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BOSNIA AND SOMALIA: STRATEGIC, LEGAL, AND MORAL DIMENSIONS OF HUMANITARIAN INTERVENTION

Many legal scholars favor intervention against states that perpetrate massive human rights violations; their arguments are based upon moral principles and international standards of justice. But at present, policymakers and government leaders often allow their political interests to outweigh these other considerations. In affirming respect for the sovereignty of states, they fail to acknowledge that sovereignty is not necessarily absolute, and they ignore other provisions of international law that in some situations should be given priority. This short-sighted position has prevented the United States and Western Europe from mounting an effective cooperative effort to deal with the Bosnian conflict.

A number of newspaper columnists have contributed to the paralysis. Aware that the crisis in Bosnia has reached a point where a military commitment would be required to end the campaign of ethnic cleansing, they evoke the image of young Americans dying for the sake of nebulous policy objectives. But the sensible way to meet this concern is not to rule out intervention, but rather to insist that it combine precise policy goals, clear strategic objectives, and tactics that are suited to the desired end-

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In This Issue

**BOSNIA AND SOMALIA:
STRATEGIC, LEGAL, AND MORAL DIMENSIONS OF
HUMANITARIAN INTERVENTION**
Barbara Harff 1

TASSELED LOAFERS
David Luban 7

GAY LAW AND THE FUTURE OF CIVIL RIGHTS
Richard D. Mohr 12

MANDATED SERVICE AND MORAL LEARNING
Robert K. Fullinwider 17

state of the military involvement. It is illogical to conclude on the basis of an extreme case requiring an extensive military commitment that all forms of intervention are misguided in principle or are someone else's responsibility. If a coherent strategy for intervention had been in place from the beginning, the Bosnian crisis might never have assumed the proportions of genocide.

A multitude of ethnic conflicts may develop in the former Soviet Union and elsewhere in the next decade. Responses to these conflicts will, in turn, set the stage for the twenty-first century. In the early phases of ethnic conflict, will global leaders stand idly by while would-be dictators fight to expand their power base by killing their citizens, crossing internationally recognized boundaries, inflaming irredentist passions, and implementing ideologies of ethnic superiority?

An intervention must combine precise policy goals, clear strategic objectives, and tactics that are suited to the desired end-state of the military involvement.

It may prove to be a costly mistake if the last superpower and its friends (and sometime allies) become isolationist paper tigers once again. Explosions of ethnic passion rarely remain internal affairs. From a strategic perspective, it is clear that a future diffusion of ethnic passion, hatred, and rebellion will eventually call for much greater military measures than a maximum collective show of force with a minimum use of weapons in Bosnia. Failure to exert our capabilities may mean that we will lose our chance to build a world free from the forces that create global instability. From a cost-benefit perspective — as abhorrent as that may seem, when we consider the loss of lives in Bosnia and similar theaters — early warning measures, a clear policy position, and a strategy with civil and military components are the best guarantees to forestall adventurers of the caliber of Saddam Hussein and Radovan Karadzic. From an American perspective, to be able to intervene with the knowledge that the U.S. is proceeding on a clearly plotted course that is strategically sound, morally correct, legally justified and internationally supported makes the task easier for the young men and women who have joined the military in order to fight for their country's just cause. Indeed, the more clearly designed the policy and tactical objectives are, the greater the likelihood that few if any American lives will be lost—provided action is taken swiftly in response to early signs of impending disaster.

The Legal Foundations of Humanitarian Intervention

Hersch Lauterpacht, one of the great scholars of international law, once asked whether law can promote the "realization of socially obtainable justice." My own answer is a qualified yes. We can achieve minimum standards of justice by affirming such essential goods as the right to live, and by enforcing sanctions against those who deprive people of those essential goods. Mass murder is unacceptable in all national legal systems and, in principle, states should apply their domestic laws to their own and others' external behavior. In other words, foreign policy should reflect the standards of national morality defined by domestic law.

In accordance with this principle, the Genocide Convention forbids governments to take steps to destroy any distinct national, ethnic, or religious group. Article 3 of the Universal Declaration of Human Rights asserts that "everyone has the right to life, liberty, and security of person." The large number of signatories to the human rights and genocide conventions attests to the fact that international morality in regard to the protection of fundamental human rights coincides with national moralities. These treaties constitute, as Lauterpacht writes, "a recognition of fundamental rights superior to the law of the sovereign State."

Thus, when basic rights are violated to the degree we see at present in Somalia and Bosnia, international responses should follow, under the leadership of a United Nations that asserts and, ideally, enforces codified standards of morality. The most common argument against such action is based on Article 2, paragraph 7 of the U.N. Charter, which prohibits intervention in matters that are within the domestic jurisdiction of any state. In contrast, Article 34 identifies a competing principle by empowering the Security Council to investigate disputes that cause international friction, while Article 51 and Chapter VIII of the Charter offer regional organizations the legal justification for collective intervention.

The Bosnian situation is illustrative. If one accepts Bosnia's claim to being an independent state (as the U.N. did when it granted Bosnia a seat in the General Assembly), then under Article 51, the Bosnians have the right of self-defense, including the right to ask for outside help and to invite intervention by individual states, regional organizations, or the U.N. If one denies that Bosnia is an independent state (as does what remains of the federal Yugoslav government), then the situation is one of civil war between a state and a secessionist region. In this circumstance, the Security Council is empowered to execute collective

measures, on the grounds that the situation is causing widespread abuse of human rights and international friction. Accordingly, in response to Serbian atrocities in Bosnia and Croatia, the first act of the General Assembly in the fall 1992 session was to deny membership to Serbia/Montenegro as the successor state to Yugoslavia.

Once it is established that international standards of human rights are being violated, the right to impose such standards should prevail over assertions of national sovereignty. But the path that leads from recognizing that a crime against humanity is being committed to the prescription of appropriate responses and sanctions is fraught with political difficulties. In principle, the U.N., as a collective body representing the great majority of states, is the entity that should delegate authority for any kind of intervention to willing and capable member states. Ideally, all full members would bear both the responsibility and the costs of the actions undertaken, even if the burden of action fell to the United States as perhaps the only country presently able to take a strong stand on such matters. Specific actions to be taken would be decided by the Security Council with the assistance of the Military Staff Committee (see Article 46).

The targets of international sanctions can be expected to complain that they are being victimized by a new brand of imperialism under the guise of the new world order. Given the archaic structure of the Se-

curity Council, in which the former imperial powers play a larger role than other states, such claims may have some *prima facie* plausibility. But such a claim by weaker states at no time and in no place mitigates the crimes of mass political murder, ethnic cleansing, or complicity in mass starvation of ethnic rivals.

What has been lacking, time and time again, on the part of states with the capacity to act is the political will to take a strong stand and accept the consequences of boldness. Standards of international morality and order are not achieved through timidity; precedent is never set through inaction. Violent ethnic conflicts in the Third World have steadily increased in frequency and intensity since the 1960s, as Ted Robert Gurr has demonstrated in a study tracking some 200 minorities during the entire post-war period. The disintegration of the Soviet, Yugoslav, and Ethiopian states has released the evil genies of nationalist xenophobia and ethnic hatred in vast new areas. Genocides — directed against people on the basis of their ethnic, racial, or social identity — and politicides — directed against people on the basis of their political beliefs — often follow war and revolution in poor countries. In my own work, I have identified more than forty such episodes since 1945 and have shown that they caused greater loss of life than all the wars fought *between* states during that period. For this reason, it is essential to demonstrate



that building states on mass graves violates the moral standards of global society, and must lead with some certainty to sanctions proportional to the crimes.

In the absence of a formal international authority to monitor and police the human rights performances of states, communal and nationalist contenders seeking territory or autonomy often press their claims by force. Intimidation of opposing forces within states and assaults on less powerful neighbors are becoming more common, most acutely so in Eastern Europe. Yugoslavia in particular has regressed to a nineteenth-century mentality. Myths and memories of old injustices are invoked to mobilize young Serbs and Croats for war against one another, and together against Muslims. The territorial ambitions of the contenders take no account of Yugoslavia's carefully balanced heterogeneity; a resurgent nationalism calls instead for the creation of fictive homelands, purified of "alien peoples." The claims being made by the most militant of Serbs are reminiscent of Nazi ideology, and one can well imagine that in the future, nationalist Serbs, if unchecked, will assert their racial and cultural superiority over competing ethnic groups in a greater Serbia extending from Macedonia to Austria.

