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Clarifying the Goals of Nondirective Genetic Counseling

In recent years, scientists have identified genetic mutations associated with a broad range of diseases, from rare conditions like Huntington's disease to certain forms of breast and colon cancer. These discoveries, in turn, have prompted the rapid development of genetic testing. Two different kinds of genetic tests are now in use. *Somatic* tests aim to detect a current disease or to identify disease susceptibilities in the patient being tested. *Reproductive* genetic tests detect mutations in germ cells and fetuses — mutations that are associated with disease in the patient's (potential) offspring.

The proliferation of genetic tests, and their significance for individuals beyond the patient tested, have increased the importance of genetic counseling — the effort to advise patients about the availability of genetic tests; to help them make informed and voluntary decisions about whether or not to undergo testing; and, if they choose to be tested, to enable them to understand and respond appropriately to genetic test results and diagnoses.

Despite occasional dissents, the standard view of genetic counseling is that it must be "nondirective." In using that term, many commentators emphasize two concerns: patient autonomy and value neutrality. They assume that these concerns are closely related, and that any expression of a counselor's values — or indeed, any moral discussion at all — undermines the ability of patients to make decisions for themselves.

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We may wonder, however, why genetic counseling should require any greater circumspection about values than is practiced in other areas of health care. One purpose of this paper is to argue that it does not. Properly understood, nondirectiveness requires the counselor to adopt whatever method best ensures that the patient's choices about genetic testing are informed and voluntary; it is centrally concerned with patient autonomy. But respect for autonomy is distinct from, and does not require, value neutrality. Indeed, the standard insistence on value neutrality may only make the goals of nondirectiveness more difficult to achieve.

Two Histories

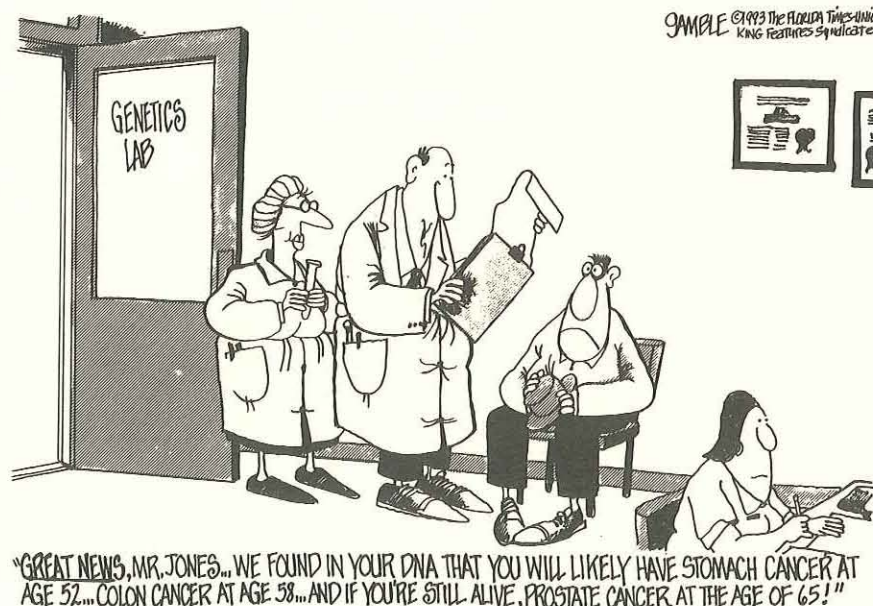
In order to understand why patient autonomy is central to nondirective genetic counseling, we must return to the generally agreed-upon aim of such counseling: enabling patients to understand and respond appropriately to genetic test results and diagnoses. The phrase "respond appropriately" is crucial, for it generates the main disagreements about the proper role of the genetic counselor. The nondirective approach insists that an appropriate response is one made by the patient herself. Whatever she decides is "appropriate," so long as her decision results from an understanding of the facts and truly reflects her values. Whether or not the counselor agrees with this decision is irrelevant.

This understanding of what constitutes an "appropriate response" to genetic diagnoses is still

relatively new. Early in this century, it was widely believed that an "appropriate response" was one that tended to promote genetic health and to eliminate genetic disease. Choices at odds with these purposes reflected ignorance, selfishness, or worse. Such notions of appropriateness were driven in large measure by the assimilation of genetic health to public health. Combating genetic disease was seen as a public health problem; someone who did not strive to promote genetic health risked not only her own well-being but also that of the "race." This approach quickly led to notorious abuses, from the practice of forced sterilization in the United States to the comprehensive eugenic programs in Nazi Germany. Policies intended to promote "genetic hygiene" did so at the expense of individual liberties and, often, lives.

Nondirective genetic counseling is a reaction to this history of abuse. It rejects genetic hygiene as its primary objective, and distances itself from abuses committed in the name of eugenics by attempting to ensure that patients' choices about testing and intervention are both informed and fully voluntary. Its goal is to make the patient aware not only of genetic risks, but also of her freedom to decide whether or not to be tested and how to respond to positive results.

More generally, the history of eugenics helps explain why we have genetic counseling at all. There is no special counseling profession associated with other medical tests: we do not have cardiac counselors or oncology counselors. But then, cardiac and oncology testing have no comparable history of being used against the patient's will and interests.



Ed Gamble

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The contemporary concern with value neutrality reflects a different history. A controversy over the relation between science and values, culminating at the end of the nineteenth century, took the form of a debate over whether the various social sciences were free of value claims and whether, if they were to make statements of value, they could still be truly regarded as sciences. By the early part of this century, the standard view was that scientific results neither confirmed nor refuted value claims. Thus, to assert such claims was to venture beyond the authority of science. Even now, scientists writing about values tend to treat them as merely psychological or social phenomena; they often use the terms "values" and "biases" interchangeably. In genetic counseling, a commitment to value neutrality is meant to secure the objective and scientific character of the counselor's communications.

Rightly understood, respecting autonomy and maintaining value neutrality are distinct concerns. Respect for autonomy means helping to ensure that the patient's choices regarding genetic diagnoses are informed and voluntary, reflecting her own values and interests. Thus, it serves the primary goal of nondirective genetic counseling. In contrast, maintaining value neutrality means expressing no opinion about the value of the medical procedures the patient faces, nor about the ethical issues the patient should consider in making her choice. Thus, value neutrality is best understood as a constraint on the counselor's interaction with the patient. The question is whether this sort of constraint is necessary, or even helpful, for the purpose of respecting autonomy. Why should genetic counselors be more constrained in their expression and discussion of values than other health professionals are?

Defending Value Neutrality

One answer to this question holds that in the specific context of genetic counseling, value neutrality is a necessary means of preserving patient autonomy. There are several arguments for this claim: (1) the genetic counselor's value judgments would enjoy a spurious scientific authority; (2) the expression of such judgments would lead counselors down a slippery slope to more coercive measures; (3) the autonomy of patients considering genetic testing is especially fragile; and (4) the social pressure on these patients is especially great. None of these reasons, however, can withstand scrutiny.

With respect to the first concern, nothing compels a counselor to present moral issues as matters of scientific judgment or give the impression that the values she expresses have the authority of science. So long as she carefully disclaims any special expertise in

matters of value, her expression of values may be compatible with a respect for the patient's autonomy.

Arguments to the contrary have often focused on the issue of what a counselor should say to a patient who asks, "What would *you* do?" Seymour Kessler argues that a forthright answer to such a question is inherently directive, since the "counselor attempts to create the illusion that he/she has taken responsibility for the counselees' actions and decisions." Certainly the counselor violates value neutrality in giving a direct response, in that she expresses her own values. If, however, the counselor also makes it clear that she has no greater expertise in making moral judgments than the patient, surely she will not appear to be taking responsibility for the patient's "actions and decisions." Indeed, she might well emphasize the patient's responsibility for a difficult choice, even as she explains how her values would inform her own decision.

Similarly, a counselor may violate value neutrality if she emphasizes the harms or costs of a particular reproductive decision, for example, the decision to give birth to a child whom genetic testing reveals to have a severe chromosomal disorder. But although the counselor's emphasis on the emotional and moral costs of creating a severely disabled child may reveal her own values, it may also enhance the decision-making process of a patient who has ignored or glossed over those costs — even, or especially, if she ultimately decides to have the child.

The second concern suggests that even if the expression of values is not objectionable in itself, it may be the first step in a process that would lead counselors, or the counseling profession, to adopt blatantly coercive measures. This may be a plausible concern if we assume that counselors would have difficulty expressing or advocating their own views without pressuring the counselee to adopt them. If, however, the counselor is committed to the goal of protecting the patient's autonomy, she will express her own values only to the extent that doing so serves that goal.

