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Retribution and Reconciliation

David A. Crocker

In his recent book, *No Future Without Forgiveness*, Archbishop Desmond Tutu evaluates the successes and failures of the South African Truth and Reconciliation Commission (TRC). The chair of the TRC, Tutu defends the Commission's granting of amnesty to wrongdoers who revealed the truth about their pasts, and he lauds those victims who forgave their abusers. While recognizing that a country must reckon with its past evils rather than adopt "national amnesia," Tutu nevertheless rejects what he calls the "Nuremberg trial paradigm." He believes that victims should not press charges against those who violated their rights, and the state should not make the accused "run the gauntlet of the normal judicial process" and impose punishment on those found guilty.

Tutu offers practical and moral arguments against applying the Nuremberg precedent to South Africa. On the practical side, he expresses the familiar view that if trials were the only means of reckoning with past wrongs, then proponents of apartheid would have thwarted efforts to negotiate a transition to democratic rule. The South African court system, moreover, biased as it was toward apartheid, would hardly have reached just verdicts and sentences. Tutu points out that trials are inordinately expensive, time-consuming, and labor intensive—diverting valuable resources from such tasks as poverty alleviation and educational reform. In the words of legal theorist Martha Minow, prosecution is "slow, partial, and narrow." Rejecting punishment, Tutu favors the TRC's approach in which rights violators publicly confess the truth while their victims respond with forgiveness. Powerful practical reasons may explain the decision to

spare oppressors from trials and criminal sanctions. But, as I shall show, no *moral* argument—at least neither of the two that Tutu provides—justifies rejection of the Nuremberg paradigm.

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The Argument Against Vengeance

In the first of these moral arguments, the argument against vengeance, Tutu offers three premises for the conclusion that—at least during South Africa's transition—legal punishment of those who violate human rights is morally wrong. He asserts: (i) punishment is retribution, (ii) retribution is vengeance, and (iii) vengeance is morally wrong.

Although Tutu understands that forgiveness may be appropriate for any injury, at one point he claims that amnesty provides only a *temporary* way for South Africa to reckon with past wrongs. He provides no criteria, however, to determine at what point punishment for crimes should be reinstated, and he also offers no reasons that punishment is justified in normal times. Further, one might wonder on what grounds Tutu would deny exoneration for those who committed human rights violations *after* the fall of apartheid and who now wish to exchange full disclosure of their wrongdoing for amnesty.

Is Punishment Retribution?

Consider the first of Tutu's three premises in his argument against punishment. While Tutu assumes that punishment is no more than retribution, he fails to define what he understands by "punishment." He does not, for example, explicitly identify legal punishment as state-administered and intentional infliction of suffering or deprivation on wrongdoers. Tutu also says almost nothing about the nature and aims of legal punishment. He fails to distinguish court-mandated punishment from therapeutic treatment and social shaming, among other societal responses to criminal conduct. Tutu does not consider the various roles that punishment may play—such as to control or denounce crime, isolate the dangerous, rehabilitate perpetrators, or give them their just deserts—and whether these roles justify the criminal sanction. He does at one point say that the "chief goal" of "retributive justice" is "to be punitive." Tutu apparently takes it as a given that "punishment" means "retribution" and that the nature of legal punishment is retributive.

Tutu does at times concede that trials have two other aims, at least during South Africa's transition: vindicating the rights of victims and generating truth about the past. Again and again, Tutu states that victims of past wrongs have the right—at least a constitutional right and perhaps also a moral one—to press criminal charges against and seek restitution from those that abused them. He also extols the "magnanimity" of individuals who, like former South African President Nelson Mandela, have not exercised this right but are willing to forgive and seek harmony (*ubuntu*) with their oppressors. These statements suggest that Tutu regards legal punishment not merely as a means to ret-

ribution but also as a way to affirm and promote the rights of victims.

Tutu also endorses the credible threat of punishment as a social tool to encourage perpetrators to tell the truth about their wrongdoing. The TRC did not grant a blanket amnesty to human rights violators or pardon all those convicted of rights abuses committed during apartheid. Instead the TRC offered amnesty to *individual* perpetrators *only if* (i) their disclosures were complete and accurate, (ii) their violations were politically motivated, and (iii) their acts of wrongdoing were proportional to the ends violators hoped to achieve. According to Tutu, individuals who fail to fulfill any of the three conditions have a strong incentive to apply for amnesty and reveal the whole truth. It is precisely because violators are threatened with trial and eventual punishment that they realize that making no application for amnesty or lying about their wrongdoing is too risky. Without

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such a threat of trial and punishment, the TRC is unlikely to have had the number of perpetrators who did come forward to confess gross wrongdoing.

