit homo economicus where it hurts: an eye for an eye, a tooth for a tooth and a bottom line for a bottom line.

scale of values in the moral world, we have a rough-and-ready yardstick for assessing punitive damages (and, in many cases, for capping them). Let me illustrate what I mean with an example.

In 1981 a California jury heard a case involving Grimshaw, a boy who had been hideously burned in an explosion of his Ford Pinto. The plaintiff presented evidence that Ford had known of the Pinto's defective gas tank, but had decided against recalling it after a cost-benefit analysis showed that the company could save \$125 million by leaving the unaltered cars on the road. The jury awarded the boy \$125 million in punitive damages, later reduced by the judge to \$6.6 million. The case has been cited by critics of the tort system as a classic example of a jury run amok; but I believe that the jury's award was a perfect case of "letting the punishment fit the tort."

On a deterrence rationale the jury's decision makes obvious sense: Ford's reliance on cost-benefit analysis indicates that it could be deterred only if it lost money through its decision, and the jury's punitive damages were calculated precisely to annihilate Ford's profit. But on a retributivist view it also makes sense to take the outcome of Ford's cost-benefit analysis as a measure of wrongdoing. Ford had displayed contempt for Grimshaw's value, but more importantly it had displayed a certain *kind* of contempt for Grimshaw's value. In Kant's famous words, it treated Grimshaw as pos-

sessing merely a price, not a dignity. For this reason, inflicting a monetary defeat on Ford was an especially expressive form of punishment. Moreover, Ford had affixed its customers' prices through the technique of cost-benefit analysis. For this reason, the jury chose to inflict a monetary defeat on Ford that incorporated within it a reference to Ford's own cost-benefit analysis—a defeat that Ford could not help but understand because the jury held up the cost-benefit analysis as a kind of mirror in which we would all recognize the moral truth of the situation.

Obviously, the medium of monetary damages has limited expressive power, and in many instances of high punitive damages we will be unable to infer anything from the amount beyond the message that the jury thought the tortfeasor had been a real schmuck. Nevertheless, high punitive damages are often adequate expressions of the tortfeasor's wrongdoing. Punitive damages arise most often in the context of economically motivated wrongdoing: corner-cutting in manufacturing or recalling products, as in *Grimshaw*, or ruthless business practices, as in *Kelco*. High punitive damages hit *homo economicus* where it hurts: an eye for an eye a tooth for a tooth, and a bottom line for a bottom line.

The Practical Reason for Punitive Damages

This brings me to one of the most important points about punitive damages. It is of the nature of the beast that punitive damages are sought only against white collars, because only white collars have deep pockets. I want to contend that punitive damages are the only practical method of exercising social control on white collars, because criminal penalties are no substitute. For even if egregious and morally shocking torts were criminalized, the cases would never be prosecuted, because it's very hard to determine that an accident was brought about by egregious and morally shocking torts. Consider the Pinto cases once again. The only objective event is a car crash and subsequent burning. The repeated pattern of such crashes indicating defective design emerges only when we do a statistical analysis of all the evidence from many different states and jurisdictions, and then go into the company to discover culpable negligence. No federal agency has or could have the resources to carry out such massive investigations across the entire range of accidents and the entire range of products. Nor would we want such an omniscient federal agency.

The punitive damages system remedies this problem in the most obvious way: it provides injured parties and their lawyers with financial incentives to do the investigation themselves. Typically, a tort lawyer works on a 30- to 40-percent contingency fee and invests thousands of dollars of her firm's resources in investigation, hoping to recoup the investment by winning big-ticket punitive damages cases. She is a bounty-hunter. She may not be a "nice person," for bounty-hunters are mainly out for the buck. This is the grain of truth in critics' suspicions about personal injury lawyers. But in a world of scarce public resources for law enforce-

ment, the private bounty-hunter does an important and worthwhile job. Viewed in this light, the punitive damages system exists not to provide plaintiffs with windfalls, but to induce the bounty-hunter to do her job. And this provides an important practical argument against slashing punitive damages: if we cut back on the bounty-hunter's reward too much by limiting punitive damages or contingency fees, we will lose out on needed law enforcement.