Civil Wars, Rebellion, Repression

Bosnia, Somalia, and Iraqi Kurdistan exemplify three distinct types of crimes against humanity in which the international community has a legal and moral imperative to intervene. Bosnia is a case that combines elements of civil and international war. On the civil side, Bosnia-Herzegovina's declaration of independence provoked uprisings by Bosnian Serbs concerned with their status in the new state. On the international side, they were armed by and acted as agents of "greater Serbian" nationalists. Recent events offer clear evidence of direct Serbian military support through air strikes and artillery barrages. The states of the European Community face a double responsibility, first because they helped precipitate the civil war by granting what many observers thought was premature recognition of Bosnian independence, and second because they have ample capacity to act. Yet EC leaders have largely behaved like bystanders, offering verbal condemnation and sending inadequate relief. It is clear that most European leaders find it politically more acceptable to condemn the participants and to talk about eventual war-crimes trials than to risk military casualties by trying to stop the war while it is still in progress.

Meanwhile, new civil wars and acts of aggression tragically similar to events in Bosnia are already under way or imminent in Macedonia, Moldova, the

Caucasus, and some of the new republics of Central Asia. The international community has a compelling legal right and obligation to defend the civilian victims of such conflicts, not merely to provide them with minimal humanitarian assistance. The situation in Bosnia is all the more urgent because actions there will send a message to ambitious and potentially ruthless nationalists in all the states of the former Soviet bloc and elsewhere.

In Somalia, mass starvation is the result of the complete disintegration of political order. The process began in 1988 with a north-south civil war and massacres of northern civilians that attracted virtually no international attention. Since then, feuding clan leaders and warlords have made most of the country into a deadly wasteland in which humanitarian assistance, belatedly supplied, is seized at gunpoint. International pressure and diplomacy might have forestalled the crisis at an early stage. The immediate task must be to protect civilians against mass starvation, followed by restoration of critical elements of the transport infrastructure and preparation of the groundwork for an interim government. None of these tasks can be accomplished unless peacekeeping forces are authorized to use force. Somalia is a member of two regional organizations with the potential, in theory, to respond more forcefully: the Organization of African Unity and the Islamic Conference. Neither has acted decisively.

In Somalia, mass starvation is the result of the complete disintegration of political order. . . . International pressure and diplomacy might have forestalled the crisis at an early stage.

A similar situation existed in Lebanon and has now emerged in Liberia. The Liberian case is instructive: a West African peacekeeping force, operating under international auspices, temporarily stabilized the country and facilitated negotiations among the principal factions. The West African precedent for international intervention has been marred by the recent renewal of fighting in Liberia, but the peacekeeping effort undertaken so far appears preferable to the belated and inadequate international response to the Somali conflict. Other weak African states are at risk of similar crises.

Iraq exemplifies a more common kind of humanitarian crisis. Since the 1960s the Ba'athist regime in Baghdad has repeatedly used deadly force, including

poison gas, against civilian Kurds suspected of rebellion. In the aftermath of the Gulf War, the Kurds revolted again and the Allies eventually responded with humanitarian aid in a Kurdish zone protected by Allied air cover. But for many Kurds, the response came too late. Allied leaders did not act until they were pressured by domestic and regional political considerations. Media coverage of atrocities mobilized public outrage in Western countries, and the Turkish government expressed its concern about the destabilizing effect of a flood of Kurdish refugees on its own Kurdish minority.

The main precedents for humanitarian intervention to end gross human rights violations like those in Iraq are unilateral ones: India in East Pakistan, now Bangladesh, in 1971; Vietnam in Cambodia, in 1978; and Tanzania in Uganda, in 1979. The intervenors' motives in these cases were politically suspect, but, on balance, unilateral action in each instance was better than inaction: it helped to end the killings and, except in Uganda, led to the establishment of regimes with a greater respect for human rights. The establishment of a security zone in Iraq was more easily achieved because it was done under international auspices in a pariah state that had lost credibility and clout in the Arab world; two previous decades of Iraqi abuse of Kurdish villagers had no significant international consequences.

Many future conflicts are likely to require international responses of the kind offered in Iraq. Chronic warfare and repression persist in Sudan and Myanmar (Burma); Ethiopia is at serious risk of renewed warfare that could be forestalled by international action. More distant crises can also be anticipated in such large Third World countries as Nigeria and Pakistan, where there are deep regional cleavages.

An Agenda for Peace: Responding to International Crises

The need for a more active role by the U.N. in such conflicts has been explicitly recognized by the new Secretary General, Boutros Boutros-Ghali. His *Agenda for Peace*, issued on June 17, 1992, focuses attention on threats to international security arising from "ethnic, religious, social, cultural or linguistic strife." The Agenda outlines four kinds of responses: preventive diplomacy, peacemaking, peacekeeping, and post-conflict peace-building. "Peace-building" refers to policies that address the root causes of conflict: "economic despair, social injustice and political oppression." The case of the Iraqi Kurds highlights the need to organize such responses to gross human rights violations at an early stage rather than wait for news of atrocities to create political pressures for

action. The more quickly the U.N. acts, the less devastation communal conflicts will cause, whereas the longer that effective responses are delayed, the more difficult and costly peacekeeping and peace-building will be.

The U.N. Agenda for Peace focuses on threats to international security arising from "ethnic, religious, social, cultural or linguistic strife."

Let me conclude by examining the kinds of actions that the international community has at its disposal for responding to civil wars, repression, and anarchy that threaten the human rights and lives of large numbers of people. All have been used selectively to remedy past violations. The first are lowest in cost, and pose the least challenge to sovereignty. The last constitutes the revocation of a state's sovereignty. Military occupation and trusteeship are, or should be, the ultimate sanctions for states and local leaders that will not desist from mass killings.

1) Issue early-warning assessments of impending or escalating conflicts; send fact-finding missions and widely publicize their results. Establish a U.N.-sponsored news bureau with instant access to satellite telecommunications to assure global distribution of news and reports (a CNN for peace). These policies are particularly appropriate to civil wars and repression in their early stages. Fact-finding reports issued after six months of deadly and widely publicized conflict, as in Bosnia now, are little more than empty gestures.

2) Call on governments and their opponents to seek accommodation, provide international mediation and arbitration, offer political and material incentives to encourage contenders to reach agreements. These actions are well-suited for the early and middle stages of civil wars.

3) Condemn putative violations of international law, issue formal warnings of impending sanctions, set deadlines for corrective action by the perpetrators. Such responses may help restrain states from gross human rights abuses. They are less likely to influence contenders in civil wars, especially those (like the Bosnian Serbs) whose moral and political ties to the international community are weak. More important, these symbolic acts help set the legal and political stage for more forceful international action.

4) Withdraw diplomatic recognition, apply sanctions, embargo military goods, energy supplies, and other commodities that prolong fighting. These actions can be applied to all armed contenders in civil wars,

and against state perpetrators of gross human rights violations. Of these options, embargoes are the most likely to be effective but are also the most difficult to enforce consistently. Implementing them is likely to require higher-order responses.

5) Use limited shows of force such as overflights by military aircraft, the stationing of warships offshore, and the introduction of moderately armed peacekeeping forces with sufficient firepower to defend themselves if attacked. These actions convey strong messages to belligerents and position international forces to respond more forcefully if warnings are not heeded.

The key is to use all means necessary to establish secure zones in which civilians can be supplied and protected.

6) Begin selective applications of force such as interdiction of military movements, air strikes on strategic targets, and the capture and disarming of combatants (individually or in small units). These actions require the international community to "take sides," which is politically feasible when one state or party is clearly the aggressor or perpetrator, as in Bosnia, but which may be impossible in other civil war situations. Selective use of force also poses risks of escalation that may worsen and prolong conflict.

