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Controlling Global Climate: The Debate over Pollution Trading

Last November, delegates from 160 nations met in Buenos Aires to negotiate implementation of the global climate treaty signed in Kyoto in 1997. That treaty seeks to stabilize atmospheric concentrations of carbon dioxide (produced by burning fossil fuels) and other heat-trapping gases that may contribute to global warming. Industrialized nations, including Japan, the United States, and members of the European Union, promised at Kyoto that they would cut and permanently limit their production of these "greenhouse gases." Taking 1990 pollution levels as a baseline, these countries agreed to reduce their emissions by 6 to 8 percent by the year 2012.

Developing nations did not sign on to the Kyoto accords, and efforts to secure their cooperation in Buenos Aires were largely a failure. This was hardly surprising. Countries such as China, India, Indonesia, and Malaysia want to make sure they are not saddled with emissions limits that impede their industrial development. They take the plausible view that the welfare of their people depends more on the growth of their economies than on the stability of the atmosphere. Accordingly, they insist that wealthy countries should take the lead in reducing their own emissions, rather than try to limit the energy use (and thus the economic growth) of poorer nations.

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If developing countries do not join in efforts to control greenhouse pollution, however, these efforts will be futile. Developing countries, as a result of rapid economic and population growth, are likely to surpass the industrialized countries in their emissions levels within about fifteen years, and if they accept no restrictions, they will by themselves emit more than enough greenhouse gases to destabilize the atmosphere. The greenhouse emissions of China alone are increasing so fast that they are likely to exceed those of the United States in a decade or so. Partly for this reason, the leadership of the U.S. Senate has insisted that it will never ratify the climate treaty unless developing nations commit to "substantial participation" in an international emissions-control regime.

Might there still be a way to draw developing countries into a global agreement to reduce greenhouse emissions? One approach—pollution trading—has been endorsed by many economists and energetically promoted by U.S. negotiators. This essay seeks to clarify the economic and moral issues raised by this approach, and then to recommend an alternative strategy to be pursued in future negotiations with the developing world.

How Trading Would Work

At the insistence of the United States, delegates at Kyoto accepted a trading provision that rewards countries willing to reduce greenhouse emissions further than the treaty requires. These countries are allowed to sell credits for their "excess" reductions to other nations, who would then count them toward meeting their own targets. The U.S., for example, might choose to assist the Russians in converting their inefficient coal-burning electric utilities to cleaner and more efficient gas-fired power plants. The Russians would receive the new technology at little or no cost, and the U.S. would be able to take credit for the reduction in emissions from the Russian plants.

William Nordhaus, a Yale University economist, has estimated that developed nations would cut the costs of meeting their treaty obligations by at least 85 percent if they could apply to their own targets credits earned by reducing emissions in other nations. The reason is simple: It costs much less to achieve a 50 percent reduction in pollution from the dirtiest industries in Russia or India than to achieve a 10 or 20 percent reduction in European or U.S. industries that are already technologically advanced. Controlling pollution and increasing energy efficiency generally become incrementally more expensive as industry gets cleaner and leaner.

Because poorer and developing countries offer so many opportunities for the cheapest pollution reduction, the case for pollution trading appears to be obvi-

ous and persuasive. In an article published by Resources for the Future, a Washington policy think tank, economist and law professor Jonathan Weiner notes that a "world market for 'greenhouse gas' emissions abatement services could lower the costs of preventing global climate change, widen the availability of climate-friendly technology, and engage more countries in emission reduction efforts."

Nonetheless, developing countries have rejected the idea of pollution trading. Weiner speculates that their opposition may result from a "misunderstanding," implying that these countries do not appreciate the wisdom of economic theory. Alternatively, he suggests that developing nations may be acting out of self-interest rather than ignorance: Their rejection of pollution trading, he writes, may "mask a desire to gain leverage" in the negotiations to set emissions limits. Other critics point to a concern among developing countries

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greenhouse emissions?*

that trading will enable the U.S. and other wealthy nations to buy their way out of their obligations to reduce greenhouse emissions at home.

This last concern has been raised by critics in industrialized countries as well as the developing world. Michael Sandel, a professor of government at Harvard, has argued that although the trading scheme certainly makes economic sense, it fails to make moral or political sense. Specifically, Sandel argues that pollution trading, in spite of its obvious efficiency, confronts major ethical objections. We shall see that none of the ethical concerns Sandel raises withstand scrutiny. Yet a different moral problem may pose an insuperable obstacle to the trading of pollution credits as a way to control greenhouse emissions.

Removing a Stigma

First, Sandel contends that emissions trading "turns pollution into a commodity to be bought and sold," and thereby "removes the moral stigma that is properly associated with it." If nations that do not meet their targets are allowed to purchase credits abroad, they will, in effect, be paying a fee for the right to pollute. And a fee—unlike a fine—implies no moral stigma. Instead, it "makes pollution just another cost of doing business, like wages, benefits, and rent."

Sandel notes that our efforts to prevent despoliation of the environment generally depend on preserving the distinction between a fee and a fine. Imagine a



Jim Borgman

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wealthy hiker who tosses a beer can into the Grand Canyon. He would not escape moral censure simply because he was willing to pay a \$100 fine for littering. Indeed, by treating the fine as if it were merely "an expensive dumping charge," he would be guilty of undermining the shared ethic on which our laws against littering rest. In Sandel's view, the Kyoto treaty is intended to promote a similar ethic by stigmatizing practices that contribute to global warming. Emissions trading, he suggests, subverts that ethic when it allows nations that do not meet their targets to purchase credits abroad.

If Sandel's argument seems persuasive, that may be because many of us do think of pollution in moral terms: We condemn it as a kind of invasion or assault that has to be minimized if not eliminated. No one, we say, has a right to deposit his or her effluents on the persons or property of others. From this perspective, pollution constitutes a tort or nuisance—like a punch in the nose.

We may accept this principled argument about pollution in general, however, and yet question whether we should regard greenhouse emissions in the same way. In some measure, greenhouse emissions are the inevitable and unavoidable consequence of economic activity. Thus, it is difficult to argue that they are objec-

tionable in themselves. What is more, within limits, greenhouse emissions are safe for the global environment, since ecological systems, especially vegetation in the oceans and forests, can absorb them. Accordingly, it is not clear why society should condemn or stigmatize greenhouse emissions as it does toxic emissions.

Some environmentalists may reply that no one knows exactly how far greenhouse emissions must be reduced to avoid the risks associated with global warming. Indeed, the idea of a sharp line between safety and danger may make no sense in this context. But experts believe that capping aggregate emissions at 1990 levels worldwide will greatly slow or lower projected warming (while no action at all may well be catastrophic). It is reasonable to regard global emissions under the 1990 cap as posing an acceptable risk, given where we are now, what actions are feasible, and where the world is otherwise headed.

The trading provision of Kyoto accord, while not stigmatizing greenhouse pollution as Sandel would like, seeks to control it when it poses unacceptable risks. Emissions, even when traded, would count neither as unacceptably harmful nor as disrespectful to others so long as the aggregate levels of gases did not exceed the stringent global limit or cap. The basic problem is one of allocating a scarce resource (the ability of

**Graceful Simplicity:
Toward a Philosophy and Politics
of Simple Living**

Jerome M. Segal

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the atmosphere to process emissions), not one of penalizing inherently wrongful acts. The point of pollution trading, or any control strategy, is to maximize economic production while curtailing threats to the stability of the atmosphere. By driving down the costs of reducing pollution, and by providing an incentive for countries and industries to create cleaner technology, trading strategies allow nations to pursue economic growth while bringing global emissions within tolerable limits. Thus, pollution trading—at least for greenhouse gases—would seem to pass moral muster.

Evading Responsibility

This response to Sandel may not fully address one element of his critique: his concern that wealthy nations, by purchasing permits rather than reducing their own emissions, would express a callousness toward norms that govern or ought to govern the global commons. Emissions trading among nations, he writes, may "undermine the sense of shared responsibility that increased global cooperation requires." At first glance, it may not be obvious how the United States, Sweden, and other wealthy countries would undermine global cooperation if they enabled Russia, Poland, and other poorer countries to make their industries cleaner and more energy-efficient. To inform our intuitions on this matter, Sandel offers another analogy.

He asks us to imagine a neighborhood in which each family is permitted a single bonfire each year to burn unwanted leaves but can sell that permit and take the leaves instead to a community compost heap. When a wealthy family buys up the permits, perhaps for its own use or to clean the air, the "market works, and pollution is reduced, but without the spirit of shared sacrifice that might have been produced had no market intervened." The bonfires will be seen "less as an offense against clean air than as a luxury, a status symbol that can be bought and sold." Countries like the United States, which can enjoy bonfires by purchasing the necessary pollution credits, will seem privileged, while those who cannot afford these luxuries may grow to resent this difference.

In the context of global warming, bonfires are in fact a problem. In many developing countries, impoverished peasants burn forests to clear land for farming. These fires cause far more deforestation than all commercial uses of forests combined. Tropical deforestation, of which slash-and-burn farming is a principal cause, accounts for about 20 percent of total carbon emissions to the atmosphere. In addition, most of the wood from trees harvested in tropical forests—that is, those not cleared for farms—is used locally for fuel.