For as we have seen, government is incapable of controlling white-collar wrongdoing, though it may work to control the villainous poor. That leaves the punitive

damages system, which—warts and all—stands out as our best hope for protection from the villainous rich.

—David Luban

This article was condensed and adapted from "Let the Punishment Fit the Tort," a talk given at the Institute's Workshop on Philosophy and Public Policy, held at the Catholic University of America on June 21-23, 1989. Sources used in writing this article are: *Kelco v. BFI*, 845 F. 2d 404 (2nd Cir. 1988); Jean Hampton, "The Retributive Idea," in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988); Marc Galanter, "Punishment Civil Style," (unpublished); and *Grimshaw v. Ford*, 119 Cal. App. 3d 757 (1981).

Who Is the Patient?

New genetic discoveries and technologies in medicine have raised a host of profound ethical questions. One of the most prominent concerns our understanding of the traditional obligations of the physician, in particular, his obligation regarding confidentiality. As we learn more and more about the genetic basis of many diseases, questions such as "To whom does the physician owe a duty of confidentiality?" are becoming increasingly difficult to answer. Part of this difficulty can be traced to a transformation in our understanding of who is the patient, and a corresponding change in our understanding of the physician-patient relationship.

Let me illustrate this transformation with an example, based on a true case recently told to me. A young boy has been diagnosed as having hemophilia A. Since this is an x-linked, recessive disease, there is good reason to believe that the boy inherited the defective gene from his mother who in turn inherited it from her mother. (Because it is a recessive disease, these women are under no risk of contracting any symptoms or suffering the disease themselves even though they carry the harmful gene.) The physician learns that the boy's mother has two sisters. Given the available information, each of these sisters has a 50-percent probability of also being a carrier of the harmful gene. The physician wishes to inform these sisters of their condition, since it might affect their reproductive plans, but the boy's mother, who has had a terrible falling out with her sisters, forbids it. Bent on withholding information as a way of getting revenge on her sisters, she insists that the boy's right to confidentiality be respected.

Admittedly, articulating the ethical question raised by this sort of case as "Who is the patient?" is not the usual approach. A more common one would be to frame the ethical question in terms of the scope and

limits of the physician's duty of confidentiality to the patient. Thus, if the medical condition may (or must) be disclosed to others, this is because the duty of confidentiality here is outweighed by other obligations. By presenting the issue instead in terms of who the patient is, I am trying to underscore a shift in how such cases should and will be seen. If the physician must disclose the information to others, this does not reflect a duty or consideration that competes with the integrity of the physician-patient relationship. Rather, it grows out of that very relationship. Disclosures in these cases are not "news leaks." If and when they are justified, they arise from the physician's loyalties and obligations as a physician to the patient. The physician's disclosure, if it is to have this kind of justification, must be to his patient. The crucial question, however, is who is the patient.

We can get a better understanding of how this question will become increasingly significant by analyzing the hemophilia example. Let me begin by examining three different models of health care that might be invoked to frame the ethical dilemma raised.

The Private Health Model

The most familiar model is what we could call the *private health model*. Its clearest applications are to cases of physical injury or non-communicable diseases. In such cases, the question "Who is the patient?" has an obvious answer: the patient is the particular individual suffering the disease or accident. According to this model, the physician's mission is to care for his patient and treat the medical condition. This mission, however, is constrained by a respect for the autonomy of the patient. This respect is generally taken to mean that the physician must have the patient's informed consent before performing any major medical intervention. Fur-

thermore, the physician owes a duty of confidentiality to the patient.