But Tutu cannot have it both ways. He cannot both reject actual punishment and still defend the threat of punishment as efficacious in dispelling lies and generating truth. Hence, Tutu's acceptance of a "threat to punish" practically commits him to a nonretributive and consequentialist role for punishment, since without occasionally making good on the threat to punish, such a threat loses credibility.

Tutu does not bring enough precision to the term "retribution." He seems, at points, simply to identify retribution with legal punishment. Instead, one must understand retribution as one important *rationale* or *justification* for and a constraint upon punishment. Proponents of the retributive theory of punishment offer a variety of competing accounts, but all agree that any retributive theory minimally requires that punishment must be "backward looking in important respects." That is, justice requires that a crime is punishable as, in the words of lawyer and legal theorist Lawrence Crocker, "a matter of the criminal act, not the future consequences of conviction and punishment." These future consequences might comprise such good things as deterrence of crime, rehabilitation of criminals, or promotion of reconciliation. For the proponent of retributivism, however, the infliction of suffering or harm, something normally prohibited, is justified because of—and in proportion to—what the



Pictorial Archive of Printer's Ornaments from the Renaissance to the 20th Century, selected by Carol Belanger Grafton (Dover Publications, Inc., 1980).

criminal *has done antecedently*. Only those found guilty should be punished, and their punishment should fit (but be no more than) their crime.

Some supporters of the retributive theory of punishment, assert, moreover, that only (and perhaps all) wrongdoers *deserve* punishment, and the amount or kind of punishment they deserve must fit the wrong done. Harvard philosopher Robert Nozick explains

Retribution provides both a sword to punish wrongdoers and a shield to protect them from more punishment than they deserve.

desert in terms of both the degree of wrongness of the act and the criminal's degree of responsibility for it. Retribution as a justification for punishment requires that wrongdoers should get no more than (and perhaps no less than) their "just deserts."

Is Retribution Vengeance?

The second premise in Tutu's argument against punishment—that retribution is (nothing but) vengeance or revenge—is flawed as well. Given Nozick's understanding of retribution as "punishment inflicted as deserved for a past wrong," is Tutu right to treat retribution and revenge or vengeance as equivalent? Both retribution and revenge share, as Nozick puts it, "a common structure." They inflict harm or deprivation for a reason. Retribution and vengeance harm those who in some sense have it coming to them. Following Nozick's brief but suggestive analysis, I propose that

there are at least six ways in which retribution differs from revenge.

Retribution addresses a wrong. First, as Nozick observes, "retribution is done for a wrong, while revenge may be done for an injury or slight and need not be done for a wrong." I interpret Nozick to mean retribution metes out punishment for a crime or other wrongdoing while revenge may be exacted for what is merely a slight, an unintended injury, an innocent gaze, or shaming in front of one's friends.

Retribution is constrained. Second, Nozick also correctly sees that in retribution there exists some "internal" upper limit to punishment while revenge is essentially unlimited. Lawrence Crocker concurs: "an absolutely central feature of criminal justice" is to place on each offense "an upper limit on the severity of just punishment." This limitation "is the soul of retributive justice." It is morally repugnant to punish the reluctant foot soldier as severely as the architects, chief implementers, or "middle management" of atrocities. Retribution provides both a sword to punish wrongdoers and a shield to protect them from more punishment than they deserve. In contrast to punishment, revenge is wild, "insatiable," unlimited. After killing his victims, an agent of revenge may mutilate them and incinerate their houses. As Nozick observes, if the avenger does restrain himself, it is done for "external" reasons having nothing to do with the rights or dignity of his victims. His rampage may cease, for instance, because he tires, runs out of victims, or intends to exact further vengeance the next day.

Notably, Martha Minow and others subscribe to a different view. Minow suggests that retribution is a *kind* of vengeance, but curbed by the intervention of

neutral parties and bound by the rights of individuals and the principles of proportionality. Seen in this light, in retribution vengeful retaliation is tamed, balanced, and recast. It is now a justifiable, public response that stems from the "admirable" self-respect that resents injury by others.