7) Use collective military intervention with the objectives of separating forces, disarming contenders, protecting neutral areas, and establishing secure procedures and zones for delivering and distributing humanitarian aid. This is the most decisive and costly form of international response, and seems to be the only one that might remedy the current situations in Bosnia and Somalia. The key is to use all means necessary to establish secure and defensible zones in which civilians can be supplied and protected. This is an interim strategy that must be complemented by diplomatic and political initiatives aimed at bringing about a political settlement. There is no denying the high-risk nature of such undertakings, but the consequences of inaction will ultimately lead to far greater cost and injustice.

8) Establish interim, internationally sponsored trusteeships, rebuild civil administration and basic services, provide material and technical assistance, supervise free elections. This form of wholesale intervention is equivalent to Allied policies in occupied Germany after 1945 and current U.N.

actions in Cambodia, and is appropriate to Somalia's situation today. It requires a costly long-term commitment. Peacekeeping units must remain in place and be authorized to use force until authority can be transferred to elected local leadership.

Collective Responsibility

The international community has a wide range of options for responding to emerging communal conflicts and humanitarian crises. The choices are not restricted to passivity on the one hand and total war on the other. There are diverse and graduated responses that can be tailored to fit specific circumstances. Many of these responses have had demonstrably constructive effects in the recent past: belligerents have been separated by peacekeeping forces, abusive governments have been discouraged or prevented from continuing gross human rights abuses, humanitarian assistance has been delivered to victims of ongoing civil wars.

The central issue for timely and effective response is political will. The responses can be carried out under the direct auspices of the U.N. itself or under the authority of regional organizations. If international organizations default on their legal obligations to respond because of political paralysis, and if regional organizations are unable to act, then a strong argument can be made that individual states have the right to act unilaterally. But unilateral military intervention should not be used unless and until all collective remedies are exhausted. The intervenor must prove necessity and proportionality: military intervention has to be shown to be imperative and should remain the last resort.

The United Nations was not founded so that it could impede progress by doggedly clinging to standards of absolute sovereignty.

International law provides the justification for all such actions. The U.N. was not founded so that it could impede progress by doggedly clinging to standards of absolute sovereignty. Instead, it was founded to limit the arbitrary rule of "sovereigns" and to imbue the world's citizens with a sense of collective responsibility for one another and for the survival of the species. The official

History of the United Nations War Crimes Commission includes an appendix which is as compelling today as it was in 1948. After observing that "the idea of sovereignty paralyses the moral sense of humanity," the author points out that periods of growth in international law coincide with world upheavals. "The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind." The humanitarian crises of the post-Cold War world point to the compelling necessity of translating international consensus into prompt and effective collective action.

— Barbara Harff

Barbara Harff is associate professor of political science at the U.S. Naval Academy and the author of *Genocide and Human Rights: International Legal and Political Issues* (Monograph Series in World Affairs, University of Denver, Vol. 20, Book 3, 1984) and a series of theoretical, empirical, and case studies of genocides and politicides since 1945. The examples of present and potential communal conflicts were contributed by Ted Robert Gurr of the University of Maryland, based on his study of *Minorities at Risk: A Global View of Ethnopolitical Conflict* (forthcoming in 1993 from the United States Institute of Peace Press). Rodney Tomlinson of the U.S. Naval Academy provided useful comments. Other sources: Hersch Lauterpacht, *International Law: Collected Papers*, Vol. II, edited by E. Lauterpacht (Cambridge: Cambridge University Press, 1975); Lord Wright, "War Crimes under International Law," Appendix VI to the *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office, 1948).

Tasseled Loafers

Why did the medical researcher switch from laboratory rats to lawyers?

Because it's too easy to get emotionally attached to rats.

Because lawyers breed faster.

Because there are some things that rats won't do.

You find lawyer-bashing in Scripture: "Woe unto you, lawyers!" You find it in Shakespeare: "The first thing we do, let's kill all the lawyers." You find it in a medieval anthem to the patron saint of lawyers:

Saint Ive was a Breton,

A lawyer but not a thief.

A miraculous thing to the people!

It is in Carl Sandburg's 1920 poem "The Lawyers Know Too Much": "Why is there always a secret singing/When a lawyer cashes in?/Why does a hearse horse snicker/Hauling a lawyer away?"

During the recent election campaign, lawyer-bashing emerged as an improbable yet potent campaign issue. Picking up on themes that the Vice President has sounded repeatedly over the past two years, George Bush, in his acceptance speech at the Republican national convention, asserted scornfully that his

Democratic opponent had received the backing of "practically every trial lawyer who ever wore a tasseled loafer."

Sharp lawyers are running wild. Doctors are afraid to practice medicine, and some moms and pops won't even coach Little League any more. We must sue each other less and care for each other more. I am fighting to reform our legal system to put an end to crazy lawsuits, and if that means climbing into the ring with the trial lawyers, well, let me just say, round one starts tonight.

The *Washington Post* subsequently reported that the attack on lawyers had struck a more responsive chord with voters than any other line in the President's speech. As we all know, America has too many lawsuits and too many lawyers.

But do we know this, really? As a long-time critic of lawyers' adversarial excesses, I now find myself in an unaccustomed role: explaining why America needs its lawyers. To see why, we must look closely at the arguments for the "too many lawyers" thesis.

The Free Market for Lawyers

Coming as it does from such vigorous advocates of the free market as President Bush and Vice President Dan Quayle, the thesis seems almost nonsensical. Like any other business, law practice is governed by supply and demand. If there is a thriving market for legal services, that must be because consumers want them and need them. And if the day ever came when there actually were too many lawyers, the market would solve the problem. Lawyers would find themselves out of work; law school applications would dwindle.

Recent law graduates have trouble finding jobs — just as engineers, schoolteachers, and auto workers do. Yet we do not find politicians scoring points by insisting that America has too many schoolteachers.

During the current recession, lawyers have in fact been hit hard. Law firms are downsizing. Recent law graduates have trouble finding jobs — just as engineers, schoolteachers, and auto workers do. Yet we do not find politicians scoring points by insisting that America has too many schoolteachers. And even in the recession, the demand for lawyers is still rather substantial. Americans obviously have a considerable appetite for legal services: a fact that is hardly likely to have escaped the critics. That's one reason why their lawyer-bashing looks suspiciously like client-bashing — and, ultimately, consumer-bashing.

If the complaint about "too many lawyers" doesn't hold up under market analysis, is there another way of understanding it? Of course there is. When newspaper columnists complain that there is too much violence on TV, they do not mean that Americans dislike violent TV shows. Just the opposite — audiences have an insatiable appetite for violence; the ratings don't lie. Rather, the columnists mean that violent TV shows are objectionable regardless of what the audiences want. The problem is not one of subjective demand but of what, objectively, is bad for us.

Evidently, then, critics such as Vice President Quayle believe that we have too many lawyers for our own good, regardless of what we want. There is something objectively wrong with what lawyers do. What might that be?

Carving Up the Pie

One celebrated answer has been proposed by Derek Bok, the respected former president of Harvard University and former dean of Harvard Law School.

"In Japan," Professor Bok wrote in a widely-publicized 1983 report, "a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*. . . . As the Japanese put it, 'Engineers make the pie grow larger; lawyers only decide how to carve it up.'"

This argument has disturbing implications, because "carving up the pie" is what distributive justice is all about. It may be that Professor Bok is dismissing the whole idea of distributive justice, on the grounds that it encourages acts of appropriation on the part of the undeserving. Then again, he may simply want to claim that distributive justice is something America cannot afford — that justice can only be obtained at the cost of national destitution. Economists often speak of a trade-off between efficiency and equality, implying that a fairer and more equitable distribution of economic goods is bad for the economy. Perhaps this is what Professor Bok has in mind. If he's right, then we find ourselves at a genuine moral crossroads.

We should, however, greet this argument with considerable skepticism. After all, the current recession, and the record numbers of Americans now living below the poverty line, correlate with growing *inequality* in the distribution of income and wealth. The plain fact is that no one knows at what point, if ever, greater economic justice turns an economy sour. And given our recent economic history, it seems just as likely that a bit more thought as to how the pie is carved up could actually help it grow.