On this model there are two arguments for the physician's duty of confidentiality. One argument looks at the consequences of assigning such a duty. By binding the physician in this way, we encourage the patient to provide the physician with any information that might help in providing medical care, regardless of how embarrassing or awkward the information might be thought to be. Without this duty, people might withhold information or even fail to seek medical care because they fear that their broader interests might be jeopardized. The other argument looks at the rights of the patient, in particular the right to privacy. Insofar as the patient has a right to privacy, the physician has a corresponding obligation to respect that right, which is expressed in a duty of confidentiality.

Of course, the duty of confidentiality on the private health model is not absolute. The most notable exception is when disclosure would prevent the occurrence of serious harm. That exception, however, does not arise in this case. Disclosing the genetic information would at most succeed in preventing the birth of possible harmed individuals, but that is quite different from preventing any actual harm. (If this isn't clear, imagine the case where the aunts are informed, but they decide nevertheless to have children. Given that the children, including any who are born with hemophilia A, might not otherwise have been born, can we say that any of them have been harmed?) Thus, we should conclude that, whatever the physician's own feelings in this case, he is ethically obligated to keep the information confidential. Since the two sisters are not the physician's patients and no harm is threatened to any actual, identifiable party, he has no special duty toward them.

THERE IS NO RECORD OF HEMOPHILIA IN VICTORIA'S ANCESTORS SO WE MAY ASSUME THE DEFECT APPEARED IN HER GENES AS A SPONTANEOUS MUTATION. THIS HAPPENS WITH HEMOPHILIA IN AN ESTIMATED 1 CASE IN EVERY 50,000 PARENTS.



Drawing by Gonick from *The Cartoon Guide to Genetics*
©1983 by Larry Gonick and Mark Wheelis

It might be thought that this problem could be avoided by the physician's simply announcing in advance that his duties of confidentiality have several exceptions. Among those exceptions are cases where the physician believes that disclosing medical information to a patient's relatives could result in a direct benefit to them. The patient is thus told that access to health care services is contingent on his consenting to these exceptions.

As we learn more and more about the genetic basis of many diseases, questions such as "To whom does the physician owe a duty of confidentiality?" are becoming increasingly difficult to answer.

This approach, however, faces several problems. First of all, what is the moral justification for this modification in the duty of confidentiality? Can it be reconciled with the arguments for confidentiality identified in the private health model? Or does this modification represent a new exception to that duty, requiring its own justification? Second, suppose the patient does agree with this restriction. Is the physician then obligated to inform relatives in cases such as the one above? If he is obligated, is it because he is a *physician* or would anyone who learned the relevant information have the same obligation to inform the relatives? Finally, what happens if the patient refuses to consent to these restrictions? If the physician refers the patient to some other physician who doesn't place such restrictions, then the potential problem is simply passed to someone else. From the standpoint of the medical community, the problem remains. If the physician does not refer the patient to anyone else, does this mean that the patient is to be abandoned? This hardly seems to be a satisfactory result since the point of placing these restrictions was, in effect, to ensure that the physician is not forced to ignore important health concerns.

The Public Health Model

A different approach to the problem of disclosure is the *public health model*. Its clearest application is to cases of highly contagious diseases. In such cases, the patient is the public, and the physician's mission is to promote the public's health. Concepts such as autonomy or informed consent are to be understood in terms of the political will and decision-making process of the public. There is, however, no duty of confidentiality in this model since it plainly makes no sense to talk about such things with respect to the general public.

Because the public's will doesn't always reflect a consensus, the mission of the public health model may, at times, conflict with a respect for the autonomy of some individuals. As the case of quarantine or mandatory vaccinations illustrates, public health measures

may require restricting some people's liberty or ignoring some people's choices. While these conflicts point to regrettable costs in this model, they do not give rise to any constraints on the physician's mandate, given the sheer magnitude of the serious harm that would be avoided. The public's health cannot be sacrificed for the sake of the rights of some individuals. Because of this decisive normative feature in the public health model, identifying anything as a public health problem is a significant matter. Some of the darker moments in our history arose from incorrectly characterizing some problems as public health problems. In many cases, for example, state sterilization laws enacted in the early part of the century were based on the view that "feeble-mindedness" was a public health problem. Unchecked, it would undermine the quality of the race. In a famous Supreme Court decision, Justice Oliver Wendell Holmes said, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough."