It seems plausible that wealthy countries, to reduce carbon emissions globally, might provide peasants

with the technology they need to increase yields on land better suited to farming than to forest. Wealthy nations might also help these peasants purchase food and fuel. In these ways, wealthy countries in a sense may "buy up" bonfires, as Sandel's example suggests. Why, though, should an effort like this—to help poorer nations develop a sustainable agriculture—engender their resentment? It is not as if the United States wants to buy pollution credits so that it may torch its own forests.

One may object that pollution trading would permit Americans to persist in their wasteful ways—driving gas-guzzling automobiles, for example—while purchasing compensating credits abroad. This objection misses a key point. If the United States were to take no action under the Kyoto treaty, its greenhouse emissions would increase by about 30 percent by the year 2012 (once again taking 1990 levels as the baseline). By agreeing to cut these emissions by 7 percent, the U.S. has undertaken a massive commitment—one that cannot be fulfilled through pollution trading alone. According to an American diplomat who negotiated the original climate treaty in Rio de Janeiro in 1992, the United States simply cannot find enough cheap pollution reductions abroad to reach the target. It will have to make politically unpopular improvements at home, even if it supplements these actions with purchased credits. Thus, it is inaccurate to compare the United States to the wealthy family burning all the bonfires it wishes. Developed countries will have every incentive to adopt at home the same efficiencies that they subsidize abroad.

An Insurmountable Objection

If one accepts the argument thus far, it may seem a matter for profound regret that emissions trading was not implemented in Buenos Aires. In rejecting such a scheme, the developing countries may appear to be alarmingly short-sighted. Such an assessment, however, would be unfair. This is because the defenders of pollution trading have glossed over a fundamental ethical problem—though not one that Sandel mentions.

If a system of pollution credits is to work, nations have to agree to a method of distributing initial allowances among themselves. Each nation has to accept a meaningful limit on its own emissions to provide a baseline from which it can sell or purchase credits. A global cap or limit on greenhouse gases, in other words, must be translated into an initial set of permits which nations can use or trade. Thomas Schelling, who teaches public policy at the University of Maryland, has expressed skepticism about the ability of nations to agree on this initial distribution. "Global emissions trading is an elegant idea," he has written, "but I cannot seriously envision national representatives sitting

down to divide up rights in perpetuity worth a trillion dollars."

Advocates of pollution trading often seem oblivious to this issue. They observe that once nations have accepted an initial allocation of permits, targets, or limits, they will be able to take advantage of emissions trading. But this is like saying that if nations had a can opener, they could use it to open a can. In fact, many developing nations have refused to participate in the

*Defenders of pollution trading
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Kyoto accords not because they oppose pollution trading as such—its advantages are perfectly plain—but because no one has suggested a sensible or fair principle on which to divide up initial emissions allowances under the global cap. Weiner does acknowledge "that it would be difficult to allocate emissions allowances." But, he goes on to say, "this problem is unavoidable in any climate agreement; emissions trading just makes allocations explicit." One would be hard pressed to find a plainer example of assuming the can opener.

Sandel is correct in believing that pollution trading, while economically efficient, fails to make moral and political sense. The reason, though, does not appear among the ones he mentions. The real problem—the intractable one—lies in identifying a principle on which to base an initial system of allowances. None is even under consideration. For this reason, pollution trading, while a no-brainer, is also a non-starter. China, India, and other developing countries have to wonder why they are called upon to cap their emissions at their 1990 baseline, say, at 1 ton per person, while Americans, who polluted twenty times as much in 1990, are rewarded with a 20-ton-per-person cap. These and most other developing nations have refused to accept any limits, even voluntary ones, until their emissions come to equal, on a per capita basis, those of wealthier countries.

Is there a non-arbitrary, morally attractive basis on which to distribute pollution allowances under a cap? People in colder climates may reasonably claim greater need than those in more temperate ones; those who produce necessary goods such as food (agriculture is fuel-intensive) may demand larger allotments than those that produce, say, entertainment. National boundaries seem arbitrary as a basis for distribution, since differences in per capita emissions within countries may be as great as the differences between them. Even if some sense of what justice demands could emerge in this context, moreover, it may not carry the

day against powerful interests which, as Schelling suggests, see a trillion dollars' worth of rights at stake.

Aiming for Efficiency

A way out of this impasse suggests itself. Developing nations will not accept overall limits on their greenhouse emissions. They may recognize, however, that the strongest economies, such as Germany and Switzerland, also have the cleanest, most energy-efficient technologies, and that it is in their interest to obtain such technologies for themselves.

Consider the comparative data on CO₂ emissions. In 1995, Russia managed a 1995 per capita GDP of only \$4,820, yet its CO₂ emissions per capita exceeded 12 tons. Compare this performance with that of Switzerland, which achieved a per capita GDP of about \$25,000, while emitting per capita only 5.5 tons of CO₂. Falling between these two extremes, Germany, with a per capita GDP of \$20,120, produced per capita emissions of 10.3 tons; this works out to about \$1 GDP per pound of CO₂. If Russia had the benefit of German technology and know-how, it could more than quadruple its economic performance with no additional pollution. With Swiss technology and organization, it could enjoy a twelvefold growth in its economy.

Industrialized and developing countries alike, then, should be able to accept as a target a *ratio between a country's per capita GDP and its emissions*. Wealthy countries would assist poorer ones to reach, say, the German ratio of \$1 GDP per pound of CO₂. This target, a distant but eventually achievable goal in developing nations, would constitute a minimum for the wealthier countries, which could promise to improve their own GDP/CO₂ ratios well beyond targets set for the developing world. Under this regime, all countries would move toward making their economies less dependent on fuels that produce greenhouse gases.

It is reasonable to hope that developing nations will sign on to a protocol that requires wealthy countries to subsidize their progress toward greater efficiency and productivity—so long as that protocol does not impose emissions limits inimical to economic growth. The Global Environment Facility (GEF) already operates as a mechanism for nations to cooperate in providing grant and concessional funding for investments in pollution abatement. In exchange for the cooperation of the developing countries, wealthy nations could agree to increase GEF funding for competitive proposals from the developing world.

The Real Choice

It is true that by seeking to improve GDP/emissions ratios, the world may not achieve the goal, envisioned at Kyoto, of stabilizing global greenhouse loadings at or below 1990 levels. But so long as developing countries refuse to freeze their own emissions at those levels, the goal cannot be achieved in any event. Despite the best efforts of the climate treaty negotiators, there is every reason to think that in 2012 or even 2020 the world will be emitting more greenhouse gases than it is today. The question we must ask about any proposed policy is not whether it will stabilize the atmosphere within the next fifteen or twenty years, but whether it will lead to less pollution than we would have under some other policy or in the absence of an agreement.

A worldwide attempt to make economies less and less carbon-intensive has the best likelihood of success. Insistence on pollution trading, in contrast, makes theoretical perfection the enemy of practical progress. As Peter J. Wilcoxon of the Brookings Institution observes, "The real choice is not between a sharp reduction in emissions and a more modest policy, but between a modest policy and no policy at all."

—Mark Sagoff

Sources: Hermann Ott, "The Kyoto Protocol to the UN Framework Convention on Climate Change—Finished and Unfinished Business," publication of the Wuppertal Institute for Climate, Environment and Energy, available at http://www.wupperinst.org/Publikationen/Kyoto_Protokoll.html (1998); Calvin Sims, "Poor Nations Reject Role on Warming," *New York Times* (December 13, 1997); Henry D. Facoby, Ronald G. Prinn, and Richard Schmalensee, "Kyoto's Unfinished Business," *Foreign Affairs* (July–August 1998); Jonathan B. Weiner, "Global Trade in Greenhouse Gas Control: Market Merits and Critics' Concerns," *Resources*, vol. 129 (Fall 1997); Michael J. Sandel, "It's Immoral to Buy the Right to Pollute," *New York Times* (December 15, 1997); Thomas Schelling, "The Costs of Global Warming: Facing the Trade-offs," *Foreign Affairs* (November/December 1997); Michael McCarthy, "Why Hot Air Is Stopping the World from Doing a Deal on Global Warming," *The Independent* (London) (November 14, 1998) (quoting the American diplomat at the Kyoto talks who argued that pollution trading credits alone would not enable the United States to meet its treaty obligations); Eileen Claussen and Lisa McNeilly, "Equity and Global Climate Change: The Complex Elements of Global Fairness," Pew Center on Global Climate Change (October 29, 1998), available at <http://www.pewclimate.org/report2.html>; Peter Passell, "Trading on the Pollution Exchange: Global Warming Plan Would Make Emissions a Commodity," *New York Times* (October 24, 1997) (quoting William Nordhaus and Peter Wilcoxon).