The third concern stems from a belief that patient autonomy in the context of genetic counseling is particularly fragile. The patient in a genetic counseling session is apprehensive, anxious, and unsure. She faces the possibility of receiving devastatingly bad news, or good news alloyed with guilt about being spared a fate that others suffer, often others very close to her. If the genetic counselor expresses a value judgment, the patient will acquiesce, since in this situation she has neither the strength nor the self-confidence to disagree. The patient's autonomy is so fragile that *any* influence undermines it. Thus, value neutrality must be maintained in order to respect the patient's autonomy.

Yet in other areas of medical practice, respect for autonomy is not thought to require extreme circumspection in the expression of values. No one has suggested that physicians, for example, should be barred from giving advice. Indeed, it is a common part of medical practice to offer patients advice, recommendations, warnings, and encouragement. None of these activities, if performed properly, is thought to threaten the patient's autonomy. Doctors are obliged to make sure that the patient is fully informed about her situation. They must acknowledge the need for her consent before initiating certain procedures, and they must support her rational assessment of the diagnosis. But as long as they fulfill these obligations, there is no objection to their expressing values or offering advice.

One may argue that a patient considering genetic testing faces great anxiety and conflict, and thus may be unusually impressionable. But the same might be said of a desperately ill patient deciding whether to undergo risky but potentially life-prolonging surgery or chemotherapy. A cardiac or oncological surgeon who responds candidly to a patient's anxious inquiry about what she would do in his place may reveal strong values about health and risk. But we would not regard her candor as threatening the patient's autonomy. It may be that the authority and prestige of doctors in general is so great, and their patients so dependent and vulnerable, that all doctors should forswear advice and argument. But that would radically, and detrimentally, restrict the doctor-patient relationship, turning the personal physician into an impersonal medical technocrat.

The fourth reason for thinking that respect for autonomy requires value neutrality focuses on the social pressure that, it is argued, is peculiarly associated with reproductive testing — social pressure to test for, and abort, "defective" fetuses. A patient who contemplates genetic testing may confront an oppressive social consensus that a patient considering cardiac or oncological testing does not face.

We need not assume, however, that genetic counselors who engage in moral dialogue with their patients will become mere enforcers of social pressures. In fact, they might succeed in making those pressures less insidious. By articulating the reasons and values that underlie a social consensus, and by providing a noncoercive setting where patients can assess these reasons and values, they may help the patients see their options as agreement or disagreement, rather than acquiescence or defiance.

Is Value Neutrality Possible?

Beyond these refutations of common arguments, there is another reason for separating respect for

autonomy from value neutrality: in the context of genetic counseling, value neutrality may not be possible. In the first place, autonomy is itself a value about which the counselor cannot be neutral. Second, promoting awareness of genetic testing, especially reproductive testing, seems fundamentally incompatible with value neutrality.

As we have seen, the standard view defines autonomy as the primary value in nondirective genetic counseling. Counselors and patients, however, often differ as to the importance of autonomy. Patients do not always regard reproductive decisions as theirs to make; they may often defer uncritically to the judgments of their spouses, family, or religious leaders. Thus, the essential principle of nondirectiveness — that the patient is to be treated as the decision-maker — departs from neutrality with regard to a very controversial issue.

One might argue that the genetic counselor should remain neutral about all values *except* the paramount value of patient autonomy. But this is not possible, either. The very development and promotion of reproductive genetic testing conveys the impression that something should be done when an abnormal genetic condition is detected. The implicit assumption is that the condition should be eliminated — which, given the limitations of present technology, almost always means terminating the pregnancy. The genetic counselor may not share this view; but as the person who mediates the patients' encounter with the technology, she cannot stand apart from it. As Angus Clarke argues:

I contend that an offer of prenatal diagnosis implies a recommendation to accept that offer, which in turn entails a tacit recommendation to terminate a pregnancy if it is found to show any abnormality. I believe that this sequence is present irrespective of the counselor's wishes, thoughts, or feelings, because it arises from the social context rather than from the personalities involved — although naturally the counselor may reinforce these factors.

We may recognize the force of these concerns if we imagine an expensive and risky prenatal test for eye color or hair color. Most of us would probably insist that a genetic counselor should not even offer her patients such a test, since eye or hair color should have no relevance to the patient's reproductive choices. To invite the patient to consider a test with more than minimal costs and risks is, at the very least, to suggest that the test has such relevance. This is a significant departure from value neutrality, and the values it implicitly endorses are eugenic in nature. The genetic counselor can help to ensure that the patient makes her own decision about whether to accept those values and undergo testing, but she cannot proclaim her complete neutrality with respect to them.

There are, finally, more general reasons for doubting that value neutrality is possible. One important function of the counselor is to provide information on risk, but the communication of risk cannot be neutral. For example, the counselor must choose between characterizing a risk as a probability of a loss or a probability of a gain. That choice is no more neutral than the choice between describing a glass as half-empty or as half-full. Such "framing" involves a departure from value neutrality, and there is strong evidence that it influences the patient's decision. As one researcher found in a study of outcome framing and patient decisions, "surgery appeared to be much more attractive when the options were framed in terms of the probability of survival rather than in terms of the probability of death."

The fact that value neutrality is difficult or impossible in the context of genetic counseling does not mean, of course, that the counselor should give free reign to her values, treating the counseling session as an opportunity to mount a "bully pulpit." The purpose of counseling is to help the patient make her own decision, not to persuade her to decide a particular way. In some cases, the counselor will enhance the patient's autonomy by being forthcoming about her own values, convictions, and experiences. But this will not always be the case. A counselor who preached to her patients would almost certainly do a poor job of enhancing their capacity for independent decision-making. But what should constrain the counselor's expression of value is a concern for the patient's autonomy, not the illusory ideal of value neutrality.

The Challenge of Genetic Counseling

In their efforts to respect patient autonomy, genetic counselors must address two distinct sets of issues: (1) empirical issues about the effect of tacit and expressed values on the patient's capacity to make a knowing and fully voluntary choice; and (2) conceptual issues about the meaning of autonomy in the context of genetic testing.

One empirical issue is whether the social pressures accompanying the screening, testing, and counseling processes are more likely to threaten autonomy when they are made explicit or when they are permitted to operate *sub rosa*. There is reason to suspect that the latter is more subversive of autonomy than the former. Social psychological research suggests that social pressures affect behavior most strongly when they are unspoken. In contrast, explicit efforts to control behavior often backfire, provoking autonomy-preserving resistance. Other empirical research suggests that overtly directive counseling is not terribly coercive in its effect. Professor Kessler cites

studies from communist-ruled Eastern Europe, including one in Hungary which found that "even under social and political conditions where directiveness is expected, nearly 40 percent of counselees with high genetic risks did not take the counselor's advice."

A second empirical issue has to do with the effects of giving patients a very concrete appreciation of the options available to them. For example, what if genetic counselors established contact between prospective parents who receive positive results on a prenatal test and the parents of children who have the condition that has been tested for? Exposure to parents who decided not to terminate a pregnancy, and who did not regret their decision, may act as a powerful corrective to the social pressure to terminate.

The conceptual issues are more complex. Many of the major debates in medical ethics involve questions about what autonomy means in particular contexts, what external factors threaten or subvert it, and what weight it should have in conflicts with other values. Do we respect a person's autonomy by enforcing her living will or by yielding to her semi-comatose resistance to the termination of life support? Do we enhance or threaten autonomy by giving a patient information about the risks involved in a surgical procedure, when she has not indicated a desire to learn those risks or has even indicated a desire not to know them?

The most familiar controversy over patient autonomy in the context of genetic testing concerns sex selection: should the geneticist assist a patient in finding out whether her fetus is of the "wrong" sex, or is the commitment to her autonomy outweighed by our objections to her decision criteria? Dorothy Wertz and her colleagues have documented a shift among health professionals, from refusal of assistance to compliance with the patient's desires, as patient autonomy has become more firmly entrenched as a dominant value in health care. Although fetal sex selection involves a sharp moral conflict, the rejection of value neutrality offers the geneticist an option besides outright refusal and silent acquiescence; she can explore and challenge the reasons for her patient's sex selection preferences, even if she ultimately accepts the patient's decision.