Let us suppose that hemophilia A is taken to be a public health problem. Then, according to this model, the physician has no duty of confidentiality in this matter; instead he has a duty to inform not only the sisters of their possible medical condition, but also anyone else who is responsible for controlling the spread of this disease.

While both the private health and the public health models have some legitimacy, neither perfectly fits the facts of this example. The private health model is not entirely appropriate, because we are dealing with a *transmissible* disease. We should not see the disease as confined to isolated individuals, for how we treat the disease in one individual will affect the likelihood of its appearing in another individual. But neither is the public health model entirely appropriate because we are dealing with a *non-contagious* disease. The general

Some of the darker moments in our history arose from incorrectly characterizing some problems as public health problems. In many cases, . . . state sterilization laws enacted in the early part of the century were based on the view that "feeble-mindedness" was a public health problem.

public is not at any special risk because some individuals have this disease. Indeed, as we noted, no actual people are at risk, only the possible offspring of women carrying the relevant gene could be affected. If we regard incurable genetic diseases, such as hemophilia A, as public health problems, then we are in effect regarding the birth of certain kinds of individuals as public health problems, a view that is as ominous as it sounds.

The Family Health Model

Finally, let us consider what we could call the *family health model*. As the name suggests, the physician's patient is the entire family, where "family" is understood to refer to a genetic network rather than a social institution. The physician's duties are to the family as a whole. While his respect for the family's privacy obligates him to refrain from disclosing any information to unrelated third parties, this obligation does not extend to the family itself. The family's privacy is plainly not violated by disclosing information to other family members.

The family health model seems to acknowledge that genetic diseases are often family diseases, and so it seems to be tailored to fit some of the ethical problems arising in this area. It also seems to fit the current practice of some physicians since members of a family typically see the same physician. Nevertheless, this

The family health model seems to acknowledge that genetic diseases are often family diseases, and so it seems to be tailored to fit some of the ethical problems arising in this area. Nevertheless, this model has problems as well.

model has problems as well. First, if the family is the patient, the physician would seem to be ethically obligated to ensure that all its adult members are informed of the medical situation. But many families are scattered, with some members completely out of touch with others. Without a radical change in the profession, the physician does not have the resources to track down distant family members. Moreover, many families are divided. Who, then, speaks for the family? Who decides that some piece of information should be kept confidential? Rather than clarifying the ethical issues, the family health model may simply shift them.

I don't wish to suggest that the options I have surveyed are the only options or that the problems I have raised with them are insoluble. We have only begun to reflect on these matters. But as we learn more and more about the genetic basis for various common diseases, such as cancer, Alzheimer's disease, manic-depressive psychosis, diabetes, and others, this kind of case will become progressively familiar. As our scientific understanding of diseases improves, our moral responsibilities will become more complex. A diagnosis will not only identify a disease; it may also thereby indicate the medical condition of other individuals. Thus, physicians from a wide range of specialties will increasingly find themselves confronting situations where it is not clear who the patient is, and consequently, what their responsibilities and obligations are.

—Robert Wachbroit

This article was adapted from "Who is the Patient? A Moral Problem," *Maryland Medical Journal* 38 (1989):957-59.

Love and Justice

Love and justice might seem to be fundamentally opposed, alike only in their blindness. Even this one similarity serves to highlight their deep differences. Justice is blindfolded so that it can be meted out to persons impartially, without fear or favor, looking only to the right and wrong of an action and not to the particularity of an agent. Love, on the other hand, is blind in its cleaving to the particular loved one, despite any faults, in reckless disregard of the merits. What love is blind to is justice, one might say, just as justice is blind to love.

Love and justice have come to be associated with two spheres, and with the two genders. Love is the province of hearth and home, of the domestic sphere, presided over by women; the ideal of justice regulates the world of business and politics, the marketplace and public forum, the world of men. But even as we now challenge such gender-typing, and argue for a blurring if not an eradication of gender roles, we can also question the separateness of the two spheres, and, in the context of the family, as we shall see, the opposition between love and justice themselves.