Open Admissions and Remedial Education at CUNY

In January of this year, the Board of Trustees of the City University of New York (CUNY) voted to phase out all remedial instruction at its four-year colleges and to deny admission to any student who has not passed three skills-assessment tests measuring competency in reading, writing, and mathematics. The purpose of the reform, its supporters contended, was to "raise standards" at CUNY, but not to eliminate remediation altogether or limit access to higher education. Students who cannot meet the new requirements may enroll in one of CUNY's junior colleges to begin their work toward a bachelor's degree, or seek to upgrade their skills during special summer sessions, or obtain remediation "elsewhere as may be available." As the chair of the Board explained during a prior vote in May 1998, the new policy calls for "more remediation, not less, but the venue is different."

The action by the Board seemed to write the final chapter in a story begun with dramatic fanfare in 1970 when CUNY embarked on an historic "open admissions" experiment. Back then, in the face of student strikes, mounting racial tensions in the city, and considerable political pressure, the university promised a post-secondary education to every high school graduate in the city. CUNY was flooded with new students, many needing extensive remediation to bring them up to college level, many possessing aims and values quite different from those of their predecessors. Faculty divided sharply over the task facing them, some committed to the proposition that all students can be educated, others alarmed at the decline in standards they saw ensuing. Writing twenty-four years later about City College, CUNY's best-known campus, James Traub, in his book *City on a Hill*, described the "culture fostered by the [open] admissions commitment."

Teachers who knew that they couldn't insist on the highest standards without losing much of their class had succumbed to the ethos of mediocrity . . . ; they waved as students went on to the next level, still locked in the simplest patterns of thought. And this was so despite City's very high attrition rate, which one could interpret either as proof of the school's high standards . . . or as a sign that the majority of students were unable to meet even fairly forgiving standards.

In reviewing Traub's book, one alumnus of City College offered this lament:

Once regarded as the jewel in New York's public higher education crown, it used to be called the Harvard of the proletariat. Today only half its students ever make it to graduation; the majority can barely read or write English or do basic math.

No wonder the current mayor of New York, Rudolph Giuliani, recently characterized the present condition of CUNY's senior colleges as "really sad."

Given these mournful assessments, it may seem that the Board of Trustees acted wisely in setting out to restore standards at City College and the university's other senior institutions. Yet open admissions alone did not create the problems now afflicting the various campuses in the CUNY system. And as we shall see, the new policy may have institutional and social costs that did not enter into the Board's calculations.

The History of Open Admissions

The checkered story of CUNY's experiment in open admissions reflects important changes in higher education generally since 1970. It also demonstrates the persistence of controversy about the meaning and value of "equal educational opportunity."

The purpose of the reform, its supporters contended, was to "raise standards" at CUNY, but not to eliminate remediation altogether.

After World War II, demand in the United States for higher education increased rapidly each decade into the 1970s. One effect in New York City of increased demand for limited college slots was a rising threshold for admission to the city's system of higher education. By the end of the 1960s, an applicant needed high school grades of B-plus or higher to get into one of the four-year colleges, and at least a C-plus to get into a two-year institution. Thus, calling City College the "Harvard of the proletariat" was not altogether fanciful. Getting into City College had become quite

difficult. However, its student body was less and less a mirror of New York City's "proletariat." During the 1950s, hundreds of thousands of whites had left the city, replaced by an equal number of African Americans and Puerto Ricans. Yet few of the children of these new residents got into City College or into CUNY's other four-year colleges. Because of their lower high school grades, they weren't qualified.

This exclusion had become politically untenable by 1970. Beginning that year, under the bold new open-admissions policy, students who graduated from high school with at least an 80 average in academic courses or ranked within the top 50 percent of their class could enroll in one of the senior colleges. High school graduates who did not meet these conditions were guaranteed a place in a community college or job-training program.

The effect was instantaneous and dramatic. Whereas 20,000 freshmen had matriculated in one

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in substantial numbers.*

CUNY institution or another in 1969, more than 35,000 showed up for registration in the fall of 1970. Forty percent of these newcomers to the senior colleges were open-admissions students. The proportion of black and Hispanic students in the entering class nearly tripled. At the same time, significant numbers of white middle-class students with solid if not spectacular academic backgrounds—students who would have gone to college in any case, but who would have been excluded from CUNY in the years when it was the Harvard of the proletariat—took advantage of open admissions to gain a tuition-free education.

On average, the open-admissions students arrived at CUNY with one-and-a-half fewer high school academic credits than regular students and grade-point averages that were six or seven points lower. A great many of these students fell below college level in their mathematics and language skills, and a substantial stratum of remedial courses was put in place at these institutions to make up for this lack.

What was the upshot of this experiment in open admissions? Was it a "failure," as one recent critic of CUNY, Heather MacDonald, has declared? We can supply several parts of an answer to this question thanks to the data gathered by David Lavin and associates, who tracked entering cohorts of students from 1970 to 1975, examining their progress (as well as the progress of other cohorts) at different intervals for more than a decade.

After five years, 26 percent of open-admissions students who entered a CUNY senior college in 1970 had graduated, 16 percent were still in school, and 58 percent had dropped out. By contrast, 48 percent of regular-admissions students had graduated, 12 percent were still in school, and 40 percent had dropped out. Disaggregated by race, the figures show that 23 percent of black open-admissions students in the 1970 class, and just 19 percent of Hispanic students, had graduated by 1975. In contrast, approximately 35 percent of white open-admissions students had gotten their degrees. The gap between the graduation rates for minority open-admissions students (21 percent) and regular-admissions students (48 percent) was even more substantial. Then as now, minority open-admissions students were likely to be older than regular-admissions students. They were also more likely to come from poor families, to work full- or part-time, and to exhibit academic deficiencies.

It may be misleading, however, to focus on graduation rates after five years. Consider what happens when degree attainment for the 1970 open-admissions freshmen in the senior colleges is measured not against the year 1975 but the year 1984. By this latter date, 56 percent had earned a B.A., including 49 percent of

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blacks. Because of their weaker academic preparation and their greater need to work while in school, minority open-admissions students traveled the route to a B.A. more slowly, but travel the route they did, in substantial numbers.

Quite clearly, a great many blacks and Hispanics achieved college degrees they would not have gotten but for their access to CUNY. In follow-up studies, Lavin and Hyllegard estimate that for an arbitrarily selected year in the late 1980s, these students earned \$67 million more than they could have expected without their college degrees. Given the increase in lifetime earnings that this figure suggests, the financial value of open admissions for these students, and for New York City, turns out to be pretty impressive.

A Period of Declines

What happened over the years to produce the dour evaluations of CUNY's condition by Traub, Giuliani, MacDonald, and others? What happened to prompt the Board of Trustees to embark this year on radical surgery for the senior colleges?



*Graduation day, Lehman College, 1998
Photograph courtesy of the City University of New York
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The original open-admissions policy at CUNY was short-lived, in fact. By 1976, several changes in the policy converged with changing demographics in New York City to alter the picture at CUNY campuses. Foremost among those changes was the imposition of tuition, forced on the city by its near-bankruptcy in 1975. Tuition changed the incentives facing new high school graduates. Middle-class white students who had flocked to CUNY because it offered a cost-free alternative to the state university or a private college no longer had a reason to prefer it. Their enrollment at CUNY dropped precipitously. Middle-class minority students likewise faced changed incentives and increased opportunities to go elsewhere. Very poor minority students, on the other hand, were eligible to have their CUNY tuition paid for by the state. Finally, blacks and Hispanics earning too much to get state support, yet tied to CUNY as their only viable source of education, had to march even more slowly down the degree path as they shifted toward more part-time study and interrupted their course-taking more frequently to work.

Their progress was yet further impeded by new academic hurdles. In 1976, admission to a senior college was limited to high school graduates with an 80 average or a rank in the top 35 percent of their class (as

opposed to the top 50 percent in 1970). Moreover, skills tests in writing, reading, and math became mandatory gateways to the junior year.

The upshot of the new rules was a sharp decline in the number of freshmen at CUNY. More than 10,000 fewer students showed up at the senior colleges in 1976, reflecting an enrollment drop that in subsequent years has not been made good at many campuses. City College, the focus of James Traub's study, illustrates the trend. In 1969, the year before open admissions, the college enrolled 1,752 freshmen; in 1970, that number rose to 2,742. The following year, City College reached its high point, with 3,216 freshmen. By 1991, however, freshman enrollment had fallen to 1,240—a figure reflecting, as Traub noted, the lingering effects of the 1976 changes. To this day, enrollment growth represents one of City College's critical needs.

One might think that since standards were raised in 1976, the average quality of students at CUNY would have improved as well. But once again, demographic and social factors alter the picture. Freshmen entering CUNY in the 1980s and '90s were increasingly likely not to speak and write English as their native language, while students entering from New York City high schools were less academically able than they had been three decades ago. As a consequence, students at

the four-year campuses needed more, not less remediation. Two-thirds of the 1980 freshman cohort at the senior colleges took remedial courses, compared to one-third in 1970. Their dropout rate after the first year was twice as high. Their grade-point average at the end of four semesters was one-fifth of a grade lower than that of the 1970 cohort.

What was true of the 1980 cohort remains true today. Two-thirds of the Lehman College freshmen initially fail the writing test; fewer than 25 percent initially pass all three skills tests. Only 14 percent of the freshmen at Medgar Evers College pass all three tests upon entry. Even at Queens College, perhaps academically the best CUNY campus, half the entering students initially fail one or more of the tests.