While Minow's view deserves serious consideration, Nozick, I think, gives us a picture of vengeance—and its fundamental difference from retribution—that better matches our experience. Precisely *because* the agent of revenge is insatiable, limited neither by prudence nor by what the wrongdoer deserves, revenge is not something admirable that goes wrong. The person seeking revenge thirsts for injury that knows no (internal) bounds, has no principles to limit penalties. Retribution, by contrast, seeks not to tame vengeance but to excise it altogether. Retribution insists that the response not be greater than the offense; vengeance insists that it be no less and if possible more. Minow attempts to navigate "between vengeance and forgiveness," but she does so in a way that makes too many concessions to vengeance. She fails to see unequivocally that retribution has essential limits. Vengeance has no place in the courtroom or, in fact, in any venue, public or private.

Retribution is impersonal. Third, vengeance is personal in the sense that the avenger retaliates for something done antecedently to her or her group. In contrast, as Nozick notes, "the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution." Retribution demands impartiality and rejects personal bias while partiality and personal animus motivate the "thirst for revenge."

The figure of Justice blindfolded (so as to remove any prejudicial relation to the perpetrator or victim) embodies the commonplace that justice requires impartiality. Justice is blind—that is, impartial—in the sense that she cannot distinguish between people on the basis of familiarity or personal ties. This not to say, however, that justice is impersonal in the sense that she neglects to consider an individual's traits or conduct relevant to the case. Oddly, Tutu suggests that the impartiality or neutrality of the state detracts from its ability to deal with the crimes of apartheid. He defends the TRC because it is able to take personal factors into account. He writes:

One might go on to say that perhaps justice fails to be done only if the concept we entertain of justice is retributive justice, whose chief goal is to be punitive, so that the wronged party is really the state, something impersonal, which has little consideration for the real victims and almost none for the perpetrator.

Although justice eliminates bias from judicial proceedings, it may be fair only if it takes certain personal factors into account. Because Tutu confuses the imper-

sonality or neutrality of the law with an indifference to the personal or unique aspects of a case, Tutu insists that judicial processes and penalties give little regard to "real victims" or their oppressors.

Retribution takes no satisfaction. A fourth distinction between retribution and revenge concerns the "emotional tone" that accompanies—or the feelings that motivate—the infliction of harm. Agents of revenge, claims Nozick, get pleasure, or we might say "satisfaction," from their victim's suffering. Agents of retribution may either have no emotional response at all or take "pleasure at justice being done." (Adding to Nozick's account and drawing on the work of political theorists Jeffrie Murphy and Jean Hampton, I should add that a "thirst for justice" may—but need not—arise from moral outrage over and hatred of wrongdoing.)

Retribution is principled. Fifth, Nozick claims that what he calls "generality" is essential to retribution but may be absent from revenge. By this term, Nozick means that agents of retribution who inflict deserved punishment for a wrong are "committed to (the existence of some) general principles (*prima facie*) mandating punishment in other similar circumstances."

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Retribution rejects collective guilt. Nozick, I believe, helpfully captures the main contrasts between retribution and revenge. To these, I add a sixth distinction. Mere *membership* in an opposing or offending group may be the occasion of revenge, but not of retribution. Retributive justice differs from vengeance, in other words, because it extends only to individuals and not to the groups to which they belong. In response to a real or perceived injury, members of one ethnic group might, for instance, take revenge on members of another ethnic group. However, the state or international criminal court could properly mete out retribution only to those *individuals* found guilty of rights abuses, not to *all members* of the offending ethnic group. Since collective guilt has no place in an understanding of retributive justice, revenge and retribution should not be conceived as equivalent. Tutu makes precisely this mistake.

Following the Hegelian dictum "first distinguish, then unite," Nozick promptly concedes, as he should, that vengeance and retribution can come together in various ways. Particular judicial and penal institutions may combine elements of retribution and of revenge. The Nuremberg trials, arguably,

were retributive in finding guilty and punishing some Nazi leaders, punishing some more than others, and acquitting those whom it found not guilty as charged. But Tutu is right to say that the Nuremberg precedent was contaminated, compromised by revenge or "victor's justice." As he notes, Nuremberg used exclusively allied judges and failed to put any allied officers in the dock. However, Tutu neglects to affirm the achievements of Nuremberg: it vindicated the notion of individual responsibility for crimes against humanity and defeated the excuse that one was "merely following orders." One reason that Nuremberg is an ambiguous legacy is that it had both good (retributive) and bad (vengeful) elements. In no case can one accept Tutu's second premise that retribution is *nothing but* vengeance.