"We're slapping you with a stress suit, pal!"

Drawing by Shanahan; ©1991
The New Yorker Magazine, Inc.

Too Few Lawyers?

Finally, we might take Professor Bok to mean that lawyers are no friends of distributive justice. On this reading, the problem is with the way lawyers carve up the pie, not with the fact that they carve it up.

This may well be true. Legal services are distributed by the market, and the best legal resources go to the wealthiest clients, whether those clients have justice on their side or not. The high-priced talent at the command of large law firms virtually guarantees that those who can get such firms to represent them will get the largest slices of the pie, no matter what. Their poor or middle-class counterparts, unable to afford equal representation, will simply take their lumps.

Clients have legal rights, but without lawyers these rights would never be enforced. "Equal justice under law" is nothing more than a slogan without lawyers.

But of course this suggests that there are too few lawyers, not too many. For poor and middle-class people, the primary problem with the legal profession is that its services come at a price they cannot afford, and so they have no access to the legal system. The critics say that such people should not be consulting lawyers anyway: "We must sue each other less and care for each other more." But for some reason, these same critics have never, to my knowledge, proposed that government bureaucracies and large corporations be forbidden to hire lawyers of their own. On the contrary, Mr. Bush's remarks about "crazy lawsuits" clearly refer to lawsuits brought by ordinary citizens. "Too many lawyers" plainly means that while General Motors should have its corporate counsel, consumers wishing to sue General Motors probably should not have any counsel at all.

An example will illustrate the problem. For the past three years, students at the University of Maryland Law School have represented poor Baltimore residents in housing court. The clients are usually African-American single mothers, and the profile of the cases is always the same. The clients live in housing that contains egregious code violations: peeling and flaking lead paint, no heat, inoperative plumbing, leaks, crumbling walls and ceilings, rats and roaches. The landlord goes to housing court to evict the clients for non-payment of rent. City and state laws provide for rent abatements and rent escrow when the landlord does not keep the housing up to code. But without legal representation, the clients

don't know this. Often, they don't even show up at their eviction hearings, and as a result housing court has acquired a reputation as a summary eviction agency. The process works to turn a poor family into a homeless family.

With legal representation, however, the prospect changes. In three years, the students have never lost a case. In part, no doubt, that is because they bring a lot of effort and passion to their work. But ultimately, they always win because the law is on their side. Their clients have legal rights, but without lawyers these rights would never be enforced. "Equal justice under law" is nothing more than a slogan without lawyers.

Pie in the Sky

In addition to being philosophically misguided, Professor Bok's argument is practically naive. He seems to assume that if engineers make the pie grow larger, more engineers will make it grow larger still — in other words, that the economy can absorb and benefit from ever-increasing numbers of engineers (or, one assumes, practitioners of any learned profession other than law). In fact, of course, the United States presently has a glut of engineers and computer scientists; there are likewise too many MBAs, and demographers say that within a few years there will be too many doctors. The obvious point is that you can't determine what kind of job is good for the country simply by looking at that job in isolation from the rest of the economic system.

We can take this point further. The engineer—dependent as she is on the technician, the designer, the marketing manager, the supplier of parts and the retailer of finished products—can expand the pie only within a tangled network of transactions: contracts, collective bargaining agreements, sales of securities. And that's where lawyers come in. Stanford professor Ronald Gilson argued several years ago that the lawyers who sew up these transactions are specialists in reducing costs for the parties involved.

Business transactions depend upon accurate pricing of the assets that are traded or bought. Yet a moment's reflection tells us that the value of an asset is always contingent upon the laws and regulations governing its use. A piece of coastal real estate is worth less if environmental regulations restrict development; a creative financing scheme is worthless if it violates securities law. Only the lawyer can determine these facts, or structure transactions in order to reduce the losses that follow from acting upon imperfect information. In other words, rather than being parasitical middlemen or greedy ten-percenters, transactional lawyers actually add value to the deals they facilitate; that is to say, they make the pie bigger.

The Argumentum ad Nippon

What of Professor Bok's contrast between litigious America and lawyerless-but-productive Japan? The Japan argument is a commonplace among critics of the American legal profession. It is usually coupled with the implication that America's economic slippage, coinciding with Japan's ascent, has resulted from too many lawsuits against big business.

In fact, however, the Japan argument—the *argumentum ad Nippon*, in the words of Mark Sargent—is highly misleading. The number of law graduates from Japanese universities is *higher* per capita than in the United States, and so is the number of those who sit for the Japanese equivalent of the bar examination. But the Japanese government passes fewer than 2 percent of those who take the exam. And the 98 percent who fail it simply go on to corporations to do law-related work that doesn't require being a member of the bar — exactly the same kind of work that in-house corporate lawyers do in the United States.

As for the low litigation rates in Japan, these may be explained not by a Japanese aversion to lawsuits, but by the fact that Japanese lawyers charge an upfront, non-refundable retainer of 10 percent of the amount *claimed* in a lawsuit. To sue someone for a million dollars, the Japanese litigant must first pony up a \$100,000 retainer, which the lawyer keeps regardless of the outcome of the case. Japan is hardly the benign, lawyerless utopia portrayed by critics of greedy American lawyers. After all, the American contingency fee means that unless there is a successful outcome, the client pays nothing.

If there is a malpractice crisis, it is a crisis of too few claims.

Medical Malpractice

Much of today's antagonism toward lawyers focuses on medical malpractice. As Mr. Bush put it, "Sharp lawyers are running wild. Doctors are afraid to practice medicine" — afraid, that is, of spurious malpractice suits.

Here, as in the deification of Japan, the facts diverge widely from the myth. Three years ago, a Harvard team reviewing the records of hospitals in New York confirmed the findings of an earlier study in California: numerous patients are injured by physician negligence, *but fewer than 1 out of 10 of these patients file legal claims*. The other nine-tenths "lump

it." To paraphrase legal scholar Richard Abel: If there is a malpractice crisis, it is a crisis of too *few* claims. An old adage has it that when the finger points at the moon, the fool looks at the finger. When the malpractice lawyer's finger points at the physician, Mr. Bush suggests that we look at the lawyer.

There is, moreover, no truth to the conventional picture of juries eager to sock it to the doctors.

Critics argue as if the current body of litigation consisted mainly of personal injury and product liability cases.

Patients who file medical malpractice suits win less often than plaintiffs in any other type of personal injury claim, and juries award punitive damages in medical malpractice suits less often than they do in any other kind of case.

The myths surrounding medical malpractice are only one part of a larger myth about American litigiousness. Americans, it is said, cannot settle their quarrels peaceably. Instead of resorting to informal means, we are eager to appear in court, and have developed a propensity to take wild legal shots at those who can well afford (or so we imagine) to pay us off. Moreover, critics argue as if the current body of litigation consisted mainly of personal injury and product liability cases. In the words of the Chairman of the Board of the National Association of Manufacturers:

Like a plague of locusts, U. S. lawyers with their clients have descended on America and are suing the country out of business. *Literally*. . . . Product liability suits have brought a blood bath for U.S. business and are distorting our traditional values.

And yet, in the federal courts, the number of product liability suits filed in 1989 was 37 percent *lower* than in 1985. And there are strong indications that the federal court litigation explosion is caused not by tort-hungry ordinary citizens suing businesses, but by American companies that have made a conscious decision to settle their disputes in court rather than informally. Whether you look at the total number of federal court filings or the amount of judicial time occupied by the different categories of federal litigation, the results are the same: it is corporate contract cases, and not product liability cases filed by individuals, that are steadily growing in number.

Does this mean that American business has become vindictive or angry? Hardly. The increasing turn to the courts simply reflects a changed world economy

— that is to say, a more competitive one, with high-stakes single transactions that make it irrational for a company to swallow a short-term loss in order to preserve long-term amicable business relations. The legal trend has everything to do with American competitiveness, but nothing at all to do with the greed of trial lawyers.