Setting Standards

If the present condition of CUNY is "really sad," as Mayor Giuliani suggests, major surgery may be the answer. But what realistic standard should the city and the state set for CUNY? The mayor pegs his description to the very low "on-time" graduation rate at CUNY—just 8 percent of students in the senior colleges get a B.A. after four years. However, while very few CUNY students acquire a B.A. in four years, after six years their graduation rate rises from 8 percent to 32 percent—not so obviously a "sad" rate, even if an improvable one. What rate should we expect?

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Heather MacDonald contrasts the CUNY rate to the 56 percent six-year rate within SUNY, New York's state university system. The gap is considerable. However, MacDonald fails to draw some other revealing contrasts. She neglects to note that while fewer than 28 percent of SUNY students come from families making less than \$25,000 a year, 72 percent of CUNY students do. (Nationally, 30 percent of college students come from families making more than \$50,000; only 4 percent of CUNY students do.) Likewise, she neglects to note that while 44 percent of full-time SUNY students

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are eligible for some degree of state tuition assistance, 61 percent of CUNY students are. She fails to compare SUNY and CUNY students in terms of age, native command of English, family responsibilities, and time spent in the workplace. Yet each of these factors bears on how quickly, or slowly, students proceed toward a baccalaureate. In fact, SUNY and CUNY serve very different populations. CUNY students typically work more than SUNY students do, interrupt their studies more frequently and for longer periods, and begin with greater academic deficiencies.

Still, it doesn't seem unreasonable for the Board of Trustees to aim for a higher rate than 32 percent. The question is how to make the rate better, and at what cost. Both Traub and MacDonald provide examples of CUNY students truly out of place on a college campus—continually failing their skills tests, mired in remedial courses, unable to read and write, wasting their own time and the resources of the city and state. Excluding these students would seem a sensible first step in improving standards at CUNY. At the same time, Traub and MacDonald provide examples of "diamonds in the rough," students whose initial academic records were checkered with deficiencies yet who seized the opportunity they were given to proceed successfully to the B.A. Given CUNY's historic legacy as a conduit of opportunity for New York City's "proletariat," a policy of raising standards ought not to exclude such "diamonds in the rough."

How can policy distinguish between the two kinds of students? One way would be to differentiate among deficiencies. Not all academic deficiencies are the same. As research by Clifford Adelman suggests, if a student is deficient in math, say, but not in reading and writing, that deficiency usually can be successfully remedied in college. The same is true for a student deficient only in writing but not otherwise. Students

who face remediation in more than one area, however, have a much rockier time of it: the amount of remediation matters. More importantly, the *kind* matters. Inability among native speakers of English to read well constitutes a far more serious impediment to a successful college career than inability initially to pass math and writing tests. Observes Adelman: "When reading is at the core of the problem, the odds of success in college environments are so low that other approaches [than remediation in four-year colleges] are called for."

One option, then, in seeking to raise standards is to exclude from the senior colleges native speakers of English who cannot pass the reading skills test. (The Board of Trustees, in excluding from four-year programs those students who fail any one of the tests, made an exception for ESL students—students who speak and read a language other than English. ESL students were among those Traub depicted at City College as defying, and often overcoming, enormous obstacles to get an education.)

Other policy options, too, were available to the Board of Trustees. One member, for example, unsuccessfully urged the Board to allow entering students who passed the math and reading tests an extra semester to pass the writing test. As it turns out, more students by far fail the writing test than fail either the math or reading test. At Medgar Evers, 48 percent of

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the freshmen pass the reading test, 43 percent the math test, and 26 percent the writing test. At Queens, 72 percent pass the reading, 82 percent the math, and 55 percent the writing.

The policy actually enacted by the Board of Trustees is the most draconian of the options. It takes all the skills tests previously used as gateways to the junior and senior years and makes them conditions of admission to a four-year college. As a result, freshman enrollment at the senior colleges could drop as much as 45 percent, according to estimates by the CUNY Chancellor's office. At some campuses, the drop could be substantially greater.

Anticipated Gains

The policy of eliminating all remedial classes will single out the four-year colleges of CUNY as rarities in the United States. Seventy-two percent of all four-year institutions offer some remedial classes. Numbered among these are many substantial and

creditable public universities—including the four-year campuses of the SUNY system, which MacDonald and Giuliani are otherwise prone to hold up as models for CUNY. For example, the SUNY College at Oneonta offers zero-credit courses in writing and math. The SUNY College at New Paltz provides remedial courses in math, writing, and study skills. Even SUNY-Albany, one of the system's four university centers, offers a tier of non-credit "university development courses."

Why did the Board of Trustees adopt such a draconian policy? Because it sees the policy as all gains and no costs. The gains it hopes for are many. For one

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thing, the quality of classroom instruction will go up and the good students at CUNY will begin to get the really first-rate intellectual experience they deserve. For another, the city's high schools will be forced to change their ways, providing better academic preparation. In 1970, it was thought that CUNY's open-admissions policy would spur high schools to do better, since they could see a realistic prospect of placing many more of their students into higher education. However, the high schools got worse, not better, in the 1970s and '80s. The current Board of Trustees means to shock them into real reform.

Just as important, the Board means to shock students into taking more academic courses and making sure their skills are up to par. Fewer than 19 percent of New York City's students take a Regent's diploma, notes MacDonald. The Regent's diploma signifies that a student has completed a solid academic curriculum, consisting of courses like algebra and geometry rather than consumer math. The importance of a solid academic curriculum cannot be overstated. Adelman shows that the breadth of academic subjects in a high school student's record is a better predictor of college success than either grades or class standing. Some students arrive at college with limited academic preparation because their high schools offered an inadequate curriculum, but others arrive deficient by their own choice, having avoided harder, academically challenging courses. The Board of Trustees expects its new policy to stimulate a new sense of responsibility among high school students.

This expectation may meet with some success. After the Board first voted on the new policy in May of last year, the number of students availing themselves of free CUNY summer remedial courses nearly

doubled from the previous summer. Through increased diligence, New York City high school students may pass the freshman skills tests in unexpectedly high numbers. If this happens, the declines in senior-college enrollment will not be as great as feared.

The Cost of Exclusion

Still, many students who otherwise would have attended a senior college will certainly be excluded under the new policy. The Board does not count this exclusion as a cost. Students who seek educational opportunity at CUNY will still have it. Students who need remediation will still get it. As members of the Board continually emphasized, its new policy does not end remediation; it only *changes its venue*—from the senior to the junior colleges. The new policy is not an assault on CUNY's historic role of providing educational opportunity to all; it simply reorganizes in a more effective way how the different parts of CUNY play that role. So argues the Board.

Is it indeed better to move students toward the bachelor's degree by placing those in need of remediation into community colleges? Aren't these institutions the appropriate venue for preparing students to go on to senior college? In the abstract, this strategy seems plausible, but in practice an important consideration speaks against it. Community colleges seem, in fact, to hold back rather than propel students toward the B.A. This phenomenon is a general one. Studies show that students who enter junior colleges have vastly lower rates of B.A. attainment than students who directly enter four-year institutions. A good deal of this disparity, of course, is what we would expect, given that students often enter junior college aiming only for an associate's, not a bachelor's, degree; that students who attend junior college are typically less academically prepared than those who enter senior college; and that junior-college students are more likely than their senior-college counterparts to work part- or full-time. However, a significant gap in B.A. attainment remains even when we control for these variables. Students who have the same degree aspirations, high school preparation, and off-campus work responsibilities succeed less frequently in getting their B.A.'s if they start their academic careers in a two-year college.

The studies by Lavin and associates show this effect operating in the CUNY system as well. They found that "two-year entrants were 19 percentage points less likely to earn a baccalaureate than comparable students who started college in a four-year school." Part of this gap arises from two-year entrants' not proceeding onward to senior college, but part arises from their lesser success even when they do. In their study of the open-admissions cohorts, Lavin and associates found that "senior college natives did con-

siderably better than community college transfers with comparable high school averages." Put simply, certain factors in community-college culture discourage B.A. aspirants from pushing forward to senior college, and the quality of classroom instruction in junior college is inferior to senior-college instruction. Transfer students from community colleges are ill-prepared for senior-college work.

Thus, the new CUNY policy of shifting the remediation burden to community colleges is likely to mean that even in the best of circumstances, fewer of New York's "proletariat" will make their way into the ranks of the college-educated than do now. If the circumstances are not the best—if the community colleges are required to educate tens of thousands of new students without commensurate increases in their real resources—then the Board of Trustees' policy will emphatically not be all gains and no costs. It will exact a considerable toll in educational opportunity.

A High-Risk Gamble

In the last twenty-eight years, scores of thousands of lower-class blacks and Hispanics, and more recently Asians, have earned a bachelor's degree from CUNY that they would not have attained had the CUNY admissions standards of 1969 remained in place. That is a genuine accomplishment to be balanced against the putative costs of lowering the admissions bar.