Counselors must also consider whether they better respect autonomy by providing the patient with more information, or by letting the patient decide how much information to receive. On a view that associates autonomy with rationality, a patient's autonomy can only be enhanced by the receipt of accurate information; on a view that emphasizes the patient's control over the decision-making process, the communication of unsought information may violate autonomy. Even the attempt to tell the patient that she

may choose whether to receive or decline certain information is filled with difficulties. If the counselor describes these options, he unavoidably imparts some information the patient may not want to receive. On the other hand, if a counselor mentions information only when the patient requests it, he risks keeping the patient in ignorance of facts she would very much like to have but does not know enough to ask for.

Finally, difficult issues arise when patients accept, or acquiesce in, the judgments of others with respect to their reproductive decisions, or when they actively delegate control over these decisions to spouses, parents, in-laws, or religious leaders. The counselor must decide whether she respects her patient's autonomy more by deferring to the patient's willingness to let others make her decision or by insisting that the patient regard the decision as her own. Does she let the patient decide who will take part in the counseling session; does she intervene in the ensuing conversation to make sure that the patient expresses her own views? Should the counselor distinguish between patients who voluntarily delegate decision-making authority to others in order to escape responsibility, reduce anxiety, or circumvent weakness of will, and those who fail even to recognize that the decision is theirs to delegate?

The ideal of nondirective counseling takes us only so far in addressing such critical questions. What is needed is careful discussion about the meaning and relative weight of autonomy and other values central to counseling and health care. The demand for value neutrality only confuses the issues and poses obstacles to their resolution.

— Robert Wachbroit and David Wasserman

This article is adapted from an essay appearing in the *Stanford Law & Policy Review*, vol. 6, no. 2 (1995). Sources: Lori B. Andrews, et al., eds., *Assessing Genetic Risks: Implications for Health and Social Policy* (National Academy Press, 1994); Seymour Kessler, "Psychological Aspects of Genetic Counseling. VII. Thoughts on Directiveness," *Journal of Genetic Counseling*, vol. 1, no. 1 (1992); Angus Clarke, "Is Non-Directive Genetic Counselling Possible?" *Lancet*, vol. 338 (October 19, 1991); Dorothy C. Wertz, John C. Fletcher, and John J. Mulvihill, "Medical Geneticists Confront Ethical Dilemmas: Cross-cultural Comparisons among 18 Nations," *American Journal of Human Genetics*, vol. 46 (1990).

Public Lands in the Next Century

In remarks he made before the U.S. Senate in 1832, Henry Clay observed that "no subject which had presented itself to the present, or perhaps any preceding Congress, was of greater magnitude than that of the public lands." For most of our nation's history, his words would not have seemed an exaggeration. The acquisition of the Louisiana Territory, the railroad land grants, and the Homestead Act mark well-remembered stages in the development of the United States in the nineteenth century. At the opening of the twentieth century, the adoption of a dam-building and irrigation program and the creation of the U.S. Forest Service were leading elements in the Progressive agenda of Theodore Roosevelt. Over the past quarter-century, the designation of wilderness areas, the preservation of federal forest lands in the

Pacific Northwest to protect the habitat of the spotted owl, and the setting aside of public lands in new national parks and wildlife refuges in Alaska have been defining achievements of the environmental movement.

The public lands are engraved in our collective imagination; they have played a crucial part in shaping American culture. Yet this rich symbolism has not yielded corresponding benefits for the land. Despite the noble intentions of policymakers and legislators, the governance of the public lands over the past two centuries has seldom achieved its most ambitious goals.

The Homestead Act of 1862, for example, provided that each settler could acquire 160 acres of free public land by residing on and cultivating this land for five

years. As written, the Homestead Act embodied lessons from the settlement of the humid farming areas of the Midwest during the half-century preceding its passage. By the last third of the nineteenth century, however, few of these areas were still available for settlement. In Iowa, where the fertile lands had already been largely transferred to private ownership, only 2.5 percent of the state's territory was ever homesteaded.

As the frontier moved westward, moreover, it soon reached arid regions much less suitable for farming. In Wyoming, New Mexico, and other Western states, the best use of the land — and often the only feasible use in the absence of irrigation — was typically livestock grazing. But economical ranch operation required acreages much larger than the 160 acres allowed under the Homestead Act. Close observers of the public lands, including John Wesley Powell, soon realized that the Act was gravely flawed for those areas where new settlement would actually be taking place.

A member of the Public Lands Commission of 1879, Powell suggested 2,560 acres — huge by Eastern standards — as a suitable ranch size. He also promoted other reforms in recognition of the particular needs of the West. He outlined a comprehensive system of land classification, intended to allocate specific areas to the most appropriate uses, including mining and timber harvesting as well as livestock grazing. He wanted to abandon the rectangular layout of farms and ranches — a configuration based on survey methods dating back to the eighteenth century. He generally favored joint ownership of water sources and of the grazing areas that surrounded them.

Powell's arguments for these reforms were compelling on practical and scientific grounds, but unpersuasive to Congress. The Republican Party of the time saw the Homestead Act as one of its great accomplishments — a triumph for the little man, free-market individualism, and personal initiative. In the face of this romantic ideal, a contrary reality on the land, even when it was pointed out by people who really knew the West, carried little weight. The result, under the Homestead Act and other disposal legislation of the nineteenth century, was widespread farm failure in the arid West; large waste of timber, minerals, and other natural resources; and massive land-law fraud and abuse. The vindication of Powell's views did not occur until fifty years later, with the passage of the Taylor Grazing Act in 1934.

The Progressive Approach to Public Lands Management

In the early twentieth century, with the emergence of the Progressive movement, there was a turn from

nineteenth-century policies favoring disposal of the public lands. Officials now resolved to keep the lands under federal control. It is because of this shift that the federal government today still owns 47 percent of the land in the 11 westernmost of the lower 48 states. Nevada consists mainly of federal land, covering 83 percent of its total area, while 64 percent of Utah and 62 percent of Idaho is owned by the federal government.

American Progressives sought to introduce to government the same methods of modern management that were then transforming the private sector from a world of small entrepreneurs to one of large corporations. Progressives advocated a much more businesslike and efficient basis for government administration. In order to protect professional administrators from political interference, they argued that there must be a strict separation of administration and politics. The political process would set the broad policy objectives; after that, professional administrators

Public Lands and Private Rights: The Failure of Scientific Management

Robert H. Nelson

One of the leading experts on public lands and land rights issues, Robert H. Nelson brings together here a collection of his finest essays. *Public Lands and Private Rights* analyzes the history of the public lands and calls for a comprehensive re-examination of policies and assumptions that have prevailed since the Progressive era. Using insights gained from nearly two decades at the Department of the Interior, Nelson proposes a new system of natural resource and land management based on a much greater decentralization of authority.

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applying technical management skills would take over and be responsible for implementing these objectives. New Progressive institutions such as the independent regulatory commission were designed specifically with the aim of insulating administrators from political interference.

The Progressive program for expanding the scope of government did not reflect a high level of confidence in democratic decision-making. Progressives, in fact, were distrustful of democratic politics. However, they argued that the routine tasks of government could be isolated from its harmful influence. They also believed that large-scale organizations went hand in hand with modern scientific management.

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The idea that government administration could be truly scientific played a critical role in this Progressive scheme of thought. Concerned to avoid abuses of the newly enlarged government powers, Progressives offered assurances that government administration would involve little, if any, leeway for the individual feelings, values, or emotions of the administrators. Science and technology would instead reveal the one correct answer that the experts would apply. Progressives regarded the "special interests" with particular disfavor; such groups sought to distort government decisions to their own advantage and against the valid goal of "the public interest."

Retention of public lands was desirable, according to the Progressives, for two reasons. First, the conservationists among them, such as Gifford Pinchot, believed that the government would do much better than the private sector in achieving the scientific management of natural resources. In part, Pinchot was reacting to the recent rapid depletion of wildlife, forests, and other natural resources by private individuals and companies. The private sector was considered too shortsighted to achieve rational and efficient development of natural resources over the long run.

The Progressives also believed that an expanded public sector was preferable to a large private one. As its trust-busting efforts suggested, Progressivism was hostile to large concentrations of private power, which it saw as a threat to American democracy. By retaining the public lands, Theodore Roosevelt and other Progressives hoped both to achieve the efficiency of scientific management for government lands and at

the same time to prevent large private landholdings that might frustrate traditional American egalitarian ideals.

These dual objectives, however, were sometimes in conflict. As Samuel Hays has written, "Roosevelt's emphasis on applied science and his conception of the good society as the classless agrarian society were contradictory trends of thought. The one, a faith which looked to the future, accepted wholeheartedly the basic elements of the new technology. The other, essentially backward-looking, longed for the simple agrarian arcadia which, if it ever existed, could never be revived."