Finally, what about the crazy lawsuits — the 34-year-old Michigan man who lost an eye when a sky-rocket he set off on the Fourth of July exploded, and who subsequently sued his parents for letting him set off fireworks while he was drunk? Surely we must lay these at the door of the lawyers.

Must we? We often hear these stories of crazy lawsuits being filed, but less often hear what the results are. For a crazy lawsuit to win, the plaintiff must first convince a skeptical judge, eager to flush cases out of an already overcrowded docket, that the issue raised has a sound enough basis in law to face a jury; then the plaintiff must convince the jury. Moreover, since 1983, when tough rules were introduced to prevent frivolous lawsuits, courts have fined and sanctioned lawyers who file them.

If the plaintiff in a crazy lawsuit was not thrown out of court, then evidently the judge and jury didn't think it was so crazy. The critics' alarm over this matter suggests that they distrust judges (most of whom are elected officials) and juries composed of ordinary citizens.

An End Run Around the Law

The suspicious attitude to democracy expressed by the President has appeared in Vice President

Quayle's speeches to an even greater degree. The argument at the heart of Mr. Quayle's attack on the bar is that lawyers are ruining American business by winning large awards for negligence, defective manufacture, or regulatory violations. His attack is only one part of his larger attempt to denounce the effects of health and safety regulations on American business competitiveness.

Yet Americans overwhelmingly support health and safety regulations and stringent manufacturing standards. And in the United States, which traditionally distrusts big government and massive bureaucracies, we have placed the major burden of enforcing these standards on injured private parties and their lawyers. The trial lawyer in tasseled loafers is, in essence, a bounty hunter. This makes him a despised figure, no doubt, and yet his hunt for personal profit plays a crucial role in law enforcement. The American system of relying on lawyers and clients to investigate and blow the whistle on negligent manufacturers is an example of the privatization that many conservatives ordinarily support. The trial lawyers are a thousand points of law.

What are the alternatives? Either a mammoth, intrusive legion of inspectors and bureaucrats, or laws and regulations that sound fine in the books but mean nothing in practice because they are never enforced. It is not hard to figure out which of these alternatives Mr. Quayle favors.

In promoting this agenda, however, the Vice President fails to acknowledge that when a system allows popular laws and regulations to be gutted by taking the enforcer out of the picture, it has made an end run around democracy. Overall, the "too many lawyers" argument is merely a sanitized and politically acceptable way to express distrust of clients and consumers, of judges and juries — and, ultimately, of laws and democracy.

— David Luban

We regretfully note the death of Ferdinand D. Schoeman, professor of philosophy at the University of South Carolina, on June 12 of this year. Professor Schoeman's association with the Institute for Philosophy and Public Policy began during his time as a Rockefeller Resident Fellow in 1984-85. He was the editor of the anthology *Philosophical Perspectives on Privacy* (Cambridge University Press), and his book *Privacy and Social Freedom* has now appeared as a volume in the Institute's series of Cambridge Studies in Philosophy and Public Policy. A lectureship in Professor Schoeman's name, devoted to issues of law and social philosophy, has been established under the joint auspices of the Philosophy Department and the School of Law at the University of South Carolina.

Sources: Derek C. Bok, "A Flawed System of Law Practice and Training," *Journal of Legal Education*, vol. 33, no. 4 (1983); Marc Galanter, "The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days," *Wisconsin Law Review*, no. 6 (1988); Marc Galanter and Joel Rogers, "The Transformation of American Business Disputing? Some Preliminary Observations" (unpublished); Ronald J. Gilson, "Value Creation by Business Lawyers: Legal Skills and Asset Pricing," *Yale Law Journal*, vol. 94, issue 2 (1984); David Mellinkoff, *The Conscience of a Lawyer* (West, 1973); Robert C. Post, "On the Popular Image of the Lawyer: Reflections in a Dark Glass," *California Law Review*, vol. 75, no. 1 (1987); J. Mark Ramseyer, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," *Yale Law Journal*, vol. 94, issue 3 (1985); Carl Sandburg, "The Lawyers Know Too Much," in *Smoke and Steel* (1920).

Gay Law and the Future of Civil Rights

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations [that would justify a denial of constitutional rights]. . . . We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

U. S. Supreme Court
Palmore v. Sidoti, 1984

We oppose efforts by the Democrat Party to include sexual preference as a protected minority receiving preferential status under civil rights statutes at the federal, State and local level.

Republican Party platform
Houston convention, 1992

In 1986, the Supreme Court held in *Bowers v. Hardwick* that lesbian and gay sex (what the Court dubbed "homosexual sodomy") was not constitutionally protected under the Court's evolving privacy doctrine. A line of decisions recognizing privacy rights had been launched with the 1965 marital contraception case *Griswold v. Connecticut*; but the Court said that these earlier rulings protected only procreation, child rearing, education, and family relationships, and had not established a general right to privacy that would shield all private sexual conduct between consenting adults from state proscriptions. As a result, the Court upheld against constitutional challenge a Georgia law providing ten-year prison terms for gay sex. Central to *Bowers* is the contention that the state has a legitimate interest in promoting "majority sentiments about . . . morality," and that the courts may deny the existence of an asserted fundamental right if they find that the dominant culture has not traditionally affirmed it. Thus, in its justification for a ruling hostile to gays, the Court relied upon arguments that could also be used to rake in civil liberties more generally.

The next year, in *San Francisco Arts and Athletics v. U. S. Olympic Committee*, the Supreme Court ruled that the Gay Olympics could not continue calling itself the "Gay Olympics." The adoption of the title

"Olympics" was held to be a constitutionally unprotected trademark violation: the Court treated the term's use by gays as mere commercial speech, and so refused to grant it the same First Amendment protections accorded to political speech. In doing this, the Court more or less terminated a line of cases starting in the mid-1970s that were beginning to give commercial speech the same high standard of protection that political speech receives. At the same time, the Court rejected the possibility that gays might have any serious political message to convey. Only two Justices saw that the federal government's bar to gays' use of the term "Olympics" denied gays an important political means to an important political goal: dispelling the stereotype that gays, especially gay men, are limp-wristed wimps incapable of prowess or anything noble.

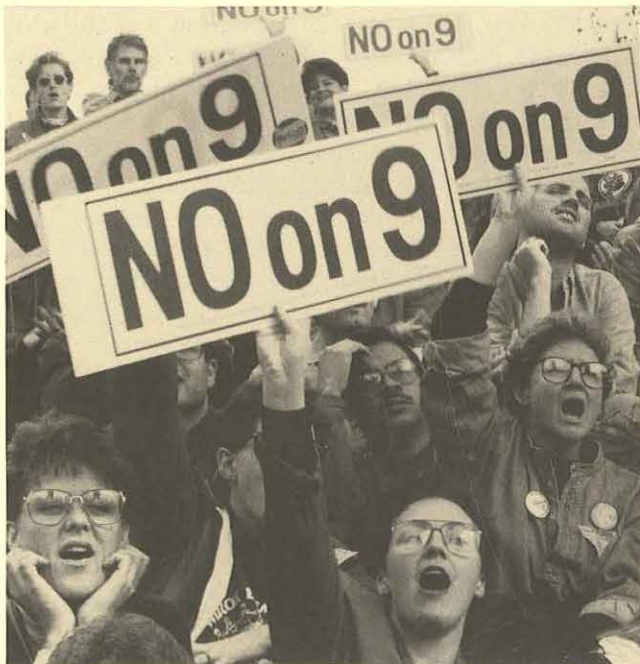
A further argument against the Gay Olympics decision turns on the Fifth Amendment. The U. S. Olympic Committee (USOC) holds a special trademark granted to it directly by Congress, and for that reason the Gay Olympics case raised the question: Did the possession of this trademark turn a discriminatory act of the USOC against gays into a "state action," and so make it subject to the constitutional restraints of the equal protection clause? Twenty-six years earlier, in *Burton v. Wilmington Parking Authority* (1961), the Court found that a privately owned restaurant located in a government-owned parking structure could not discriminate against blacks. That case established the constitutional doctrine that "symbiotic relations" between the state and the private sector generate state actions. But in the Gay Olympics opinion, only four Justices thought that the relation between the federal government and the USOC made the case relevantly similar to *Burton*. As a result, the majority succeeded in using a gay case to undermine a principle articulated in a black case.