The Family: Not Just, but Better than Just

The view that justice and love are appropriate to different spheres has a venerable pedigree. In the eighteenth century Hume argued that the virtue of justice is properly engaged only under certain circumstances, characterized by the scarcity of resources and the basic self-interest of human motivation. In the absence of either of these two conditions, justice would be rendered unnecessary. If we had unlimited stuff to divvy up, Hume suggested, we would hardly bicker about who got what. Likewise, we would have no need of the "jealous, cautious virtue of justice" were "the mind . . . so enlarged, and so replete with friendship and generosity, that every man has the utmost tenderness for every man, and feels no more concern for his own interest than for that of his fellows; it seems evident, that the use of justice would, in this case, be suspended by such an extensive benevolence, nor would the divisions and barriers of property and obligation have ever been thought of." For Hume, the family represents an example of such enlarged affections, a sphere where justice is unnecessary.

In claiming that the need for justice arises only where feelings of friendship and generosity are insufficient, Hume reflects a strand of philosophical thought that goes back at least to Aristotle, who wrote that "if people are friends they have no need of justice." One difference between these two, however, is that where

Aristotle thought it a proper goal of the state to help man realize his virtues and develop such bonds, Hume and other—male—Enlightenment philosophers took the circumstances of justice for granted. Their political and moral theories are developed against a background assumption of self-interested individuals competing for scarce resources, laying the foundation for contemporary liberal political theory, with its emphasis on equality, individual rights, and social justice.

At the time that Hume and his contemporaries were developing a conception of justice for modern public life, the institution of the family was developing into its present form. In contrast to the cheerless and bleak communal life of the Middle Ages there arose the idea of home as we recognize it today, a haven in a heartless world, marked by the emergence of privacy, intimacy, and comfort—of domesticity. This development, according to architectural historian Witold Rybczynski, was primarily the work of women. The eighteenth century home "was becoming a feminine place, or at least a place under feminine control." The domesticity it introduced, which Rybczynski traces through such diverse representations as Dutch genre paintings and Jane Austen's novels, is very much part of the idea of home we hold today—a domesticity which, Rybczynski concludes, "was above all, a feminine achievement."

Men developed theories of justice, from which the family was explicitly excluded; women developed the reality of family life. And the idea of home came to be characterized by intimacy not independence, domesticity not democracy.

The Feminist Revolt: Justice, Please

Of course after a while people—that is to say, women—couldn't help but notice that home and family as a sphere apart from justice were maintained not only through the initiative of women but also largely at women's expense. The elimination of any division between mine and thine that characterized family life, however appealing in theory, in practice gave way not to "ours," but to "his." As John Stuart Mill trenchantly observed: "the two are called 'one person in law,' for the purpose of inferring that whatever is hers is his, but the parallel inference is never drawn that whatever is his is hers."

Women were both excluded from the public sphere, on the grounds that some male representative of the indivisible family unit spoke for them, and treated unjustly within the family as well. The domesticity and comfort that Rybczynski celebrates, the cleanliness and order, didn't arise of its own accord, or by fairy hands.

Someone had to wield that mop, that broom, that toilet bowl scrub brush, and almost invariably that someone was female.

In recent decades the women's movement has lobbied simultaneously for the inclusion of women in the public sphere—for equal opportunity across occupations and for greater representation of women in political life—and for justice within the family. Some feminists insist that husbands should pay cash wages to stay-at-home wives for housework and child care, which they see as work like any other and as worthy of recompense. We have seen an extension of a contractarian framework to marriage, ranging from formal prenuptial agreements to job assignment lists posted on family refrigerators. Moms have gone on strike, demanding the basic protections afforded to workers in other—less demeaning?—occupations. The view of the family as providing a refuge from crass commercial and political concerns has been charged to be a sentimental facade masking a tyranny: when every man's home is his castle, every man is a king and every woman, a maid. It began to seem to many women not a bad idea to foreswear what Hume called the “nobler virtues, and more favourable blessings” that characterized family life. Women would be willing to settle for a little less love and cherishing, in exchange for a little more fairness and respect.