What were those costs? Obviously, inefficiency comes first to mind. An institution graduating a very low percentage of its entrants over eight years is operating inefficiently, it can be argued. There has to be a better way to match student capabilities with college demands. Secondly, the general quality of instruction suffers at colleges trying to digest too many ill-prepared students. It is difficult to quantify a decline in faculty morale or the slackening of intellectual rigor in the classroom, but "quality" is something real and its loss is to be regretted. The mediocrity in the City College classroom noted by Traub blights the performance of faculty and students alike. The Board of Trustees' desire to improve the quality of instruction at the CUNY senior colleges is not misguided. Its new policy, however, may be.

As Traub recounts, City College achieved its reputation as the "Harvard of the proletariat" largely because of the students it attracted in the 1930s, '40s, and '50s—children of Jewish immigrant families who made up a substantial majority of the college (and who made up a substantial share of the students at Queens, Brooklyn, and the other four-year institutions). These students, writes Traub, had an incredible thirst for learning and, despite their often impoverished backgrounds, came to college academically prepared.

This isn't the population CUNY draws from in 1999. The contemporary "proletariat" of New York City is the product of underperforming high schools, broken families, and different cultural aspirations for education. The college degree has become a necessary credential for entering the middle class, and CUNY students strive hard for it, often in the face of overwhelming odds. But they take a largely instrumental view of their education. A substantial amount of first-rate intellectual work still goes on at the CUNY senior colleges, but the center of gravity has shifted. No amount of "raising standards" can restore the "Harvardness" of City College.

Nevertheless, the campuses of CUNY can be made better. There are different possible paths to that goal. The path chosen by the Board of Trustees is a high-risk gamble that will be known by its fruits—as a bold and daring innovation that lifted underperforming high schools out of their apathy and prompted irresponsible students to get serious academically, or as a disastrous and rigid miscalculation that eviscerated the senior colleges and had to be undone not long after its adoption.

—Robert K. Fullinwider

Sources: The Board of Trustees of the City University of New York, text of Resolution 9 (January 25, 1999) and minutes of the Board meeting held on May 26, 1998; James Traub, *City on a Hill: Testing the American Dream at City College* (Addison-Wesley, 1994); Morris Freedman, "Sad City," *American Scholar*, vol. 64 (Autumn 1995); Rudolph Giuliani, "1999 State of the City Address" (January 14, 1999); David E. Lavin and David Hyllegard, *Changing the Odds: Open Admissions and the Life Chances of the Disadvantaged* (Yale University Press, 1996); David E. Lavin, Richard D. Alba, and Richard A. Silberstein, *Right Versus Privilege: The Open-Admissions Experiment at the City University of New York* (Free Press, 1981); Heather MacDonald, "Downward Mobility: The Failure of Open Admissions at City University," *City Journal* (Summer 1994); Report of the Evaluation Team of the Middle States Association of Colleges and Schools (1998) (noting City College's critical need for enrollment growth); William Trombley, "Remedial Education Under Attack," *National Crosstalk*, vol. 6 (July 1998) (providing recent pass/fail rates for the freshman skills tests); statement by Trustee James Murphy, minutes of the Board meeting held on May 26, 1998 (citing the Chancellor's estimate of the enrollment drop that will result from the Board's action); SUNY Office of Finance and Management, *SUNY Facts & Figures* (October 1996); CUNY Office of Institutional Research and Analysis, *CUNY Student Data Book: Fall 1997* (July 1998); Clifford Adelman, "The Kiss of Death? An Alternative View of College Remediation," *National Crosstalk*, vol. 6 (July 1998); Karen Anderson, "Classes Are Full at Catch-Up U," *New York Times* (May 31, 1998); comments by Kathleen Pesile, CUNY Trustee, minutes of the University Faculty Senate meeting held on January 26, 1999 (describing the effect that the Board hopes its action will have on high school students); "Good Summer News at CUNY," *New York Post* (June 6, 1998).

The Ethics of Representation: Realism and Idealism in Children's Fiction

In a recent article for *Horn Book*, a journal devoted to children's literature, Anne Scott MacLeod takes a number of well-regarded historical novels to task for imposing contemporary values and ideals upon the past. For example, in *Catherine, Called Birdy*, a Newbery Honor book, a medieval heroine is portrayed as an outspoken feminist; in another Newbery Honor book, *The True Confessions of Charlotte Doyle*, a nineteenth-century girl becomes captain of a mutinous sailing ship.

I want to use MacLeod's criticisms of historical novels to raise ethical questions about realism and idealism in children's and adolescents' fiction more

generally. The kinds of questions I will address are already familiar to authors and educators who must decide how to interpret and fulfill their obligations to historical (but also contemporary) truth. Should they present figures such as Abraham Lincoln and Martin Luther King, Jr., simply as heroes, concentrating on the towering achievements for which they are now famous, or offer a more problematic portrait of these real human beings, warts and all? Similar questions surround media portrayals aimed at a broader, largely adult audience. Does a program like *The Cosby Show* perform a useful social function by showing the

success that African Americans can achieve, or should it be criticized for failing to acknowledge the grave problems of poverty, crime, and substance abuse afflicting many minority communities?

My decision to focus on children's fiction stems both from the fact that children (a group presumably in need of and entitled to some special protection) are the audience, and from the distinctive characteristics of fiction, which seems to have a greater latitude than nonfiction to show us not only the world as it is but also the world as it might be. I also have a personal interest in this subject, as I am myself a writer of children's fiction—and, I might as well say, one who was once castigated in the most public of forums (the *New York Times Book Review*) for writing fiction that portrayed a child in a relatively happy and intact family dealing with problems of sibling and peer dynamics rather than, in the charge of the reviewer, drive-by shootings and prenatal crack addiction. (The reviewer called the book "science fiction about a family in a parallel universe"!) Finally, I have chosen this topic because the arguments for realism and idealism in children's fiction can provoke discussion of broader issues—social, historical, and educational—in the ethics of representation.

Looking for Realism

Anyone who reads reviews of children's literature will have noticed that the bleak books (the ones with the drive-by shootings) are often described as realistic, while the hopeful books (the ones without the drive-by shootings) are called idealistic. I want to begin by challenging these labels themselves. For it is a mere prejudice of the gloomy that portrayals of the darker side of life have a monopoly on realism. Indeed, many books widely praised as "realistic," such as those of Robert Cormier, are in my view extremely unrealistic, bordering on fantasy. Cormier's novel *The Chocolate War*, for example, is a grim tale of the mayhem and sadistic violence that can erupt when a lone individual challenges a monolithic system—here, when a child refuses to participate in his school's annual candy sale. Apparently Cormier based the novel on a real-life incident, his son's refusing participation in a similar fund-raiser. The only difference is that in real life—unlike in the "realistic" novel—school officials told the boy, no problem, it wasn't a big deal, he could participate or not, as he chose. Realism?

Still, we can draw some rough distinctions between fiction that tries to show us the world as it is versus fiction that tries to show us the world as it should or could be. We can then ask which sort of fiction—as authors, editors, teachers, librarians, parents—we should be offering our children, and why. Here we encounter two kinds of arguments, both of which, I will argue, are problematic.

First, in defense of realism, is the argument for the value of truth, for "telling it like it is," for an honest witness to the world as we actually find it. Children, this argument goes, have a right to be told the truth, as best as we can tell it. Besides, if we don't tell them the truth, they'll find it out anyway, eventually, and then distrust us for having withheld it from them.

The problem with this argument, put simply, is that there is no one truth out there that fiction can be required to mirror. Even with nonfiction, the question of what is truth is highly contested. MacLeod writes, "The German historian Leopold van Ranke said that writing history was saying 'what really happened'—but according to whom? Writers of history select, describe, and explain historical evidence—and thereby interpret. Not only will the loser's version of the war never match the winner's but historical interpretations of what happened, and why, are subject to endless revision over time." If this is true of nonfiction, how much more so of fiction, which is by its nature, well, fiction. So long as it is true to its characters, to its own story, it arguably need make no claim of being statistically representative of some larger reality. Judith Lichtenberg, writing on portrayals of minorities in TV dramas as well as in newscasts, points out, "A cop show is not a statistics textbook. Actually, a news story isn't, either. What's news, as any elementary course in journalism will tell you, is what's new, different, out of the ordinary. So even in the allegedly real world that news reporters are supposed to cover, the relevance of the typical is unclear." We go to fiction, in particular, to see characters who defy the typical, who break the mold, who dare to do what the rest of us may only dream of doing.

Nonetheless, we still expect in realistic (as opposed to fantasy) fiction some attempt to anchor its story in reality. Indeed, even in fantasy fiction, we expect an author to be true to the grounding rules of the fantasy world he or she has created: either animals can talk in this world, or they can't; either one can go backwards in time in this world, or one can't. The rules don't have to be the rules that govern our world, but what rules there are must still be obeyed.

Time-Travelers

With historical fiction, especially historical fiction for children, it is hard not to see some necessity for trying to be faithful to the actual past. If you aren't going to give a fairly faithful portrait, why write about the past in the first place? Why set your book in this or that century, this or that historical epoch? Many historical novels do have at least some implicit educational objectives—to acquaint children with another time and place, to make history "come alive" for young readers; many are adopted for curricular use, to flesh out text-



"Do you have any bedtime stories that aren't about the former Yugoslavia?"