What of Tutu's third premise that vengeance is morally wrong? When I shift the focus from vengeance to the agent of revenge, I accept Tutu's premise. Unlike the agent of retribution, the agent of revenge does wrong, or at least he is morally blameworthy. He retaliates and inflicts an injury without regard to what the person impartially deserves. If the penalty *happens* to fit the crime, it is by luck; the agent of revenge is still blameworthy since he gave no consideration to desert, impartiality, or generality. If, as is more likely given the limitless nature of revenge, the penalty is more excessive than the crime, the agent of revenge is not only culpable but also his act is morally wrong. Nonetheless, Tutu's overall argument against vengeance is unsound since two of its premises are not acceptable.

The Reconciliation Argument

Tutu proposes a second moral argument against the "Nuremberg trial paradigm" for South Africa's transition and others like it. Tutu rejects retributive justice on the grounds that it prevents or impedes reconciliation. He understands reconciliation as "restorative justice," the highest if not the only goal in South Africa's reckoning with past wrongs. Tutu defends amnesty and forgiveness as the best means to promote reconciliation. What does Tutu mean by the vague and not infrequently contested term "reconciliation" and its synonym "restorative justice"? Tutu explicitly defines restorative justice (in contrast to retributive justice) as reconciliation of broken relationships between perpetrators and victims:

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community that he has injured by his offense.

Although Tutu in this passage uncharacteristically leaves room for punishment, he understands the "central concern" of restorative justice as the reconciliation of the wrongdoer with his victim and with the society he has injured. The wrongdoing has "ruptured" earlier relationships or failed to realize the ideal of "*ubuntu*." *Ubuntu*, a term from the Nguni group of languages, refers to a kind of "social harmony" in which people are friendly, hospitable, magnanimous, compassionate, open, and nonenvious. Although Tutu recognizes the difficulty of translating the concept, it seems to combine the Western ideal of mutual beneficence, the disposition to be kind to others, with the ideal of community solidarity.

Tutu regards "social harmony" or "communal harmony" as the *summum bonum*, or highest good. He concedes that South Africa must in some way "balance" a plurality of important values – "justice, accountability, stability, peace, and reconciliation." Whatever "subverts" or corrodes social harmony, however, "is to be avoided like the plague." Presumably, whatever maximizes social harmony is morally commendable and even obligatory.

Tutu may believe that *ubuntu* presents so lofty an ideal that no one would question its justification or

Although individuals often benefit from harmonious community relationships, the community also at times demands excessive sacrifices from individuals.

importance. In any case, he offers little argument for its significance or supremacy. He does seek to support it by calling attention to its African origins. He also remarks that, while altruistic, *ubuntu* is also "the best form of self-interest," for each individual benefits when the community benefits.

As it stands, neither defense is persuasive. The moral disvalue of apartheid, also a South African concept, has nothing to do with its origins. Similarly, the geographical origin of *ubuntu* does not ensure its reasonableness. Further, although individuals often benefit from harmonious community relationships, the community also at times demands excessive sacrifices from individuals. Moreover, dissent or moral outrage may be justified even though it disrupts friendliness and social harmony.

Tutu offers practical objections—as well as moral ones—to seeking retributive justice against former oppressors. He does not consider the practicability of *ubuntu*, however, as a goal of social policy. He does not discuss, for example, what to do with those whose hearts cannot be purged of resentment or vengeance. Nor does he explain how society can test citizens for

purity of mind and heart—how it can determine who has succeeded and who has failed to assist society toward this supreme good.

Tutu's concept of reconciliation can be compared to two other versions of social cooperation: (i) "nonlethal co-existence" and (ii) "democratic reciprocity." In the first, reconciliation occurs just in case former enemies no longer kill each other or routinely violate each other's basic rights. This thin sense of reconciliation, attained when cease fires, peace accords, and negotiated settlements begin to take hold, can be a momentous achievement. Reconciliation as nonlethal coexistence demands significantly less and is easier to realize than Tutu's much "thicker" ideal that requires friendliness and forgiveness. Societies rarely, if ever, choose between harmony and mere toleration. Historically, societies have to choose between toleration among contending groups and the war of each against all. A more demanding interpretation of reconciliation—but one still significantly less robust than Tutu advocates—is "democratic reciprocity." In this conception, former enemies or former perpetrators, victims, and bystanders are reconciled insofar as they respect each other as fellow citizens. Further, all parties play a role in deliberations concerning the past, present, and future of their country. A still-divided society will surely find this ideal of democratic reciprocity difficult enough to attain—although much easier than an ideal defined by mutual compassion and the requirement of forgiveness. Some would argue, for instance, that there are unforgivable crimes or point out that a government should not insist on or even encourage forgiveness, since forgiveness is a matter for *victims* to decide.