There is a pattern here. Gay cases, I wish to argue, have provided the Court the instruments by which the recognition of constitutional rights, and the development of civil rights law generally, may be reversed. Indeed, recent setbacks to affirmative action, to job

protections for blacks, and to school integration may indicate that this general trend driven by gay cases has already begun. Within the peculiarities of gay law, the courts have discovered the levers and fulcras, the legal "principles" and the will, with which they are able to overturn the civil rights era. In several areas of civil liberties, reversals and restrictions of rights have already occurred as the result of the pivot provided by the legal treatment of gays.

What is at stake in gay law is not a set of special rights, but the very concept of rights.

During this election year, in which anti-gay referenda appeared on state ballots in Oregon and Colorado, and on local ballots in Portland, Me., and Tampa, Fla., the relation between gay law and civil rights in general has become unmistakably clear. Anti-gay organizations have tried to win votes by referring to the "special rights" that gays are allegedly seeking. With this strategy, they obscure the fact that what is at stake in gay law is not a set of special rights, but the very *concept* of rights, understood as the immunity claims that minorities have against majorities. At stake, too, is the nation's right to view itself as operating in a principled manner and in accordance with ideals, rather than as being guided merely by popular whim and the dictates of power.



*Protesting Oregon's anti-gay proposal
Chiaki Kawajiri/The Oregonian*

Black and White and Principles

Palmore and Sidoti are white. They had a child — then a divorce. The mother was given custody. Then she married a black man. In light of this change of circumstance alone, Florida's courts in 1981 transferred custody to the natural father, accepting his claim that the social recriminations against a mixed-race marriage would be damaging to the child. On appeal, in 1984 a unanimous Supreme Court reversed.

To some extent, the lower courts had acted upon a plausible understanding of the state's duty in this case. The Supreme Court has repeatedly affirmed that the promotion of the welfare of children is a compelling state interest, and the determiner of the legally relevant facts had held that the harm coming to the child was "inevitable." On those grounds, the Court might easily have agreed that a change in custody was a necessary means to a compelling end. But instead, the Justices framed an entirely different question: a question about whether there are not some means that, even if necessary to compelling ends, are nevertheless themselves beyond the pale of acceptance. Their answer, correctly, was yes:

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations . . . We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect. [emphasis added]

In a footnote to its opinion, the *Palmore* Court invoked *Watson v. Memphis* (1963), a case in which city officials had tried to delay desegregating municipal parks out of a professed fear of "community confusion and turmoil"; in that instance, the Court had held that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Palmore* affirmed this neutral interpretive principle in constitutional law. Simply citing the current existence of prejudice, bigotry or discrimination in a society against some group, or the *obvious consequences* of such prejudice, bigotry or discrimination, can never constitute a valid reason for an act of discrimination against that group. The perpetuation of stigmas is not morally or constitutionally acceptable even as a means for the state to pursue its legitimate interests.

It was this principle that the Supreme Court violated in the *Bowers* decision, by allowing the state of Georgia to give *direct* effect to biases against gays. For although it was an issue of racial bias that launched the *Palmore* principle into constitutional

orbit, the principle applies equally well to all cases where government instrumentalities enhance or perpetuate social stigmas. Indeed, one year after *Palmore*, the Court itself took the principle out of its original context and applied it to discrimination against the handicapped. In 1985, the Court in *City of Cleburne v. Cleburne Living Center*, quoting *Palmore*, struck down zoning laws that gave voice to mere "negative attitudes" toward or "fears of elderly residents" over having a group home for the mentally challenged nearby. Even though the mentally challenged had no claim to special consideration under the equal protection clause, the Court ruled that the *Palmore* principle was sufficient to bar the zoning restrictions at issue in the case. Negative attitudes and fears "are not permissible bases" for distinguishing the treatment of one group from another.

Not surprisingly, in the six years since the Court diluted the *Palmore* principle, there has been a weakening of the protections afforded to politically disfavored groups. In 1973, thirteen years before *Bowers*, the Court had struck down a federal law barring food stamps to households of unrelated people — that is, to "hippies," whose way of life clearly offended majority sentiments. But soon after *Bowers*, the Court could uphold in 1988 a ban on food stamps going to households that had a member on strike, even

though this legislation also targeted a politically disfavored group — strikers.

Giving Private Biases Indirect Effect

If the Supreme Court is now unwilling to block the state from giving private biases *direct* effect, then one cannot hold out too much hope that the Court and other courts will apply the *Palmore* principle in cases where the state, though claiming not to be motivated by discriminatory intent, yields to social prejudices and thereby gives them *indirect* effect. The military, for example, justifies its exclusion of gays by pointing to anti-gay sentiment among service personnel and potential recruits, in society at large, and even in other societies where its forces might be stationed. Such illegitimate indirect effects of private bias are the very ones that the Court so perceptively noted and voided in *Palmore*. And yet, out of dozens upon dozens of gay cases where *Palmore* should have been dispositive, the courts have only rarely noted its relevance.

Finally, even in cases where the state has given indirect effect to amassed *racial* biases, the *Palmore* principle no longer appears to be in force. In 1991, in *Board of Education v. Dowell*, the Supreme Court was asked to define the conditions under which courts can dissolve judicial decrees requiring busing as a remedy for proved past school and housing segregation. In the school district in question, the schools — after busing ceased — had become totally segregated because housing was totally segregated. The federal district court, as the relevant determiner of the facts in the case, had held that this "residential segregation was the result of private decision making and economics," not of government actions. The district court, in consequence, held that the school segregation and its likely attendant stigmatizing of those at the numerous all-black schools were "simply" the indirect results of amassed private prejudices, not discrimination mandated by the state. And so, the district court concluded that the school segregation was okay, was constitutionally acceptable.

The Supreme Court agreed. The majority held that it is all right for the courts to give indirect voice to an amassed prejudice in housing by allowing its manifestation in totally segregated state-run schools, where segregation is the consequence of the seemingly neutral rule that makes no explicit mention of race: "Let there be local schools." But this permission to allow prejudice to operate indirectly through court enforcement of neutral rules was exactly what the *Palmore* opinion had forbidden when it held that the seemingly neutral rule that custody is to be determined by reference to the best interest of the child

Richard D. Mohr

Gay Ideas: Outing and Other Controversies

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could not be used by the courts if the rule indirectly registered amassed private prejudices. We no longer hear the Court saying: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." It appears that *Palmore* has been reversed *sub silentio*.

Fundamental Rights and State Interests

In the *Bowers* opinion, the Supreme Court relied upon a tradition-and-consensus test as a way of determining whether a claim to immunity from state coercion was a fundamental right. In the past, there have been two standards for determining the constitutional validity of such immunity claims. One standard holds that an asserted right is an actual right if it is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if it were sacrificed." This standard calls for reasoned argument about liberty and justice.

The second standard for fundamental rights is the tradition-and-consensus test formulated in *Moore v. City of East Cleveland* (1977), which *de facto* acknowledged the privacy rights of extended black families. *Moore* holds that an asserted right will be an actual right only if it is "deeply rooted in this Nation's history and tradition." Such a standard calls not for reasoned argument about ordered liberty, fair play and substantial justice, but rather merely for historical survey, a project that itself is neither clear nor objective.

The *Bowers* Court, in effect, fused these two tests. That is, it treated the "ordered liberty" test as though it were simply a restatement of the tradition-and-consensus test, and in this way cast reason out from determinations of fundamental fairness. The impact of the Court's action was to undermine the whole understanding of rights that lies behind the Bill of Rights: that is, a justified belief that the country's constitutional scheme warrantably protects the individual from entrenched majorities. The grounds for such protections are rational arguments presented in the courts viewed as forums for rights. By reducing the determination of fundamental rights to a process of historical assay, the Court left the specific guarantees of the Bill of Rights standing simply as an arbitrary list, a historical quirk, devoid of any unifying understanding of what rights are.