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book accounts of the period under study. At the minimum, authors need to do their research and give accurate descriptions of the clothing, utensils, food, and so on of the period in question. Anachronisms here spoil our enjoyment of the story and make the reader regret her willing (and now seemingly gullible) suspension of disbelief. Likewise, one could argue that historical fiction should strive to be true as well to the intangibles of its period: to the attitudes, values, and worldview of the people who inhabited it.

This is the argument that underlies MacLeod's critique. "Too much historical fiction," she writes, "is stepping around large slabs of known reality to tell pleasant but historically doubtful stories. Even highly respected authors snip away the less attractive pieces of the past to make their narratives meet current social and political preferences." For example, in the case of novels about girls or women, "authors want to give their heroines freer choices than their cultures would in fact have offered. To do that, they set aside the social mores of the past as though they were minor afflictions, small obstacles, easy—and painless—for an independent mind to overcome." MacLeod continues, "These protagonists experience their own societies as though they were time-travelers, noting racism, sex-

ism, religious bigotry, and outmoded belief as outsiders, not as people of and in their cultures."

What exactly is the problem with this? MacLeod argues that by denying us a realistic understanding of the past, such novels subvert the special purpose of historical fiction: to convey the widely divergent possibilities of human experience. "Historical fiction writers who want their protagonists to reflect twentieth-century ideologies . . . end by making them exceptions to

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their own cultures, so that in many a historical novel the reader learns nearly nothing—or at least nothing sympathetic—of how the people of a past society saw their world." People of the past, MacLeod insists, "were not just us in odd clothing. . . . To wash these differences out of historical fictions is not only a denial of historical truth, but a failure of imagination and understanding that is as important to the present as to the past."

Now, while historical fiction may have the special mission of presenting another time and place with reasonable accuracy, much of children's fiction is freed from this charge. Some fiction may be overtly sociological in nature—trying to show readers, say, what it is like (really like) to live in a housing project, or to be a migrant worker; other novels, though, are just trying to entertain, or perhaps to teach some lesson about how to get along in the world, against the backdrop of a social milieu more or less taken for granted.

Living Without Philosophy: On Narrative, Rhetoric, and Morality

Peter Levine

In *Living Without Philosophy*, Peter Levine examines how we derive moral lessons from stories. Some theorists argue that any story with a moral meaning must contain—either implicitly or explicitly—general doctrines or principles. If that were true, then we would have to analyze narratives to discover their assumptions, and we would need philosophy to decide whether these assumptions were right or wrong. Levine argues, on the contrary, that narratives can carry moral meanings without relying on general principles. Further, he reveals some of the moral pitfalls that arise when we reason from ethical rules or doctrines. He provides both a philosophical argument for his position and readings of literary texts in which moral theorists are portrayed as characters. These works include Plato's *Protagoras*, selections from the Gospels and Dante, Boethius' *Consolation of Philosophy*, Erasmus' *Praise of Folly*, Shakespeare's *King Lear*, Nabokov's *Lolita*, and Martin Luther King's *Letter from Birmingham Jail*.

"*Living Without Philosophy* is very well written, clear, and easy to read. It relates previous debates in the history of ideas to contemporary issues in an enlightening and unusual way and its topic is centrally relevant to current debates about the proper nature of moral theory."

—Jonathan Dancy, University of Reading

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Yet, here, too, I think we know when authors are deviating from reality as they know it—to try to establish a role model, defy a stereotype, make a point. In one of my own easy-reader books, Gus learns to ride a two-wheel bike without training wheels and finally catches up with the superior neighbor boy; the book is based on my own son's struggle to ride a bike, at an age when he was eclipsed by our superior (and wealthier) neighbor boy. Now, in my personal real life, the perfect neighbor boy was white. In the pictures for the book, his fictional counterpart is African American. The illustrator was free to draw the character this way—authors aren't supposed to dictate details that aren't supported by the text, and I had made no reference at all to the boy's race. Still, in real life more generally, few of us live in integrated neighborhoods, and seldom is it the nonwhite child who is more privileged than the white.

Why did the illustrator want a black character in the book? For obvious reasons: to let black children see themselves in the pages of fiction, as they still relatively seldom have the opportunity to do; and perhaps to take one small step toward the day when integrated neighborhoods and mixed-race friendships will be less of a rarity.

Similarly, I often take pains in my books to depict fathers participating in household chores to a much greater degree than, to take one salient example, my own husband does. I've also made the mothers in my books kinder and gentler than, to take another salient example, I am myself. When children in my books play cruel pranks, these are much less cruel than some I've seen in real life; when they indulge in coarse humor, it's much less coarse than humor that delights my own boys. In softening the contours of both cruelty and coarseness, I am deliberately trying to avoid suggesting that cruelty and coarseness are the norms in children's culture—and, by so doing, to avoid reinforcing these as norms. After all, the world that children experience is in some significant part the world we create for them. And I am trying to create a certain kind of world for children—in the books that I write for, and read to, those few children I am able to reach.

In Defense of Idealism

We have now clearly segued into the argument for at least some degree of idealism in children's books. I think that in defense of idealism, perhaps the most compelling argument is a consequentialist appeal to results: We will do better at producing moral children, who will actually try to improve the world, if we make solutions seem at least possible, if we offer role models and heroes. Writing on the presentation of history to young students, Robert Fullinwider suggests that if we want to cultivate patriotism and civic pride

in our children (a legitimate objective, in his view), the history we present to them "cannot be 'debunking'; there have to be forefathers and foremothers worth admiring and emulating, and moral enterprises in which pride can be taken. Nor can it be 'objective' where this means introducing the full complexity of all the issues surveyed. Just as teaching the virtues must start with simple rules, teaching national history in order to develop civic attachments must start with simple (and thus selective and distorted) accounts of the course of national development."

In assessing the case for idealism, I must remind myself that we writers enforce certain norms, in however small and subtle a way, whatever we write. Even if we are only trying to present "the world as it is," if we present that world without calling it overtly into question, and if we populate it with likeable characters with whom the reader identifies and who themselves seem to endorse that world, we suggest, if only by our silence, that the world as it is is the world as it ought to be. Which is why authors who present unpalatable features of the "real world," past and present, often do try to distance themselves from them in various awkward and unconvincing ways. This is why, in the books to which MacLeod objects, sympathetic characters are introduced to question slavery, or witchcraft trials, or anti-Semitism—because otherwise the author feels she has left these unchallenged, even implicitly endorsed.

In fact, even when characters within a book do voice objections to certain unsavory attitudes displayed there, some readers may still feel disturbed that these attitudes are not denounced more vehemently. In the *Little House* books of Laura Ingalls Wilder, for example, Ma consistently expresses hatred of Indians, while Pa and daughter Laura question these attitudes and at points feel a strong identification with Indian characters. That Ma remains a basically sympathetic character despite her prejudice—a prejudice, moreover, that was widely shared in the period—has given some Native American parents cause to refuse to share the *Little House* books with their children.

Requisite Rainbows

I want to develop (briefly) two lines of objection to the argument from idealism. First, though it may seem plausible that idealistic portraits help children grow morally, while realistic portraits can inhibit moral growth (or, at the least, cause significant, uncompensated pain), such an argument is impossible to evaluate in the absence of empirical evidence—and it is highly doubtful that such evidence will ever exist. There are so many moral influences on children that it is exceedingly difficult to isolate and identify the effects of any single one. As Lichtenberg points out,

looking at the empirical research on media portrayals of minority characters, "Studies of audience effects . . . are often vague and inconclusive; it's always hard to know whether the 'effects' alleged result from the particular viewing in question or from other phenomena, such as more pervasive social attitudes." Moreover, we would need some way to decide whether the portrayal of specific attitudes was ultimately harmful. One might, for example, learn from the portrayal of Ma in the *Little House* books the valuable lesson that adult wisdom is not always commensurate with adult authority. If so, children might on balance gain rather than lose from their literary encounter with Ma.

The second objection to an insistence on idealism in children's fiction is that a certain politically correct form of mandatory idealism in children's books has become oppressive both to writers and to readers in its own right. A friend of mine who does textbook illustrations has stories that are both comic and sad about the rigidity of the requirements imposed on textbook illustration: no female character can ever be shown as anything other than strong and triumphant (an illustration was rejected that showed a little girl making a gesture of shyness and hesitation upon her introduction to the queen; the illustration was accepted when the same shy, hesitant gesture was made instead by a little boy).