The Failures of Scientific Management

If nineteenth-century efforts to dispose of the public lands were sometimes misguided and poorly implemented, the twentieth-century policy of retention and scientific management brought problems of its own. For example, Progressives tended to assume that all necessary economic information would be readily available to government decision-makers. In practice, however, important details were almost always missing, perhaps because they were too costly to justify obtaining. The central planning role for government envisioned by the Progressive theorists of scientific management was much more difficult to accomplish than they ever really understood.

The Progressives also had a flawed understanding of the relationship between science and politics. The Progressive scheme assumed that once society set clear goals through the political process, expert managers would separately and most efficiently realize these goals in the administrative process. But what if society could not agree on values in advance? What if decisions about means and ends could not actually be separated? In one of the most famous articles of post-World War II social science, Charles Lindblom raised just these concerns. He found that government worked by a process of "muddling through." The ends did not precede the means, as rational models of government decision-making supposed; instead, the ends were typically determined jointly with the means.

It has become apparent in recent years that the prospects for the Progressive governing scheme actually depended on something the Progressives mostly took for granted — the existence of a set of common values and a strong sense of national community in American life. This sense of community probably reached its peak in the United States during World War II, when a unified nation was able to undertake complex administrative tasks that would have been impossible in normal times. However, as the old value consensus in American society has given way to a new pluralism, the Progressive governing

scheme has become less and less workable. The idea of one set of values and one administrative design for all the United States not only seems flawed but increasingly an outright impossibility.

Meanwhile, the fragmentation of the body politic has encouraged local groups and private parties to assert new "rights" to government benefits. On the public lands, the result has been the creation of private rights, including grazing rights for ranchers, hunting and other recreation use rights for commercial outfitters, and the rights of wilderness advocates. The public lands have been carved up into many domains whose beneficiaries fight as fiercely as any private property owner to defend existing entitlements. It is a new form of range war, now fought in the political and judicial arenas, but with control over the use of the land still the object of the struggle. Like the old contests among homesteaders, cattlemen and sheep herders, the new range wars are often destructive to the land itself, as well as economically inefficient.

By 1964, the enactment of the Wilderness Act was signalling the emergence of the environmental movement as a powerful new force in public land management. Like the conservation movement early in the century, the environmental movement brought a moral vision and a crusading spirit to the public lands. Long-standing practices of the land agencies now came under strong attack. Demands for reform were pressed in many areas. In the 1970s, environmentalism provided much of the impetus to enact a new legislative foundation for the public lands, including the Endangered Species Act of 1973, the Forest and Rangeland Renewable Resources Act of 1974, the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1976, and the Public Rangelands Improvement Act of 1978. It was the greatest burst of legislative activity in the 200-year history of the public lands.

Yet the 1970s laws reflected more a demand for moral renewal and for better results than a clear diagnosis of why the original Progressive scheme had failed. Indeed, the old problems have persisted — high management costs, user charges well below fair market value, inefficient investments, environmental degradation, susceptibility to concentrated interest-group pressures. The efforts of Congress to guide the use of the public lands have once again proven ill-conceived and ineffective. At a recent conference sponsored by the Congressional Research Service, Frank Gregg, the former director of the Bureau of Land Management during the Carter administration, summarized the views of participants: "We have now amassed a considerable history in participating in and judging the revised system and we agree that we are in another generation of dissatisfaction. We have characterized the present as gridlock, polarization, so

extreme as to suggest extraordinary urgency in pondering what needs to be done."

A Different Sunset

Sally Fairfax has described public land management as "riding into a different sunset." Beyond the horizon, she suggests, the justifications for public land ownership inherited from the Progressive era will no longer suffice.

If we look behind the continuing formal adherence to Progressive ideas of scientific management, the real argument made today for having public lands is that they protect certain values and provide certain services that the private market neglects or ignores. The most important service provided by the public lands is the opportunity to hunt, fish, hike, explore, and participate in other forms of ordinary dispersed recreation.

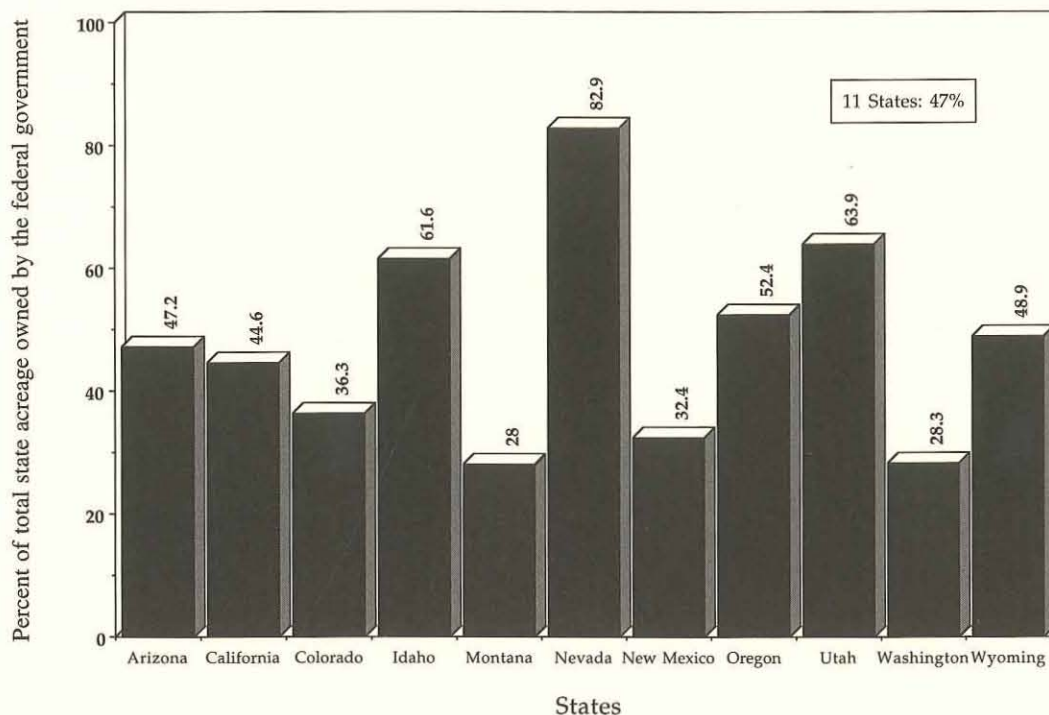
Of course, much recreation is provided privately through market incentives. Disney World did not require any government subsidy. A number of the recreational services now provided on the public lands could be provided by private owners as well. But a good analogy can be drawn here with the highway network for automobiles. Turnpikes between major cities can be provided privately (and have been on some occasions), but the general network of city streets is a public good; the collection costs and confusions of a pricing system for ordinary city streets would simply be too great. Public ownership of recreational land similarly avoids the large transaction costs that would be associated with any system of controlling access and charging for hiking, mountain biking, and many other activities that take place over wide areas of forests and rangelands.

Many people also make a value judgment that public ownership is desirable because it promotes social equality. Hunting clubs might well spring up on private lands; indeed, in the West property owners with control over entry to public lands in some cases already charge hunters and fishermen. However, government is expected to distribute goods and services on an equal basis to all citizens. For many people, the public lands are a powerful symbolic affirmation of the egalitarian ideal in a largely private market system.

State Ownership

Public lands thus can serve some of the same functions for the rural West that Central Park serves for the residents of New York City. Central Park, however, is locally owned, raising the question of the justification for federal ownership of the public lands, as opposed to ownership by states or lower levels of government.

Federal Ownership of Land in the Western States, 1991



*Public Lands Statistics 1993
U.S. Department of the Interior,
Bureau of Land Management*

One justification is that certain natural areas have features greatly valued by the whole nation. Some examples are familiar to everyone: the geysers of Yellowstone Park, the Grand Canyon, the Yosemite Valley, and the groves of the oldest redwoods and sequoias. Federal ownership of these areas declares a national commitment to protect and preserve them for future generations. There is little doubt that for most Americans such protection is a powerful motive for federal ownership of certain national parks and other areas with unique environmental assets.

However, states would also have strong reasons to protect such areas. The example of Adirondack Park in New York State is instructive. In 1894 a provision was added to the New York State constitution setting aside Adirondack Park in a permanently preserved status. The area included in the park covered more than three million acres — an area 35 percent larger than Yellowstone, making it the largest park in the United States. If these lands had been transferred to the U.S. Forest Service, they would no doubt have been used for timber harvesting — as Pinchot in fact argued at the time was the highest and best use of Adirondack forests.