In the area of privacy rights, *Bowers* has already been used in the lower courts to restrict individual liberty in a wide range of cases. The Alliance for Justice, a liberal legal policy group, reports that *Bowers* has been cited in more than 100 state and federal court decisions as authority for refusing to find a right to privacy. Challenges to drug testing, seat belt

requirements, and state laws governing the naming of children have all been turned back as a result.

Moreover, the *Bowers* opinion, by denying a general right to privacy that includes bodily integrity, and by privileging state interests over a claim to individual rights, effectively left the idea of fundamental rights without meaning or force. This is one of the lessons of the well-known "right to die" case *Cruzan v. Director, Missouri Department of Health* (1990).

The Supreme Court has left the specific guarantees of the Bill of Rights simply as an arbitrary list, a historical quirk, devoid of any unifying understanding of what rights are.

The question before the Court was whether the irreversibly comatose Cruzan, as represented by her parents, had a fundamental right to prevent the state from barring removal of a feeding tube that was necessary to sustain her biological existence. The Court answered: in theory, yes; in practice, no. The Cruzans lost the case. The Court held that there is a right to refuse medical treatment but that the right's strength is so weak that it is overridden by virtually any state interests, even paternalistic ones.

Why should a right so apparently fundamental have so little force? If the Court had recognized the right to die as one aspect of a general right to privacy, then that right would have trumped virtually any interest the state may have in protecting life. But the Court, citing *Bowers*, denied that the right to refuse treatment had any such foundation. Instead, the Justices simply plucked such a right out of thin air, rawly asserting that the right to refuse treatment is a "constitutionally protected liberty interest," but giving no analytic suggesting which of all possible free human actions do invoke constitutionally relevant liberties and which do not. By proceeding in this way, the Justices were undermining the asserted right even as they proclaimed it. For once any and all personal actions may potentially invoke fundamental liberty rights — as they may when there is no analytic given for what fundamental rights are — then invariably the rights must be weak and deferential to state interests, lest the state be universally hamstrung. But then further it would seem that if *fundamental* rights must give way to state interests, all rights must.

The Bill of Rights

The weakness of the Court's current fundamental rights holdings draws into doubt even the strength of the specific and explicit rights of the Bill of Rights. For example, in a series of cases in 1989, the Court upheld drug searches, even those entailing bodily invasions, as a condition of employment for railway workers after accidents and for customs officials seeking promotions, against challenges based on the Fourth Amendment's protections against both warrantless searches and unreasonable seizures. The Court upheld these invasions of privacy even in the absence of any individualized suspicion of abuse on the part of the workers. The customs case, in particular, opens an unobstructed path to random drug testing of all government workers, since the state interests that the Court accepted as controlling are such weak and pervasive interests as avoiding the diversion of valuable agency resources—mere administrative convenience—and the promotion of physical fitness, integrity, and judgment. Such interests in drug testing would apply to any government job.

Although this result perhaps comes as a shock, it should, after *Bowers*, not come as a surprise. For once the government may invade your bedroom to control your body there, the next logical site of invasion for the ever more ramifying state is your body itself.

Even the First Amendment is under attack from *Bowers*. In the Court's 1990 political patronage case, Justice Scalia came within one vote of successfully using the *Bowers* tradition-and-consensus test to determine what rights to free speech there are beyond the rather strict right against regulations of speech based on its content. Scalia would have held that, since political patronage laws have had a long history in this country, they cannot be declared unconstitutional restrictions of First Amendment rights to political association and political participation.

Gay Law and Affirmative Action

I wish to suggest, finally, that it was really *Bowers* that stood behind the Court's decision in the 1989 affirmative action case *City of Richmond v. Croson*. In that case, the Court held that state and municipal minority set-aside programs are unconstitutional under the equal protection clause because classifications made with respect to white people are as "suspect" as those made with respect to blacks, and are subject to the same high level of judicial scrutiny.

Yet the equal protection analytic that the Court has developed since the mid-1930s does not call for a single standard of judicial review in cases affecting different groups. At the highest tier of scrutiny, laws that discriminate against certain groups (to date, racial groups, ethnic groups, and legal aliens) are

held to be "suspect classifications" and, in order to be constitutional, must be drawn as narrowly as possible to achieve governmental objectives that are themselves compelling. At the middle tier, laws that discriminate against certain other groups (to date, women, illegitimate children, and illegal immigrant children) are held to be "quasi-suspect" and, to pass constitutional muster, must be found to be substantially related to an important state interest. At the lowest tier—unenanced or "weak" equal protection—all laws must be found to be rationally related to some legitimate state interest in order to be constitutional. In the past, the Court has extended enhanced equal protection rights to groups that have been politically disenfranchised or socially degraded. But the *Richmond* Court granted such rights to white people even though they do not meet either of these criteria.

The phony legal formalism of *City of Richmond's* affirmative action opinion is so sheer, then, as to be transparent. Justice O'Connor, writing for the majority, suggested that the Court was acting to defend "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity." But in granting enhanced equal protection rights to whites, the Court was surely self-deceived about the justifications for its results: the true basis for its opinion lay in the convolutions of gay law. For if, as per *Bowers*, those actions that are by tradition socially averred are the actions performed by right, it follows that the people whose privileges are by tradition socially averred have those privileges as a matter of right. In effect, the deference to tradition that was invoked in order to deny rights to lesbians and gay men has been extended to restrict legal protections afforded to other minorities and to enhance majority privilege. Such reasoning explains the Court's 1989 gutting of every dimension of federal civil rights statutes—restricting to ineffectiveness the who, what, when, where, and how much of civil rights remedies.

In this light, there is something disingenuous in the Republican Party's platform statement opposing the inclusion of gays "as a protected minority . . . under civil rights statutes at the federal, State and local level." For the way of thinking that justifies the denial of gay rights has already become a means of undermining the statutes themselves, as well as the Constitutional values to which they help give life.

— Richard D. Mohr

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Richard D. Mohr is professor of philosophy at the University of Illinois at Urbana-Champaign and the author of *Gays/Justice* and *The Platonic Cosmology*. During 1985-86, he was a Rockefeller Resident Fellow at the Institute for Philosophy and Public Policy. This article is adapted and condensed from his book *Gay Ideas: Outing and Other Controversies* (Beacon Press, 1992).

Mandated Service and Moral Learning

Recently the Maryland State Board of Education added a new condition for getting a high school diploma: students must perform 75 hours of "service." The activities that count as "service" will be determined by individual districts, and may include everything from tutoring younger students and visiting nursing home residents to working with non-profit community organizations. The new requirement builds on an already existing voluntary student service program supported by the Maryland Student Service Alliance, a public-private partnership. Although some municipal school systems in the U.S. impose similar requirements, the Maryland school board is the first to adopt a statewide policy.

Because the new policy mandates rather than simply encourages service, it has stimulated considerable comment and some controversy. The *New York Times*, for example, weighed in with an editorial entitled "True 'Service' Can't Be Coerced," questioning "whether mandated service is the best approach." The *Times's* lukewarm reaction to the Maryland program was somewhat curious, however, in light of the fact that on three occasions in the 1980s, the newspaper embraced universal national service for new high school graduates, without letting the possibly compulsory or coercive nature of that service seriously dampen its enthusiasm. This editorial record is peculiar because our natural response about compulsion, I think, goes the other way: we suppose it less morally

and legally objectionable to compel children than young adults, rather than the reverse.

Indeed, states typically have compulsory attendance laws requiring all children below a certain age to be in school. Children's education is not optional.

Because the new policy mandates rather than simply encourages service, it has stimulated considerable comment and some controversy.

Nor is much of their educational experience. At the same time Maryland mandated public service it also required all high school students to take algebra and geometry, "technology education," U.S. and world history, and government affairs courses before graduating. No one editorialized about *those* requirements.

I don't believe forcing students to do some service can be wrong *in principle*. Whether it makes sense to impose a service mandate depends upon its educational purpose and the likely results.