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I recently had occasion to do a study of children's books about urban gardens—a spate of books in which inner-city communities reclaim vacant lots to create thriving, multicultural spaces. All the books present the requisite rainbow of ethnic diversity; all show characters transforming themselves and their communities with conflict-free ease. The most extreme of these books is Paul Fleischman's much-praised *Seedfolks*. Fleischman's story of the communal transformation of the garden and the individual transformation of all those involved in it is narrated by thirteen different characters: his speakers are Vietnamese, Rumanian, Guatemalan, Jewish, Haitian, Korean, Mexican, African American, Indian, British, even plain old American white. And just when the cynical reader asks herself, "But where is the person in a wheelchair?" in rolls Mr. Myles, black *and* in a wheelchair. Fleischman's characters are typically transformed instantly—literally instantly—by their very first glimpse of the garden. Thus Gonzalo's great-uncle Tio Juan, who has become childlike and dependent after

his move from Guatemala to the United States, goes out to plant some seeds and *that very day* his eyes become "focused, not faraway or confused. He'd changed from a baby back into a man." While the book affects a flavor of gritty realism (in its descriptions of the litter, the trash, the obligatory scurrying rat), at a deeper level, it is, in my view, offensively unrealistic.

Now, the argument from idealism can reply that there is something wonderful about offering to young children a harvest of hope that we, individually and collectively, can transform ourselves in this positive, life-affirming way. The yearning for a return to and redemption in a garden has haunted the poets and mythmakers of virtually every culture; why shouldn't

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it haunt us still? Gardens *are* magical places; our cities *do* need whatever help we can give them by planting whatever seeds we can plant. Yet the clichés of *Seedfolks* affront me. Cultural diversity should be celebrated, but not so mechanically; individual and communal transformation is possible, but not instantaneous. Our problems are real; the solutions to them will not be easy.

Books for Thoughtful Readers

We have now come full circle back to the argument for realism. Karl Marx famously remarked that the task of philosophy is not to understand the world, but to change it. The argument from realism says that we need to understand the world *in order to* change it—that if you're going to plant a garden, you're going to have to dig in the dirt and emerge from your garden with some dirt under your nails.

What then, are my conclusions? Do I want to say that it is wrong to portray interracial friendships out of proportion to their occurrence in the population? That it is wrong to soften the cruelty of children, to temper the excesses of their humor, to blunt the expressions of racism and sexism and xenophobia as we move from real life to children's books? No. Children are children; they need to be introduced to the harsh realities of the world both gently and gradually. (We also need to remember here the earlier point that not all realities are harsh.)

As a fairly tentative suggestion, I want to close by making a recommendation against what I will call "incidental realism" and "wholesale idealism." By "incidental realism" I mean "touches" of negative realism that don't play a central role in the larger

story: minor characters who make a racist remark that is left unchallenged within the framework of the story, throwaway lines of gratuitously coarse humor (even though this is indeed the kind of humor kids would be cheerfully sharing on the playground), and so on. Here, the effect of such negatively realistic touches, I think, is merely to reinforce features of the culture that we would prefer instead to moderate or banish altogether. However, in novels of "wholesale realism," the negative features of the world in which we live—or in which others once lived—can be presented in all their complexity for the examination of the thoughtful reader, who would be done a disservice by the simple-minded skewing of reality that MacLeod decries. I would place the *Little House* books, for example, in the category of wholesale realism, though their joyful portrayal of prairie homesteading has idealistic elements as well.

With idealism, I want to suggest, the situation is reversed. I would encourage "incidental idealism"—showing the dad doing the dishes, drawing the boy next door as African American, giving a glimpse of a few small possibilities for social change—but I would discourage "wholesale idealism"—the icky, smarmy, blatant political correctness that hits us over the head in Fleischman's *Seedfolks*. This, too, does the thoughtful reader a disservice.

And of course, this tentative recommendation is accompanied by the further conclusion that what we need to do most of all is to provide children with *lots* of books, both realistic and idealistic, in a wonderfully broad range of ways—as well as lots of opportunities to talk about these books, and some of the deeper questions they raise, with parents, with teachers, and with each other.

—Claudia Mills

Claudia Mills, assistant professor of philosophy at the University of Colorado at Boulder, will publish two children's books this year: *Gus and Grandpa and the Two-Wheel Bike*, illustrated by Catherine Stock (ages 4–8), and *You're a Brave Man, Julius Zimmerman* (ages 8–12), both from Farrar Straus Giroux. Sources: Anne Scott MacLeod, "Writing Backward: Modern Models in Historical Fiction," *Horn Book*, vol. 24, no. 1 (January/February 1998); Judith Lichtenberg, "Truth, Ethnic Stereotypes, and the Media," lecture presented at Webster University (February 1999); Robert K. Fullinwider, "Civic Education and Traditional American Values," in *Values and Public Policy*, edited by Claudia Mills (Harcourt Brace, 1992); Ann Romines, *Constructing the Little House: Gender, Culture, and Laura Ingalls Wilder* (University of Massachusetts Press, 1997); Paul Fleischman, *Seedfolks*, illustrated by Judy Pedersen (HarperCollins/Joanna Cotler Books, 1997).

The Executioner's Dissonant Song: On Capital Punishment and American Legal Values

This essay concerns the implications of the practice of capital punishment on American legal values and procedures. Any death penalty, in my view, conflicts with substantive principles of human dignity, but my argument here addresses a narrower theme: the ways in which attempts to reduce delays in death penalty cases are undermining general legal norms of fairness and due process. The problem I describe is not a temporary phenomenon associated with the transition to a more efficient regime. Instead, the clash between the operational needs of an execution system and the principles and procedures of American legal culture is fundamental. Either the basic rules and values will change or the practice of execution will remain infrequent, conflict-laden, and problematic. Capital punishment can only be regarded as normal state behavior by reimagining basic principles of fairness in criminal justice.

In exploring the wide shadow that death penalty cases cast over American legal values, I am obviously rejecting a discrete conception of capital punishment

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of criminal procedure.*

held by some proponents of execution. In their view, capital punishment is a question of the appropriate sanction to be imposed on the most serious form of murder, a matter of principal importance to one part of the administration of criminal justice. In contrast, this essay reflects a belief that the conduct of death penalty cases has serious implications for the larger realm of criminal procedure. Two recent cases before the U.S. Supreme Court illustrate the pressure that facilitating executions places on legal sentiments and values. They suggest that capital punishment, though it is different in a qualitative way from other criminal sanctions, may subvert due process and fairness values broadly throughout the criminal justice system.

The Frustrating Impact of Delay

When the Supreme Court in *McCleskey v. Kemp* (1987) found that a disproportionate rate of death sentences in cases involving white victims was not unconstitutional, the difficult and divisive wholesale constitutional challenges to capital punishment were thought to have been exhausted. Eight years of Reagan appointments had created a Court more favorably disposed toward sustaining capital sanctions than had been seen in Washington for a generation. The Bush years produced

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from debilitating legal requirements.*

even more movement toward a Court sympathetic to what has been called (by Robert Weissberg) "deregulating death." The conventional wisdom has been that the legal challenge to capital punishment lacks both a broad issue to bring before the Court and a judicial constituency on the Court willing to entertain objections to executions. But major threats to the operational efficiency of executions do continue, and the Supreme Court has been forced to embrace rather extreme doctrine to protect the execution policies of the states from debilitating legal requirements.

What makes capital punishment a particular problem for criminal justice is that any pending legal challenge delays the imposition of the punishment. By contrast, a term of imprisonment normally begins right after sentencing, and jail confinement often starts after arrest. Even the most protracted appeal process in such circumstances usually does not postpone punishment. So allowing the legal process to go on is costless with respect to ensuring the imposition of imprisonment. The prisoner is not winning a battle against the state as a function of the appeal.

But no meaningful legal appeal can proceed without delay in the schedule of an execution. Even though the prisoner remains in custody, the punishment provided

for the crime will not be imposed as long as any part of the review of the case is not complete. This situation creates two instrumental incentives in the appellate legal process. First, it encourages any defendant who wishes to avoid execution to do so by prolonging the process. Second, it makes the state representatives anxious to bring the legal review process to a close. As long as the appeal process is active, the state's penal purposes are frustrated. In such circumstances, the objective of a capital punishment regime must be to minimize the scrutiny of the legal system and to make the review process as short as possible.

All of this is a necessary introduction to the Supreme Court decision in the case of *Penry v. Lynaugh*, decided in June 1989. Johnny Paul Penry was convicted of rape murder in Texas and sentenced to death. Though twenty-two years old at the time of the crime, the defendant's mental age—representing both his ability to learn and the extent of his knowledge—was that of a 6½-year-old. Penry's social maturity, or ability to function in the world, was that of a nine- or ten-year-old.

The defendant pressed two claims in the Supreme Court. First, he argued that it was unconstitutional to

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morally compromised by its failure
to protect those undeserving of death.*

refuse his request for a jury instruction that his mental retardation could be considered as a mitigating circumstance. Second, the defendant asked the Court to rule that it would be cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's level of impaired function.

The *Penry* case split the Court into three camps. Four Justices would have rejected both the need for an instruction and the defendant's per se Eighth Amendment claim. Four of their colleagues would have held that the execution of retarded persons like Penry would violate the Eighth Amendment. Justice O'Connor broke this deadlock by accepting the constitutional need for a mitigation instruction to the jury, but rejecting Penry's Eighth Amendment claim.