In the West, recreationists point to management of lands owned by the states themselves as a demonstration that state governments are predisposed to favor livestock, mining and other commodity interests over recreation. A fear echoed repeatedly in Western commentary on the Sagebrush Rebellion was that states might well prove a go-between, turning lands received from the federal government over to private owners. As one Idaho newspaper editorial commented, "Most of us, actually, would probably rather see the great forests and range lands of the West remain the responsibility of the federal government than turned over to the questionable mercies of the states. It is quite clear out here, even if it is not well understood in the East, that the states have neither the money nor the administrative capacity to manage these lands properly."

While state management would no doubt be subject to strong interest-group pressures, the Western states are changing rapidly in their demographic and political makeup. The state government of California is today more oriented towards the recreation needs of Californians than is the federal government. In any case, management of major new land areas would

cause institutional changes to occur at the state level, significantly increasing the visibility of state land management, and thus creating new political pressures favoring recreational use of state lands. Meanwhile, the states currently manage 135 million acres of state "trust" lands that earn positive revenues, in strong contrast to the significant drain on the taxpayer represented by the federal lands. Grazing fees on most state lands are significantly higher than the current federal fees.

Taking all these considerations into account, the arguments for federal ownership are strong only for a limited set of lands. The federal government does in fact provide valuable consumer information in designating certain national parks, historic monuments, wilderness areas, and other categories of special recreational lands. Moreover, it provides widely desired guarantees that the nationally unique features of some of these lands will be protected, that the lands will not be sold off and carved into second-home developments. These lands are part of the collective cultural identity of most Americans.

As for less distinctive recreational lands used mainly for ordinary dispersed recreation, they should be transferred, I believe, to the states. The states could then make decisions as to whether they should be further transferred to local governments, contracted out to private managers, leased on a long-term basis to livestock and recreational users, or managed by the state to preserve them in their natural condition. It may well be that for many lands, the most appropriate level of governance will be local.

Some people will no doubt object that transferring public lands would be unfair to other sections of the country because it would confer a windfall on undeserving state governments in the West. The truth is that the public lands have long cost the federal government much more to manage than they have returned to the federal treasury in revenues. In terms of fiscal impact, it is the federal government that would be a gainer from a transfer. Indeed, in the past it has been the states that have been reluctant to accept new management responsibilities and costs that ownership of existing public lands might entail, fearing a potential "unfunded mandate." If serious transfer proposals arise, a major issue for states will be whether they can raise higher revenues and manage the lands more efficiently, thereby stemming the financial outflows that have been the historical experience under federal management.

Devolving Federal Responsibilities

In recent decades, federal ownership of almost half the land in the West has drawn the federal government into many fierce political disputes about proper land

use that are essentially state and local in nature. The federal government is a virtual planning and zoning board for the rural West. Involving the federal government in such contentious local matters creates a drain on federal resources and needlessly squanders federal political capital. There is little or no reason that essentially state and local questions should be decided in Washington as opposed to, say, Santa Fe, Sacramento, or Helena.

One hundred years ago, a philosophy favoring disposal of the public lands was abandoned for the Progressive goal of scientific management. This shift occurred at a time of great discontent with the workings of American institutions. Today, there is a similar level of discontent and again a willingness to rethink fundamental assumptions about the role of government.

On the public lands these developments may yield a new guiding vision and a new organizational structure in the next century. If Progressivism sought centralization, the land system of the twenty-first century is likely to be decentralized. If Progressivism sought expert management by value-neutral scientists, future land management decisions will have to be made by political officials recognizing that scientific and value considerations are inextricably interwoven. If Progressivism expected the experts to act in the name of achieving maximal efficiency in the use of the resources of American society, we can expect the Progressive "gospel of efficiency" — as historians have labelled it — to give way to a much greater pluralism of social and political values.

All this is likely to mean a smaller role for the federal government and a larger role for state and local governments. It will be a shift of authority to the state level perhaps more clearly justified in the area of land management than in any other area of current federal responsibility. The management and control of the use of ordinary land is, after all, historically the most local of all government functions in the United States.

— Robert H. Nelson

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The Holocaust and Moral Education

The belief that schools have a responsibility to teach values is a very old idea in American education. In recent years, however, the aims and methods of programs in moral education have become a subject of intense debate. Some critics believe that such programs distract schools from their essential academic mission. Religious conservatives, wary of curricula that they perceive as favoring moral relativism, insist that the teaching of values should be left to parents and religious institutions. Their distrust extends to classroom efforts to foster "critical thinking" by inviting students to discuss their personal responses to texts and historical events.

One of the most widely adopted — and controversial — approaches to moral education addresses the specific issues of prejudice, conformity, and individual responsibility. It does this by examining the rise of Nazism and its culmination in the Holocaust. Facing History and Ourselves, an organization created in 1976, has produced a curriculum and resource book and conducts workshops for teachers. Its materials are now offered, in some form, to 500,000 students — mostly eighth and ninth graders — each year. The program received an unexpected burst of attention last fall, when a political scientist who had criticized it for not presenting the "Nazi point of view" was named historian of the House of Representatives. Once her comments attracted public notice, Christina Jeffrey was abruptly dismissed. But her remarks provoked a spate of articles and letters in national publications concerning the teaching of the Holocaust.

Most commentators spent little time refuting the charge that Facing History had failed to achieve "balance or objectivity" in its exploration of Nazism. Other, more significant questions about the program — its assumptions and moral purposes — engaged them instead. Was the Holocaust a "unique" event in human history? Is it legitimate to compare the Holocaust to other historical crimes, such as those perpetrated in the Soviet Union in the 1930s, Cambodia in the 1970s, Rwanda and Bosnia in the 1990s? Should the Holocaust be used as a reference point for teaching children about racism and social injustice in general — about scapegoating, intolerance, and prejudice that can occur in any society?

History and Ourselves

The moral education dimension of Facing History and Ourselves has two elements. The first is attention to features of the students' own lives, development, and identities, especially as these bear on issues of moral responsibility and civic engagement. Before focusing on Germany, the curriculum raises issues of group identity and asks how individuals are pressured into acting against their better judgment. These themes are taken up again as the curriculum turns to the period immediately prior to the Holocaust, when a series of laws deprived Jews of rights and status within German society. Students are asked to imagine themselves (to the degree that this is possible) in the place of ordinary Germans, some of whom go along with these Nazi policies, and some of whom resist them. Students are invited to consider how they would and should act in comparable circumstances.

The second moral focus of the Facing History curriculum is a consideration of a broad set of social injustices, linked to elements of the history the students have just explored. The curriculum calls attention to racism in various manifestations, especially, but not only, in the United States, involving prejudice against African-Americans, Native Americans, and other groups. Several small sections of the resource book are devoted to the Turkish genocide against the Armenians. In this strand of the curriculum, emphasis falls on the social and psychological processes that played a role in the Nazi horrors — scapegoating, fear, intolerance, isolation, the definition of "others" as inferior or alien. Students examine these processes in different historical contexts and reflect on their operation in their own lives.

Among the objections that have been made against Facing History, many have been ill-founded and based on a cursory or egregiously selective reading of the organization's material. However, some raise substantial issues for Holocaust teaching, and for moral education. The more important criticisms, not all fully distinct from one another, are these: (1) The Holocaust is a unique event in human history, and Facing History fails to honor this fact. (2) The Holocaust should not be taught in the context of moral

education, but as part of the European or world history curriculum. (3) Facing History draws illegitimate comparisons between the Holocaust and other social horrors and injustices, thereby implying that current or historical American treatment of, for example, African-Americans is on the same moral level as the Holocaust. (4) Facing History does not give sufficient attention to anti-Semitism, in its historical and contemporary manifestations. I shall consider each of these criticisms in turn.