The Educational Purpose of Service

What is the educational purpose? The Maryland Student Service Alliance characterizes "service-learning" this way: "Students learn by identifying and studying community issues, taking action to address them, and reflecting on their experience." This characterization suggests that one point of service-learning is better social analysis. By engaging in service, students will better learn to describe social problems, uncover cause-and-effect, and formulate strategies for change.

If mandated service were only a means to developing students' descriptive powers, analytic insight, and strategic efficacy, its educational purpose would excite little comment. Those opposed to service would focus only on its pedagogical effectiveness. More is at stake in the Maryland controversy, however, since the mandated service clearly aims at more



American Red Cross

than "service-learning." As state school superintendent Nancy S. Grasmick explained, "I can't think of a better example of character development than the lesson that what we take from the community we give back to the community." The larger goal of the mandated service, then, is to teach a lesson in obligation. In teaching this lesson, service purportedly trains good character. The character of students, and not their analytical adeptness, is at the heart of the Maryland program.

The larger goal of the mandated service is to teach a lesson in obligation. In teaching this lesson, service purportedly trains good character.

Now, some people think character training is inappropriate in high schools. One irate citizen of Maryland blasted the Board of Education's "arrogance" in deciding that "students ought to graduate with a better understanding of what it means to be responsible for others.... It is certainly not what high school education is or should be all about." The citizen was not alone in his sentiments.

I do not think these sentiments wholly tenable. Schools cannot avoid character training, even if only as a by-product of maintaining order, creating a learning environment, and demanding honest classwork. Schools ought to insist that students respect one another and do their part in contributing to a decent school community. The Maryland mandate goes further, however. It intends to teach students a lesson in obligation toward the larger community, not just toward one another and their school organization. *This* lesson schools *could* avoid deliberately emphasizing. They could avoid emphasizing it, but they couldn't avoid conveying it indirectly except by gutting the curriculum, since so much of the literature, history, and civics that students study exhibits the values of mutual aid, relief of distress, and duty to a larger community. The intended lesson in "what it means to be responsible for others" does not seem out of keeping with the civic mission of schools to prepare children for the duties of citizenship.

These remarks are unlikely to mollify the irate citizen, but I do not want to defend further the propriety of having schools teach the lesson of community obligation. Rather, taking its propriety for granted, I want to ask whether *mandating* service can teach the appropriate lesson. Is the *New York Times* right that true service can't be coerced? Does the mandate presuppose a wrongheaded conception of moral learning?

Moral Learning

Acquiring good character—learning to be a good person—is not a matter of learning information or skills; it is a matter of learning *to care* about certain sorts of things. Children don't come ready-equipped with well-formed and appropriate carings, whether moral or nonmoral; they must learn what to care about. They learn by adopting the carings of their elders. They learn by being inducted into a way of doing things.

Children learn to care about brushing their teeth and keeping clean because their parents set them a routine of brushing and bathing, *just like the one the parents follow*. They learn to care about telling the truth because their parents demand truthfulness and practice it: *one just does not lie*. They learn to care about the welfare of others not by being told to care but by seeing their parents themselves manifestly and uncalculatingly care: *caring for others is just what one does*.

The character of children gets formed and developed as various carings become habituated and fixed. If children are to care about doing their duty, there must be duties to do. When parents and schools set children the task of tending to people in need, or cleaning up common community space, or shouldering necessary but unremunerated collective burdens, they create expectations of proper behavior. They induct children into a way of life.

There are, of course, good *reasons* for helping people in need, cleaning up common space, and shouldering necessary burdens, but these reasons will effectively motivate only those who already care about helping, or who at least care about acting on good reasons — itself a care that children must have picked up from parents, mentors, teachers, and other adults. So, a conception of moral learning that focused *only* on cognitive tasks such as finding reasons, doing analysis, making arguments, and planning strategy would leave out a vital element. It would fail to emphasize the crucial contribution to moral learning of specific practices—practices that structure the carings children will acquire.

That is why some objections to the Maryland scheme go awry. One student, for example, complained that if the schools want to teach the value of service, the proper place for such teaching is in a values-discussion class. The complaint misses the point. Though talking about values is certainly a part of education, talking *about* value is not the same thing as learning *to* value — and it is the latter that the Maryland mandate means to accomplish.

A scheme of public service embedded in the public school curriculum can convey the message that serving others is simply part of the life of a mature and

educated person. The Maryland program is not educationally wrongheaded because it is mandatory. It may effectively teach a lesson in obligation and contribute to the good character of students precisely *because* it is mandatory.

Implementing the Lesson

I said the Maryland mandate "may" convey a desirable message and "may" teach a lesson in obligation, not that it will. Two cautions must be noted. First, when I observed that children learn to care by picking up the carings of their elders, I suggested that the learning derives not from what elders *say* they care about but from the caring that elders actually manifest. Students, for example, may be told the importance of their grammar exercises, but if their teachers themselves are slovenly in speech and writing and if the larger society puts little value on grammaticality, students are unlikely themselves to care very much about grammatical correctness. They will endure their exercises, not be educated by them.

Students are good at recognizing empty form. They know when teachers and parents are simply "going through the motions," without real conviction or devotion. Consequently, the Maryland mandate may send mixed signals to students. By imposing the service requirement on all the students of Maryland, the State says that adults take service seriously. But by imposing the requirement without simultaneously providing material support for schools to plan worthwhile service activities and opportunities, the State seems to say that adults don't take service terribly seriously. To the extent that schools in these financially pinched times can't devote much planning to their service programs or to the extent they let students fend for themselves, the service mandate may be seen by students as just one more pointless exercise they must endure.

To introduce my second caution about the Maryland program, let's reflect a moment on the asymmetrical attitudes we take toward compelling children and compelling adults. What we find offensive about mandating certain kinds of public service by adults is this. The duty to serve the community—and let's concede we have one—doesn't entail a specific performance. It only entails that we be sensitive to the community's needs and make some contribution over time to collective burdens. But there are any number of equally good patterns of service that satisfy the duty. For example, I may throw myself into full-time work with non-profit organizations my first decade out of college and then taper off my involvement to develop a career and family. You may start a career and family right out of college and later, in your

fifties, take early retirement and begin working full-time with non-profit organizations. A third person may give only a small amount of time each year, but give it continuously over the course of his whole life. Which of us has better discharged our duty to serve the community? I may devote time to helping the homeless, you to supporting local Boys and Girls Clubs, a third person to promoting political activism. Which of us has better discharged our duty to serve the community? I may give mostly financial support, you mostly personal labor, and a third person a mixture of the two. Which of us has better discharged our duty? The answer is that any one of these patterns, and any number of others, satisfies the duty to serve the community.

Consequently, we leave it to adults to work out for themselves how to integrate career, family, religious commitments, community service, and other moral duties into a unique plan of life. We leave it to them because there is no single best plan to impose; because we think adults capable of planning, and disposed to plan, morally responsive lives; and because there are few greater personal goods than giving direction to one's own life.

We exercise compulsion over small children because they don't yet have the capability and disposition to plan morally responsive lives. The capability and the disposition have to be implanted and cultivated, at home and in school. Between small children and fully autonomous adults, however, lies an intermediate group—teenagers approaching the age of emancipation. Everything else being equal, their educational experience ought to give greater room to choice and personal direction.

Thus, my second caution: mandated public service in high school may teach a lesson in obligation, but mandated service might more appropriately (and successfully) teach this lesson in the early instead of the late years of schooling. The Maryland program might make best sense applied not to grades 6-12 but to grades 1-8. Then it could be followed by encouragement and support in the high school for continued *voluntary* public service. Under this scheme, children would be inducted from the beginning into a form of life that includes service and then, as they approach maturity, given opportunities to experiment with their own, unique morally responsive plans of life.

— Robert K. Fullinwider

Sources: The *New York Times*, March 13, 1983; Dec. 10, 1986; Jan. 22, 1989; Aug. 2, 1992. The *Baltimore Sun*, July 29 and Aug. 18, 1992. The *Washington Post*, July 30, 1992. Maryland Student Service Alliance Fact Sheet, "Service-Learning in Maryland."

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