Beyond Justice, to Caring

Feminism has not raised a unanimous voice, however, in favor of justice supplanting love. As some feminists have sought to remake family life on the model of the political and commercial world, others, also claiming the feminist flag, have sought to defend the importance of caring and sharing and community as distinctively female contributions to our moral life. Their goal is not to make mothers more like businessmen and congressmen, but to make sure that more businessmen and congressmen are mothers: to define and celebrate and finally to enlarge the scope of traditional feminine influence.

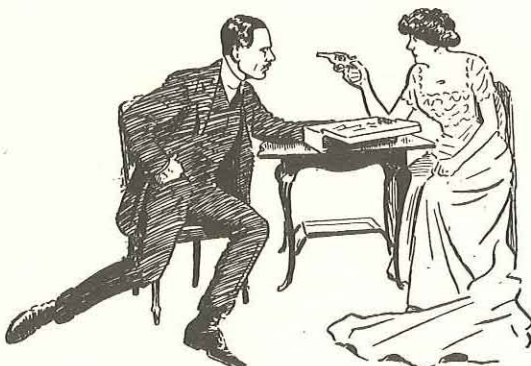
Looking at the distinctive contributions men and women have made to moral philosophy, Annette Baier notices a “broad brushstroke” approach in predominantly male theorizing that centers on “what

has been the men theorists' preoccupation, namely obligation.” But, Baier notes, there is “a lot of morality not covered by that concept.” Most liberal theories contain “only hand waves concerning our proper attitude to our children, the ill, to our relatives, friends, and lovers.” Baier concludes that by more or less renouncing theorizing on a grand scale in favor of a more context-situated “ethics of love,” female philosophers can be seen as filling in the gaps and perhaps laying a new foundation for moral theory.

The view of the family as providing a refuge from crass commercial and political concerns has been charged to be a sentimental facade masking a tyranny: when every man's home is his castle, every man is a king and every woman, a maid.

Feminist psychologists like Carol Gilligan have made respectable the notion that, in their moral reasoning, women just think differently from men. Men typically view moral problems in terms of rights, justice, and fairness; women, in contrast, tend to approach moral problems by exploring the human interrelationships at stake in them, emphasizing the importance of community and harmony. On traditional scales of moral development, the female concern with particular individuals caught in the web of actual relationships has ranked lower than the male concern with abstract moral principles. But Gilligan suggests that the two approaches to moral thinking should not be ranked as better or worse, but appreciated as complementary.

Nor are women alone in defending the importance of values other than justice. Michael Sandel, a critic of contemporary liberal political theories, writing on the relation between love and justice, asks us to consider two families. In the first, “relations are governed in large part by spontaneous affection and where, in consequence, the circumstances of justice prevail to a relatively small degree. Individual rights and fair decision procedures are seldom invoked, not because injustice is rampant but because their appeal is preempted by a spirit of generosity in which I am rarely inclined to claim my fair share.” Now, Sandel says, “imagine that one day the harmonious family comes to be wrought with dissension. Interests grow divergent and the circumstances of justice grow more acute. The affection and spontaneity of previous days give way to demands for fairness and the observance of rights. And let us further imagine that the old generosity is replaced by a judicious temper of unexceptionable integrity and that the new moral necessities are met with a full measure of justice, so that no injustice prevails.” Would we see the second family—with its strict but sullen adherence to rules and regulations—as a moral improvement on the first? Sandel would not.