The O'Connor opinion is a puzzle. This Justice had earlier led the Court in concluding that imposition of the death penalty for a crime committed when the perpetrator was not yet sixteen would be an Eighth Amendment violation. Why not a per se rule for a defendant with abilities and controls less than those of the average ten-year-old? Even though the concept of "mental age" is rather arbitrary, the gap between

Johnny Penry and normal seems wide enough for a per se rule. And Justice O'Connor's opinion in *Penry* is not unsympathetic to the arguments for an Eighth Amendment ban. Indeed, Justice Stevens, who dissented on this issue, saw no need to outline the reason for his conclusion because he believed that Justice O'Connor's opinion (to the opposite result) "adequately and fairly states the competing arguments respecting capital punishment of mentally retarded persons."

What, then, is the special danger of per se rules on this subject to Justice O'Connor? One answer to this question may be the potential of delays in large numbers of cases if an Eighth Amendment ban on executing the retarded were announced. This potential certainly distinguishes retardation from objectively incontrovertible factors such as chronological age, where only manifestly eligible defendants could benefit from a new legal rule. With no bright line between borderline and profoundly retarded adults and many hundreds of death row inmates who suffer from substantial cognitive deficits, the threat of a per se exemption for the retarded is by no means trivial. Excluding defendants who had not raised the issue at trial would seem morally objectional. Sorting out deserving from undeserving claims on the merits would take years. This possibility is nowhere discussed in Justice O'Connor's opinion, but its role as a subtext is one of few plausible explanations for the O'Connor vote.

Allowing the Eighth Amendment exemption would certainly produce delay and extra litigation. This is one important way in which a rule on chronological age is less troublesome than a rule on mental retardation. But not allowing such an exemption compromises the substantive claim that this ultimate penalty is reserved for only the most blameworthy criminal defendants. Nowhere in the opinions of the *Penry* case is there any argument to the effect that Johnny Penry is more culpable than a fifteen-year-old who murders, or than a fully competent rapist who is exempted by the Eighth Amendment from the death penalty because no death occurred as a result of his acts.

From the perspective of a capital punishment regime, the operational danger of setting up a new categorical target for postconviction litigators to aim for is quite severe. The substantive problem of allowing the ultimate penalty for a person profoundly disabled in judgment and cognitive ability is equally severe. A judicial system that recognizes the exemption will bog down in the extra hearings many defendants will gain. An operationally efficient capital punishment system will be morally compromised by its failure to protect those undeserving of death. These are the kind of hard choices that produce sharp and close divisions among the Justices in cases such as *Penry*.



Norma Rodriguez speaks at a protest on behalf of her brother, Leonel Herrera, on May 9, 1993. Four days later, Herrera was executed by lethal injection. Photo: Houston Chronicle. Reprinted with permission.

Executing the Innocent

The clash between operational necessity and moral legitimacy is even more evident in the 1993 decision of *Herrera v. Collins*. The petitioner in *Herrera* had been convicted in the murder of a police officer and sentenced to death in 1982. Ten years later, after exhausting state remedies and fully prosecuting one federal habeas corpus petition, Herrera brought another federal habeas action alleging that he had proof of his actual innocence of the crime for which he was sentenced to death. He argued that executing a person for a crime he did not commit would constitute cruel and unusual punishment under the Eighth Amendment, and that he was entitled to one evidentiary hearing to establish his innocence. The federal district court ruled that a hearing was in order on this claim.

The Court's opinion, by Chief Justice Rehnquist, rejected Herrera's claim without deciding the question of whether the execution of an innocent person would constitute an Eighth Amendment violation: "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after a trial would render the execution of the defendant unconstitutional, and warrant federal habeas corpus relief if there were no

state avenue open to process such a claim." The opinion then holds that the proof offered by the defendant falls short of such a "persuasive demonstration" and therefore does not require the Court to decide whether the assumed constitutional standard should become an actual constitutional rule.

Two concurring opinions joined in by three Justices go further in supporting some constitutional protection against the execution of the probably innocent

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"assume for the sake of argument"
that there is some constitutional problem
with hanging the wrong man?*

defendant, so that one might count as many as six of the nine Justices as supporting some form of Eighth Amendment protection in extreme cases. But why is the concession that executing the innocent might be a constitutional error so grudgingly made by all but the three dissenters? Why are the proper procedural channels and waiver rules so important not only to Justices Scalia and Thomas (who reject any constitutional protection), but also to the Chief Justice, who will only

"assume for the sake of argument" that there is some constitutional problem with hanging the wrong man?

What we have here is a head-on collision between the operating needs of the capital punishment system and the sentiments and norms of Anglo-American criminal justice. As a substantive matter, nothing could be worse for a criminal justice system in the United States than the execution of an innocent person. No matter the procedural history that might precede such an event, no set of circumstances would seem to justify or excuse the outcome. The strongest reason for last-

gasp hearings and procedures is to save the innocent from execution. Yet a rule that provided a right to a fresh hearing when new evidence might cast doubt on guilt would provide a procedural avenue of delay that many death row inmates would try to use. The few reversals that might result would be accompanied by scores of two-year delays tacked on at the end of a long and convoluted process.

In *Herrera*, the Court could not forthrightly endorse a basic sentiment of American justice without placing the efficient performance of the capital punishment regime in substantial jeopardy. This is the only plausible explanation for the ambivalent and indecisive analysis of most of the majority justices in *Herrera* on a basic issue of principle.

The Killing State: Capital Punishment in Law, Politics, and Culture

Austin Sarat, editor

More than 7,000 people have been legally executed in the United States this century, and more than 3,000 men and women now sit on death rows across the country. Today there appears to be a widespread public consensus in favor of capital punishment and considerable political momentum to ensure that those sentenced to death are actually executed. Yet the death penalty remains troubling and controversial for many people.

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An Inevitable Conflict

Is the conflict between fairness and certainty, on the one hand, and operational efficiency, on the other, inevitable in a legal system with capital punishment? As a logical matter, the answer to this question is no. One path away from the conflict would be to reduce the amount of time necessary to assure just outcomes in capital trials and appeals. Given that the passage of time prejudices the capital punishment system, why not invest resources in excellent lawyers, quick trials, and expeditious appeals in capital cases?

In practice, however, such a formula is unlikely to be implemented. The political units that maintain criminal justice systems are unwilling to make the heavy investment in defense services that faster, high-quality justice would require, and this is particularly true of the states where death sentences and executions are most common. Moreover, limiting the acceleration of the process to procedures that would ensure fairness would not reduce the anger and hostility of prosecutors toward judicial review. Even the perfunctory version of appeal that has emerged in California during the last decade takes many years to accomplish and dominates the agenda of the state supreme court. With more than three thousand persons on death row nationwide, even the best case trial and appeal systems would produce a ten-year lag between trial and execution if a defendant wished to delay death. A delay of that length would generate the same frustration and tension observable in the current system.

Legal rights for persons accused of crime are never politically popular, and due process is a particular source of contention when fear of crime is a conspicuous part of the urban social landscape. Rules of substantive and procedural legality are cumbersome and inconvenient for those charged with the investigation and prosecution of crime. Francis Allen has recently reviewed the manifold threats to what he calls the "habits of legality" that currently operate in American

society and government. I would add to his list of dangers the possibility that compromises of due process in capital cases will undermine procedural guarantees throughout the criminal justice system. Even though capital cases are infrequent, and even though the special tension between judicial review and punitive closure only occurs in capital cases, insensitivity to considerations of legality can carry over from capital cases to the rest of criminal justice.

Such insensitivity is, to some extent, contagious no matter where in the justice system it occurs. But compromising principles in capital cases carries more than

general contagion. Because death is the system's largest punishment, when rights are forfeited in capital cases, there is a momentum toward permitting the same compromises when the penal stakes are more modest. If the capital defendant cannot claim a right, who can?

Hostility to the delay produced in capital cases may also result in broad curtailment of legal remedies because capital cases cannot permissibly be singled out for special prejudice. In habeas corpus, for example, while the real target of both legislative and judicial restriction was death cases, the curtailment of the federal great writ in all state criminal cases was the means employed to achieve the restriction in death cases. This was a process of letting the tail wag the dog in collateral review of state criminal justice.

The destructive influence of capital cases on rights and remedies in other criminal cases is a historical process come full circle. The capital case was always a leading indicator of the direction in which due process guarantees would be extended. The constitutional right to counsel was extended in state capital cases a full generation before it was extended to state felonies. But even with that time gap, the flow from *Powell v. Alabama* in 1935 to *Gideon v. Wainwright* in 1963 was obvious. So there is symmetry if not poetic justice when capital cases now serve as leading indicators of a contraction in defendants' rights and the scope of judicial review.

Hostile reactions to delay are by no means the sole reason for restrictions on due process protections in the criminal justice system. But the contribution of the death penalty cases to the contraction of the scope of judicial review in habeas corpus, the growth of "harmless error" doctrine, and recent enthusiasms for enforcing procedural default rules is evident and very important. Further, when formalism neutralizes moral claims for procedural protection in capital cases, there can be no persuasive moral claim to protection in lesser cases. The behavior of the Supreme Court in capital cases thus becomes a portent of moral regression in criminal justice generally.

—Franklin E. Zimring

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