Not only is Tutu's ideal of social harmony impractical, but it is also problematic because of the way it conceives the relation between the individual and the group. Tutu's formulation of *ubuntu* either threatens the autonomy of each member or unrealistically assumes that each and every individual benefits from the achievements of a larger group. Sometimes individuals do benefit from social solidarity. But life together is often one in which genuinely good things, such as communal harmony and individual freedom, my gain and your gain, conflict. In these cases, fair public deliberation and democratic decision making are the best means to resolve differences. A process that allows all sides to be heard—and encourages all arguments to be judged on their merits—respects public well-being, individual freedom, and a plurality of values.

This analysis of alternative conceptions of reconciliation not only shows that Tutu's ideal is unrealistic

but also that it pays insufficient attention to individual freedom, including the freedom to withhold forgiveness. In making social harmony the supreme good, Tutu unfortunately subordinates—without argument—other important values, such as truth, compensation, democracy, and individual accountability. In some contexts, social harmony—if it respects personal freedom and democratic deliberation—should have priority. In other contexts, society may pursue other equally important values, for example, justice, which might require a society to indict, try, sentence, and punish individuals who violated human rights. If social harmony is judged to have priority over other values, that judgment should emerge not from a cultural, theological, or philosophical theory but from the deliberation and democratic determination of citizens.

Sources: Desmond M. Tutu, *No Future Without Forgiveness* (Doubleday, 1999); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998); David A. Crocker, "Civil Society and Transitional Justice," in *Civil Society, Democracy, and Civic Renewal*, edited by Robert K. Fullinwider (Rowman & Littlefield, 1999); David A. Crocker, "Reckoning with Past Wrongs: A Normative Framework," in *Ethics & International Affairs*, vol. 13 (1999); David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society," in Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, forthcoming); Paul van Zyl, "Evaluating Justice and Reconciliation Efforts," *Perspectives on Ethics & International Affairs*, vol. 1 (1999); Lawrence Crocker, "The Upper Limits of Punishment," *Emory Law Journal*, vol. 41 (1992); Geoffrey Cupit, *Justice as Fittingness* (Clarendon Press, 1996); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (Times Books, 1998); Robert Nozick, "Retributive Punishment," in *Philosophical Explanations* (Belknap Press, 1981); Bill Berkeley, "Aftermath: Genocide, the Pursuit of Justice and the Future of Africa," *Washington Post Magazine* (October 11, 1998); Jean Hampton, "The Retributive Idea," and Jean Hampton and Jeffrie G. Murphy, "Hatred: A Qualified Defense," both of which appear in *Forgiveness and Mercy*, edited by Jeffrie G. Murphy and Jean Hampton (Cambridge University Press, 1988); Steve Coll, "Peace Without Justice: A Journey to the Wounded Heart of Africa," *Washington Post Magazine* (January 9, 2000); James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press, 1996); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996).

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Authority and Excuses

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What we find in the common soldier, party functionary, and obedient subject is the same limitless capacity to yield to authority and the use of identical mechanisms to reduce the strain of acting against a helpless victim.

—Stanley Milgram, *Obedience to Authority*, 1974

Stanley Milgram's famous obedience experiments show that in some contexts, ordinary people obey authority even when doing so involves gross wrongdoing. Milgram found that two-thirds of subject "teachers" obeyed orders of experimenters and willingly administered apparently large and harmful, and even lethal, electric shock to "learners" as punishment for responses to what they were told were memory tests. This striking result raises many questions about individual moral responsibility for wrongful conduct. Milgram's subjects were randomly selected. Hence all of us have reason to believe that we might have behaved just as the majority of Milgram's subjects did. Although few would deny that the Milgram subjects behaved wrongly, questions stubbornly persist about whether these people deserve blame for doing what most of us would have done in the same circumstances. These questions are not merely scholastic. Everyday people in organizations—military soldiers, corporate employees, government officials—respond to morally questionable authority in morally questionable ways. Without wrongful obedience to authority, our world would be unrecognizable. How should one think about the blame or punishment that a person deserves for general conduct that arises from respect for authority?

A core idea in traditional morality is that, ordinarily, people deserve blame for their wrongful conduct.