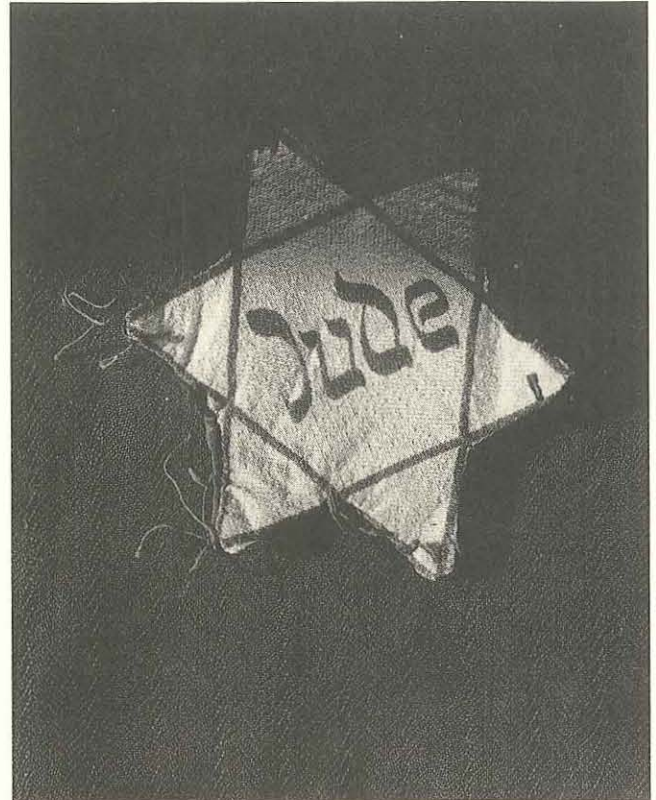
The Uniqueness of the Holocaust

The claim that the Holocaust is unique can mean several distinct things. On one level, every historical event is unique: no historical evil is like any other in all respects. The Holocaust is distinct from all other examples of mass murder; American slavery is different from other forms of oppression and even from other forms of slavery (as practiced in ancient Greece, Latin America, or Arabia). Understood in this sense, uniqueness is a quality that always deserves recognition, if only for reasons of historical accuracy.

However, assertions of the Holocaust's uniqueness usually involve more than a claim that the Holocaust is unlike other historical events *in some respects*. The central idea (though it is not always made explicit) is that the Holocaust is *uniquely evil*. Yet this claim is itself ambiguous. It can mean that the Holocaust has evil features shared by no other historical evil; or that, taken as a whole, it is the *worst* evil ever perpetrated.

Neither of these claims entails the other. It is sometimes argued, for example, that the Holocaust is the only time in recorded history when a state attempted to annihilate an entire people; the concept of "genocide," invented and reflected in the United Nations Convention on Genocide in 1948, is meant to mark the moral difference between this sort of killing and other mass murders. Yet the Holocaust, though it may have given rise to the concept of genocide, is not the only historical instance of genocide. The Turks' violence against the Armenians between 1915 and 1923, the United States' treatment of some Native American tribes, the Hutu government's massacres of Tutsis in Rwanda — all are arguably cases of genocide.

It can, no doubt, be plausibly claimed that the Holocaust is the *worst* instance of genocide — given the number of people killed, and the systematic mobilization of a modern state's resources for the purposes of extermination. Still, it does not follow that the Holocaust is the worst *historical evil*. Consider Stalin's starvation of millions of peasants in the 1930s, during the era of forced collectivization. This is a mass murder that is not a genocide, since it involved the targeting not of a people defined by religion, nationality, or race, but rather of a social grouping defined by status. But does this distinction have greater moral significance than the number of people killed?



Arnold Kramer,
United States Holocaust Memorial Museum

It is doubtful that we can achieve any final reckoning of degree of evil. Moreover, even if there is some analytical and historical value in making the attempt, the uniqueness dispute is not of paramount importance to moral education. Indeed, an emphasis on the "uniqueness" of the Holocaust, in any sense other than that shared by other historically significant events, is likely to have deleterious consequences for moral development. One of the primary goals of moral education is to increase awareness of, sensitivity to, and concern for human suffering and injustice. An acute awareness of, and constant attention to, the Holocaust as "unique," as the worst evil in human history, can thwart the development of this moral consciousness. Suppose students are learning about ethnic cleansing in Bosnia, or slavery in the United States. Appropriate moral awareness of the evil and injustice in these situations is an integral part of understanding them. But the constant refrain, "Well, that atrocity is not as bad as the Holocaust," would inhibit this moral understanding. Ironically, some Afrocentric writers use a similar moral move to deflect appropriate moral concern *from* the Holocaust: "You lost six million, but we lost 100 million to slavery." The "more oppressed than thou" gambit is inimical to a proper concern with the sufferings and injustices experienced by groups other than one's own.

Moral Education and History

The second criticism — that the Holocaust should not be taught as part of moral education at all, but only as part of the history curriculum — does not depend on a uniqueness claim. It does rest on a questionably firm distinction between the teaching of values and the teaching of history. Education about the Holocaust cannot help but be moral education as well. A student who knew in great detail about the Nazi policies that led up to the Holocaust, who was thoroughly familiar with the means by which the mass killings were carried out, but who did not recognize that these events constitute a moral horror, would lack historical understanding of the Holocaust. Similarly, a student who failed to grasp that American slavery dehumanized the people who were slaves would not understand slavery. As students confront these historical phenomena, their moral capacities are necessarily engaged. The Facing History teacher who helps students articulate and explore the bases of their moral reactions is only building on a response that occurs in any case in the teaching of history.

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In a recent essay, Deborah Lipstadt offers an example of how moral issues arise in the context of historical study of the Holocaust. Describing her university students' reactions to Claude Lanzmann's documentary film *Shoah*, she suggests the inescapability of moral discussion in a Holocaust history class:

As they listened to contemporary Poles decry the fate of the Jews and then, using imagery from the New Testament, seamlessly slip into explanations of why this was really the Jews' fault, the student sitting next to me groaned. "Blaming the victim. Again." My students recognized both the particular and universal component of what they had seen. For me, the most moving responses came from the Christian students in the class who spoke about the challenge of reconciling what they consider to be a religion of love with the history of contempt which they now recognized as intrinsic to it.

Even at the high school level, some students who learn about the Holocaust will face challenges like the one acknowledged by Professor Lipstadt's Christian students. This will occur whether the Holocaust is taught in history classes or as a component of moral education. In either case, we should expect teachers to offer their students the opportunity to address moral

questions they may never have confronted before. Some religious conservatives who oppose moral education appear to believe that *no* classroom should provide such opportunities, lest the students be encouraged to articulate ideas at odds with what they have been taught elsewhere. But this suggests that the true object of the critics' suspicion is not moral education, but education itself.

Making Comparisons

The third criticism holds that education about the Holocaust should not be used to do moral education about matters other than the Holocaust itself, for doing so will necessarily involve drawing false comparisons between the Holocaust and other examples of injustice, oppression, or mass destruction. This criticism is obviously related to the first, which insists on the Holocaust's uniqueness. It is also a criticism relevant to many programs of historical study and moral education, not only Facing History.

Last fall, for example, the Holocaust Memorial Museum in Washington opened an exhibition of documentary photographs from the Bosnian war. The question immediately arose whether the Museum was "equating" ethnic cleansing in the Balkans with the treatment of Jews during the Holocaust. In response, a spokesperson for the Museum explained, "Our mandate is to show the contemporary implications of the Holocaust. In Yugoslavia today, we see certain elements of the Holocaust repeating themselves: how genocide can be accomplished by the modern state, how the world can stand by."

For its part, Facing History invites teachers and students to make comparisons between the persecution of the Jews, especially in the years leading up to the Final Solution, and the racial injustices, stereotypes, prejudices, and discriminatory laws directed against African-Americans, Native Americans, and other groups in the United States. Seeing the horrors to which anti-Semitism and other Nazi racial attitudes led helps students appreciate that stereotyping and prejudice are neither innocent nor insignificant. Such lessons can be conveyed without implying that the errors or crimes of all societies are "equivalent." It is only necessary that there be *some* parallels, *some* similarities, not parallels in every respect. Deborah Lipstadt rightly says that teachers must be careful not to impart the message that every ethnic slur contains the seeds of a Holocaust. However, an appreciation of the hurt and danger of racial stereotyping does not, or need not, proceed by way of claiming that the Nazi situation is exactly comparable to that of the United States. Facing History never claims such direct comparability, and frequently suggests that students be asked to think about the differences.

Professor Lipstadt has criticized Facing History for explicitly drawing historical connections and parallels; she wants the students to draw their own connections, leaving to the instructor only the task of ensuring that the *distinctions* are appreciated. For junior high and high school students, however, this division of responsibility seems arbitrary; there is no less reason to help these students see the similarities than the differences.

What would be lost if a program like Facing History declined to invite discussion of both parallels *and* distinctions? First, teachers would miss an opportunity to help students become morally reflective and sensitive in a nation and world where such qualities are urgently important. For example, Facing History devotes considerable attention to rescuers and bystanders during the Holocaust. Included in this unit is an account of an African-American man in Los Angeles during the riots that followed the Rodney King verdict. Remembering his victimization by whites as a junior high student, the man rushes to help an Asian-American driver as rioters are throwing bricks and stones at his car. Now of course there are differences between the rescuer's situation in Los Angeles and that of rescuers who saved Jews from the Nazis; in the United States, there is no state policy to murder members of a stigmatized group and their would-be protectors, as there was in Nazi-occupied Europe. But would students be better off if we omitted the story of an ordinary citizen standing up for decency and humanity in the midst of our social disorders?