Just as academic thinkers are rediscovering the territory of love, so is family life enjoying its own renaissance. Families are "in." Headlines announce that commitment and marriage are "back," with the current baby boomlet placing concerns about family and children at the center of the national policy agenda. Both female and male workers are demanding more flexible work hours and on-site day care: some acknowledgment by employers and government that family comes—well, if not first, then at least not out of the running. Is the "me" decade giving way to the "we" decade, as a new "familialism" replaces the old rights-centered individualism, and love takes pride of place over justice?

Love and Justice

Yet whatever central place we may give to family life, its costs are still borne primarily by women. Women still earn only 71 cents for every dollar earned by men—a differential explained both by discrimination in the workplace and by women's heavier share of domestic responsibilities that compromise their participation in the work force. We may give lip service to gender equality in the home, but Arlie Hochschild, professor of sociology at the University of California at Berkeley, reports that only 20 percent of couples split household tasks and child rearing equally. Squabbles



over housework are beginning to replace squabbles over money as the leading subject for discord in marriage; Hochschild documents the powerful and corrosive resentment of women who find themselves stuck with the "second shift" of housework. Debates about justice in the family refuse to disappear.

Nor, of course, are most women willing to renounce concerns about justice in the wider world, whatever distinctive role they may hold in the domestic sphere. Philosopher Onora O'Neill reminds us that women's lives inescapably have political and economic dimensions, and she insists that "even if we find commonalities in women's experience, take them at face value, and use them to construct a moral voice that is to replace the voice of justice with the voice of care and concern for relationships, we will still need to say something about the political and economic context of women's lives. An ethic of caring and relationships will be adequate only if we assume lives that are confined to the nursery or the boudoir."

But what of the nursery and the boudoir? Do we want to say, with Aristotle and Hume, that when we are in a domain governed by love, we need not worry about justice? What do love and justice, in the end, have to do with each other?

In her new book, *Justice, Gender, and the Family*, Susan Moller Okin suggests that the appearance of a deep and abiding conflict between love and justice arises from our misunderstanding the way these two values might

Men typically view moral problems in terms of rights, justice, and fairness; women... tend to approach moral problems by exploring the human interrelationships at stake in them, emphasizing the importance of community and harmony.

be related. Okin questions the assumption that "justice somehow takes away from intimacy, harmony, and love." She asks, "why should we suppose that harmonious affection, indeed deep and long-lasting love, cannot co-exist with ongoing standards of justice? Why should we be forced to choose and thereby to deprecate the basic and essential virtue, justice, by playing it off against what are claimed to be higher virtues?" Okin answers that a realistic view of the family, sensitive to the long-standing gender-patterned injustices within it, allows us to conclude that we can insist on justice in families at the same time that we hope for more from them: "We need to recognize that associations in which we hope that the best of human motivations and the noblest of virtues will prevail are, in fact, morally superior to those that are just only if they are firmly built on a foundation of justice, however rarely it may be invoked."

...Our interactions, even in the domestic sphere, ought at least to conform to the demands of justice and respect, even if we may wish that they not be motivated by these concerns.

This last seems a crucial point. The noted philosopher John Rawls, whose liberal and egalitarian theory of justice has been both praised and criticized by feminists, draws an important distinction between the basic values of political life and our ultimate personal values. The goods associated with justice, Rawls concedes, are not "anyone's idea of the basic values of human life" and are "not intended as an approximation to what is ultimately important." What we care about most, our ultimate values, have to do with family, friends, religion, and the like. But because of our historical circumstances, the pursuit of any of these

values can and has led to tyranny, intolerance, and exploitation, and so our interactions, even in the domestic sphere, ought at least to conform to the demands of justice and respect, even if we may wish that they not be motivated by these concerns. We seek love when we marry and found families, not increasingly complex ways in which we can learn to treat each other justly. We want justice to be the foundation, not the focus, of family life.

But in loving relationships people not only find intimacy, they also discover new ways to step on each other's toes, violate each other's dignity, and show a lack of respect. Not only love and justice, but people too are often blind. They are, for a variety of reasons, blind to the hurts they cause. When our partners show us how we have hurt them or acted selfishly, they are calling for justice as well as love. If justice is not the focus of loving relationships, it must still be a continuing concern: like freedom, it requires eternal vigilance.