Beyond the missed opportunities, failing to help students make these connections does them a moral disservice. One thing we rightly expect from a moral education program is an enlargement of moral imagination and a willingness to face uncomfortable moral truths — not only to make well-informed judgments about past horrors. Our pluralistic society, with its tendencies to ethnic fragmentation, is particularly needful of people able to recognize and acknowledge their ties to and commonalities with others; promoting such recognition is an important goal of moral education.

Admittedly, making valid comparisons and drawing necessary distinctions are by no means simple or uncontroversial matters. Whenever members of a particular group find that their historical experience is being compared with that of another group, they may object that the comparison is an insensitive appropriation of their sufferings and struggles. For example, some African-Americans dismiss the suggestion that the prejudice directed against gays and lesbians is comparable to racial prejudice, and they are indignant when gay rights advocates draw on the language and symbolism of the civil rights movement. Between those who see

parallels in the two struggles and those who do not, there is a wide divergence of perception and historical understanding.

There are two lessons here. First, comparisons are politically charged and controversial; for just this reason, we have an obligation to draw them as responsibly as we can. Second, there is no formula for getting either the comparisons or the distinctions right. As Henry Louis Gates, Jr., observes with respect to analogies between the predicaments of African-Americans and gay Americans, the difficulty "isn't that there's simply no comparison; it's that there's no *simple* comparison." We can only proceed according to our own best lights. In any case, we cannot dispense with efforts to apply the understandings we have gained in one area (including our own experience) to another.

Studying Anti-Semitism

Finally, some critics worry that to teach about the Nazi era for the broader purpose of moral education is to "de-Judaize" the Holocaust. In a widely reprinted column from the *Boston Globe*, appearing after the dismissal of Christina Jeffrey, Jeff Jacoby argued that the central focus of a program like Facing History ought to be the anti-Jewish hatred that made the Holocaust possible. "If the Final Solution was about anything," Mr. Jacoby wrote, "it was about the uniquely virulent power of anti-Semitism, a hatred older than and different from any other in human history."

In fact, Facing History devotes considerable space to anti-Semitism, as even a cursory examination of its resource book makes clear. Certainly any study of the Holocaust must include the history of European anti-Semitism. However, those who press for attention in a Holocaust curriculum to *contemporary* anti-Semitism, particularly in the United States but also in Europe, cannot escape the issues of comparison and differentiation that, as we have seen, affect all efforts to link the Holocaust with other examples of persecution and hatred. The continued presence of timeworn anti-Semitic stereotypes in America is no more a portent of, or cousin to, a Nazi-like persecution of Jews than is contemporary prejudice against African-Americans a portent of a return to slavery or Jim Crow. Contemporary forms of American anti-Semitism have no *more* claim to relevance in a Holocaust curriculum than do other mass murders, other forms of racism, other forms of state-initiated persecution. Contemporary anti-Semitism is a serious cause for concern, and a course on the Holocaust should certainly attend to it. But those who argue for its inclusion share the same responsibility for analogizing and disanalogizing that is assumed by those who link Nazism with contemporary forms of racism,

stereotyping, and prejudice not specifically directed at Jews.

Oddly enough, the complaint that Facing History's treatment of the Holocaust pays insufficient attention to Jews and Jewish concerns has sometimes come from people who oppose multicultural education on the ground that it emphasizes the distinctness of groups at the expense of unity and common values. Moreover, the idea that the Holocaust is exclusively "about" anti-Semitism, that our central focus must always be on the Holocaust as a Jewish tragedy, is curiously reminiscent of one of the criticisms made by Christina Jeffrey in her 1986 evaluation of Facing History. The program, she wrote, "may be appropriate for a limited religious audience, but not for widespread distribution to the schools of the nation." Defenders of the former position will rightly distinguish their view from Professor Jeffrey's, since they want this Jewish tragedy to be of universal concern, not of concern to Jews only. Nevertheless, a willingness to appreciate the sufferings of others, a lack of possessiveness about a tragedy that affected millions of non-Jews as well, is much more likely to foster this general concern.

This past spring, the Los Angeles Jewish Federation arranged an evening on which five Japanese-American judges reflected on the relocation and internment of Japanese-Americans during World War II, and on the current wave of anti-immigrant hysteria and resurgent anti-Japanese prejudice. The Federation speaker

observed that "while no wartime experience could compare with the Holocaust, no group had a monopoly on suffering." There are no such monopolies now. This is a central lesson of moral education programs, and one to which Facing History and the Holocaust Memorial Museum have helped point the way.

— Lawrence A. Blum

Lawrence A. Blum, professor of philosophy at the University of Massachusetts, Boston, and member of the Center for Ethics and Social Policy, is the author of *Moral Perception and Particularity* (Cambridge University Press, 1994). Sources: Melinda Fine, *Habits of Mind: Struggling Over Values in America's Classrooms* (Jossey-Bass, 1995); *Facing History and Ourselves Resource Book: The Holocaust and Human Behavior* (Facing History and Ourselves National Foundation, 1994); Berel Lang, *Act and Idea in the Nazi Genocide* (Chicago: University of Chicago Press, 1990); Deborah Lipstadt, "Not Facing History," *The New Republic* (March 6, 1995); Henry Louis Gates, Jr., "Blacklash?," *The New Yorker* (May 17, 1993); Jeff Jacoby, "Facing History: What it Really Teaches," *Boston Globe* (January 17, 1994); "Japanese-American Judges Reflect on Internment," *New York Times* (May 19, 1995).

Escaping from Politics

Americans have long been committed to a particular conception of republican government. Within this conception, as articulated in our founding documents and the patterns of our political speech, we may distinguish two animating principles. (1) The people are to rule. In particular, those doing the governing are to be accountable to the citizenry through elections and other devices. (2) The people and those who speak for them cannot rule any way they please. We are to be a democracy but of a certain kind, one in which the people's rule is to be limited.

The desire to limit the reach of democratic politics is prompted by a fear that popular rule can be the means by which a majority subordinates a minority or violates individual liberty. As Jefferson observed, "One hundred seventy-three despots would surely be as oppressive as one. . . . An elective despotism is not the government we fought for." Popular rule may also be the vehicle through which those with particular interests can gain the power to advance them, often at public expense. Thus, the central problem of republican government is to define (and enforce)

limits on democratic politics, to ascertain what should be beyond the people's reach.

It is to law and moral theory that we most commonly look for the definition of such limits. In doing so, we assume that democratic politics itself cannot provide them. Democratic politics too often involves a squalid search for narrow advantage and displays of crass self-interest; it is rife with strategic calculation in the service of material gain and high position. We must surely look outside politics, the argument goes, if we wish the limits to be other than arbitrary — the outcome of activities that have other purposes, notably self-interest, and which therefore have no systematic justification. In this light, law and morality look attractive as a source of limits on popular rule.

But upon more careful examination, I think, neither of these ways of limiting the reach of democratic politics looks so appealing. In the end, we must say that the only way to limit democratic politics is by *more* such politics — to be sure, of a different kind from the version I have just been describing, but politics nevertheless. Or so I will argue. Once this is understood, moreover, some recent proposals for reforming our politics look distinctly less attractive than their supporters imagine. They would in fact make it more difficult for us to realize the well-ordered republican regime to which we are committed.

Morality and Limits

Many moral theorists (and political theorists who look to them) argue that our politics must be bound by such values as an individual right to equal respect and economic justice. Their argument is straightforward. Such transconventional values ought to bind us in our political practices. We are not free to adopt just any form of political life, nor to pursue just any objectives that a majority of us happen to prefer.

The principal difficulty with such arguments is that, for the most part, they are presented as if we need not concern ourselves, as we commend specific values, with the question of whether they can actually be given life in political practice. When doubts are raised as to whether a value is attainable, these are often dismissed as "practical objections" that are not decisive from the perspective of moral theory.

But why a "practical objection" should *not* be decisive, as we try to determine what the content of the limits on politics should be, is, to put it mildly, unclear. If there is no plausible version of political activity, of the workings of political institutions, that will give life to the values being advanced, this must be a decisive objection to devoting effort to achieving them. "Cannot" implies "ought not." Moreover, we can only become disheartened and cynical if we assert

a commitment to values that we see no possibility of realizing.