When Aristotle wrote that friends have no need of justice, we should recall that he took for granted that the highest form of friendship was reserved for the leisure-filled lives of aristocratic males. In our time men and women, heirs to a long legacy of gender-based in-

justice both within the family and in the world beyond, have been forced to become uncomfortably specific about who owes what to whom and why. Our hope can be not that we will somehow get beyond justice, but that we can get beyond talking about it so often and so stridently. Justice should be the basis of loving relationships, not the topic for daily dinner conversations. But we may be in for a lengthy stretch of domestic strife and reorganization before our family lives can give both love and justice their due.

—Douglas MacLean and Claudia Mills

Sources cited in this article are: David Hume, *Enquiry Concerning the Principles of Morals*; Aristotle, *Nicomachean Ethics*, Book VIII; Witold Rybczynski, *Home: A Short History of an Idea* (New York: Viking Penguin, 1987); John Stuart Mill, *The Subjection of Women*; Annette Baier, "What Do Women Want in a Moral Theory?" *Nous*, vol. 19 (1985); Carol Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982); Onora O'Neill, "Friends of Difference," *London Review of Books*, (September 14, 1989); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); and John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy & Public Affairs* 17 (1988).

Announcing a New Volume in Cambridge Studies in Philosophy and Public Policy

Nuclear Deterrence and Moral Restraint: Critical Choices for American Strategy

edited by Henry Shue

Cambridge University Press, 1989

\$49.50, cloth; \$16.95 paper

ATTENTION: SPECIAL 20 PERCENT DISCOUNT FOR QQ READERS

Introduction

Henry Shue

1. Having It Both Ways: The Gradual Wrong Turn in American Strategy

Henry Shue

2. Finite Counterforce

David Lewis

3. Deterrence and the Moral Use of Nuclear Weapons

Robert E. Foelber

4. Escaping from the Bomb: Immoral Deterrence and the Problem of Extrication

C.A.J. Coady

5. The Necessary Moral Hypocrisy of the Slide into Mutual Assured Destruction

George H. Quester

6. Finite Deterrence

Harold A. Feiveson

7. Defending Europe: Toward a Stable Conventional Deterrent

Lutz Unterseher

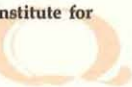
8. The Case for Deploying Strategic Defenses

Leon Sloss

9. Morality, the SDI, and Limited Nuclear War

Steven Lee

To order, call 1-800-872-7423 (1-800-227-0247 within New York state). Or write to Cambridge University Press, 40 West 20th Street, New York, NY 10011. All orders must be prepaid; VISA and Mastercard are accepted. Postage and handling paid by Cambridge University Press.



Established in 1976 at the University of Maryland and now part of the School of Public Affairs, the Institute for Philosophy and Public Policy was founded to conduct research into the conceptual and normative questions underlying public policy formulation. This research is conducted cooperatively by philosophers, policymakers and analysts, and other experts from within and without the government.

All material copyright ©1989 by the Institute for Philosophy and Public Policy, unless otherwise acknowledged. For permission to reprint articles appearing in QQ, please contact the editor.

STAFF:

Mark Sagoff, Director
Robert K. Fullinwider, Research Scholar
William Galston, Research Scholar
Judith Lichtenberg, Research Scholar
David Luban, Research Scholar
Jerome Segal, Research Scholar
Alan Strudler, Research Scholar
Robert Wachbroit, Research Scholar
David Wasserman, Research Scholar
Douglas MacLean, Affiliate Professor
Robin West, Visiting Fellow
Frances Harbour, Visiting MacArthur Fellow
Bonnie Kent, Editor
Kathleen Wiersema, Assistant to the Director

Institute for Philosophy and Public Policy
University of Maryland
College Park, Maryland 20742

Address correction requested.

THIRD CLASS BULK Non-Profit Organization U.S. Postage PAID Permit No. 10 College Park, Md.