In other words, having a table of values, a set of abstract standards to tell us when we are overstepping the proper bounds of political choice, is less useful than is often supposed, and possibly pernicious if it is all we have to guide us. If we as a republican people are indeed concerned with trying to define that which is to bind political choice, it is misleading simply to say that X is a value, and we ought not in our politics to undercut it — and leave for another time the task of working out which institutions are to put the value into effect, and how they can be made to function in the necessary ways.

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Depending on our intellectual tastes, we can say that moral theory cannot stand on its own as a guide to limiting democratic politics. Or, we might say — and this is the version I favor — that moral theory as it is usually presented in the context of political life has a mistaken view of the problem of limited republican government. In proposing a definition of the limits on democratic politics — of the purposes it should and should not pursue — moral theory typically assumes that an account of democratic institutions can be added later, that it is in some ways ancillary to the main task. In fact, it is at the very heart of the problem of limitation. To lack an account of institutions is not just to have an incomplete theory, but to have a deeply flawed one.

Courts, Law, and Limits

While moral theorists too often speed by the problem of institutions, averting their faces from the world of institutional practice, those we might call legalists are deeply concerned with institutions. However, they have such refined tastes in this matter that only courts will do. No other institutions have the necessary finesse and intellectual breeding to merit consideration.

Broadly speaking, legalists look to the "law" as the principal source of limits on democratic political choice. In this respect, they are akin to those moral philosophers who believe that natural law should guide political choice. But here "law" is understood differently. It is the law of judges and courts, not the law of nature and nature's God. Legalists have

advanced arguments aimed at delineating a body of specifically legal reasoning and, in so doing, they have assigned a privileged role to courts and judges in democratic lawmaking.

Are these legal theorists correct? Is there a special form of legal reasoning that, when employed by judges, should bind political choice? It is relatively easy to agree with the proposition that courts and, therefore, legal reasoning have a special and unique competence with regard to settling disputes *between individuals*. It is difficult, however, to sustain such claims for a special competence in other, larger matters that concern how the larger society and polity should work. I am thinking here of such constitutive questions as the meaning of the idea that all citizens should enjoy the equal protection of the laws, or the proper definition of the rights and responsibilities of citizenship.

Consider, for example, what we might call the primary political rights, such as freedom of speech and assembly. These are best understood not as products of legal reasoning, but as the conclusions of practical political reasoning and empirical assessment of the requirements of popular government. Freedom of religion almost certainly grew out of practical political reasoning on the need to keep religion off the political agenda of popular regimes. This is not surprising, since one of the central concerns of practical political reasoning is precisely how to secure and maintain a well-functioning popular regime with limited powers.

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Admittedly, we are used to thinking of judicial review — and specifically of the Supreme Court interpreting the Constitution — as *the* way in which popular rule is limited. Our guiding image is one of a simple division of labor: the people through their representatives legislate, and the Court decides whether they have gone beyond the appropriate bounds. Advocates of a special sort of legal reasoning reinforce this image by suggesting that courts are uniquely competent to define and set out doctrine, above all constitutional doctrine. The success of any effort at limitation, they argue, depends on the courts as they explicitly connect their decisions to constitutional provisions and to previous rulings.

In contrast, the point I want to urge is that courts — especially high courts that are expected to concern themselves with constitutive matters — are best

understood as political bodies with a particular sort of view of such questions. Like other lawmakers, judges employ whatever skills of practical political reasoning they can command. They sift through a large range of normative and empirical considerations; they test various arguments for relevance to the question at hand, soundness, and correspondence to analyses of similar situations. Judges may be better reasoners, in some respects, than other sorts of lawmakers, and they may generally have a variety of advantages. But that is what they are — differential *advantages*, not a case for a unique competence.

Escape and Return

Moral theorists and legalists wish to substitute for practical political reasoning some special kind of reasoning. But the kind of questions we face when we are considering what limits should be placed on political choice are, at the end of the day, ones that can only be settled by practical political reasoning that takes account of how the world works and can be made to work. There is no special or privileged form of reasoning here, no moral philosophy or theory of law that can guide us. We may need moral philosophy (or revelation) to get started, to acquaint us with plausible versions of what the limits on democratic politics should be. Similarly, we may find the history of court decisions and legal commentary on them helpful in our efforts to come to some conclusion about how to limit political choice. But that is all moral and legal reasoning can do. After that we must rely on what we always rely on in deciding what to do when practical questions confront us. We look to analogies and contrasts, we gather what information there is about the particular part of the world that concerns us, and we think through the connections between our values.

One image bedevils the work of moral theorists and legalists: that the only way to bind political choice is to escape from it, somehow get outside it. "Politics" can't be trusted and so we must somehow step beyond it. Some moral theorists and legalists will go to the extreme and wish, in effect, simply to replace politics and politicians by philosophy and law — or, more precisely, by philosophers and lawyers. As Grant Gilmore put it, however, in hell there will be only law (and lawyers). While it is doubtful that a place where there is only philosophy will be equally dreadful, it is likely that ordinary people will have, as it were, a devil of a time.

In a quite simple sense, there is no substitute for politics — if by politics one means the various ways in which we arrive at collective, authoritative decisions in a world in which people, legitimately, hold different views about the purposes for and the manner in which they are governed. To exclude politics is to require that

we all agree on purposes and manner, or that we not make any collective decisions, or that such decisions be imposed. There aren't any other choices. And since in fact we *don't* all agree, we are left with force or no government. Politics is better, more noble, than these twins of anarchy and despair.

The kind of theory I have been criticizing is surely correct, however, in one thing: a political system wholly characterized by the play of power, bargaining, and the pursuit of narrow advantage would be deeply unattractive and would endanger the kind of primary political liberties that the citizens of western countries (and, increasingly, citizens elsewhere) believe is their right. Moreover, the ordinary politics of narrow advantage and strategic maneuver is too little characterized by reasoned argument. It is too unprincipled. Practical political reasoning plays too little part in it.

But there are different kinds of politics, and we need not accept the form it currently takes. Instead of seeking to escape from politics, we must instead consider how to create a politics that provides substantial scope for our powers of practical reasoning. Where, then, shall we look for guidance on how to build into our political institutions a greater component of practical reasoning?

The Public Interest

James Madison provides one very helpful account of the kind of politics we should aim for. The essential task of lawmaking, he wrote, was to "refine and enlarge the public views." Lawmakers should be in a position to "discern the true interest of their country" and thus be unlikely "to sacrifice it to temporary and partial considerations." In Madison's vision, lawmaking would be the last stop on the road to a progressive refinement in understanding and giving substantive content to the public interest. In this way, the boundaries of the people's rule would be given concrete meaning.

For Madison, then, the challenge is to organize ordinary politics so that the meaning of the public interest gets regular and reflective attention. What purposes should we pursue, and what are the appropriate means for doing so? (Ends and means are joined in the public interest of a republic.) Which purposes and means are excluded? When these questions are the focus of legislative debate, democratic politics binds democratic politics; that is to say, in day-to-day political life there are forces that press for giving concrete meaning to the public interest, and that help contain other forces that press in other directions.

If we accept that a deliberative politics aimed at giving concrete and compelling content to the limits

on popular rule is necessary — that the burden of self-limitation cannot be borne solely by judges (or moral philosophers or other actors ostensibly outside the political realm) — we are in a position to evaluate proposals for reform of our institutions. In general, we should look favorably on proposals which would enhance the deliberative capacities of the Congress, and especially those directed at improving the citizenry's capacity to judge whether legislators are inclined to engage in deliberative ways of lawmaking. Conversely, we should be critical of proposals that would weaken the legislature's deliberative capacities.

The example of term limits is instructive in this last regard. Practical political reasoning about the public interest, and thus about limits on democratic rule, requires judgment tutored by long acquaintance with questions of governance. Yet term limits would mean that elected representatives would never have the opportunity to think systematically about such questions. Nor would lawmakers have the opportunity to devote continuing attention to the "train of measures" that these questions require, needing as they do a regular correcting and extending of initial efforts. Finally, to have a constant turnover of representatives would significantly weaken the legislature's ability to play a constructive role in public discussion of the concrete meaning of the public interest, and thus in the limiting of popular rule.

The argument for term limits is a counsel of despair. To adopt term limits would be tantamount to giving up on the legislature as a crucial component of republican government; it would say that there is no prospect of having a legislature that can play the essential role of reasoning about the limits of popular rule. By contrast, reforms recognizing that we as citizens must judge whether lawmakers are deliberatively minded, that we must have experience of deliberation if we are to so judge, and that we require opportunities at the local level to engage in a deliberative politics, are more attractive. Such reforms would have a far greater chance of serving our aspiration to be a fully realized republican regime.

— Stephen L. Elkin

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