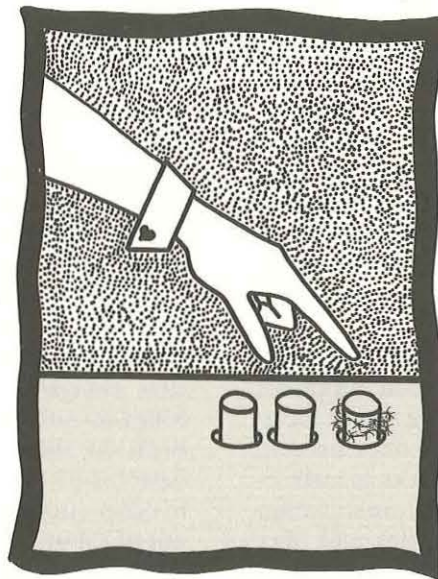
Indeed, it is only when a person has a good excuse—*i.e.*, that he acted under duress or he did not understand the nature of his act—that one does not hold him responsible for the wrong he does. How does this traditional idea of morality apply to the case of Milgram subjects? On the one hand, it may seem plain that Milgram subjects deserve blame for their actions. They were apparently willing to inflict undeserved and

unnecessary pain on an innocent person. Further, they seemed to have no good excuse for their wrongdoing: nobody coerced them; and they seemed to understand the relevant fact that they were apparently causing excessive suffering. Hence blame seems appropriate. On the other hand, the moral appraisal of Milgram subjects may not be quite so simple. Isn't it harsh and presumptuous to blame them for doing what most of the rest of us would do in the same circumstances? Something seemed to go awry in the decision-making processes of the Milgram subjects that provide a reason to restrain our criticism of them. This suggests that Milgram subjects may be entitled to some kind of excuse for their wrongdoing. Even if such an

excuse does not wholly relieve them of responsibility for their actions, it may give us reason to mitigate our blame.

Heuristics and Wrongdoing

Contemporary cognitive psychology may offer at least a partial explanation of how things went awry in the decision-making processes of Milgram subjects. They may have relied on heuristics—cognitive shortcuts or rules of thumb—which confused them about the moral significance of their actions. The operation of



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the heuristics may be relevant to the moral appraisal of Milgram subjects, and of other people grappling with the demands of authority.

Many tasks of daily life rely on the use of heuristics, which simplify otherwise complex and time-consuming decision-making and problem-solving tasks. Amos Tversky and Daniel Kahneman, two psychologists who have done pioneering work on heuristics, illustrate both the utility and danger of heuristics through an example taken from the psychology of perception. The apparent distance of an object is commonly determined in part by its clarity. The more

Much ordinary managerial wrongdoing is at least partly explained by the presence of an authority heuristic.

sharply an object is seen, the closer it appears to be. Notably, however, reliance on this rule leads to systematic errors in estimating distance. Distances are often overestimated when visibility is poor because the contours of the objects are blurred, while when visibility is good distances tend to be underestimated. The reliance on clarity as an indication of distance leads to common mistakes and confusion. Still, the kind of error involved in relying on clarity to estimate distances may seem fundamentally different than the kind of error involved in relying on authority in deciding whether to deliver high-voltage shocks to an innocent, protesting subject.

Yet psychologists argue that heuristics may play a role in explaining a broad range of human judgment beyond perceptual judgment, including moral judgment. The case of DES, the medication once used to alleviate the symptoms of morning sickness, is instructive here. In their discussion of this case, organization and management theorists David Messick and Max Bazerman conclude that erroneous reliance on a heuristic played a crucial role in explaining managerial wrongdoing. Managers of pharmaceutical companies promoting DES knew that using the drug risked causing birth defects, but they underestimated that risk. These managers may have fallen prey to what psychologists call the "availability heuristic," which inclines people to think that risks are more serious when they are more "available," more readily called to mind. Because managers relying on the availability heuristic limited their scrutiny of DES's consequences to immediate customers and shareholders, they did not take adequate account of a less salient group not present when the drug was marketed, the daughters of DES-taking women. Messick and Bazerman suggest that innocent but inapt reliance on heuristics, rather than

bad intentions, may explain the managers' decision, and thus limit their blameworthiness.

Authority Heuristics

Just as the involvement of an "availability heuristic" offers a cognitive account of the managerial decision to promote DES, an "authority heuristic" may explain the decisions of Milgram subjects to administer electric shock. Reliance on the judgment of an authority is ordinary and understandable when, for instance, one confronts technical matters concerning medicine, law, or technology. If your dentist insists that you need a root canal, you will in all likelihood defer to her expert judgment, even though doing so will cause considerable pain. In the simplest case, a person reasonably employs an authority heuristic when, lacking the time, capacity, or inclination to think matters through for himself, he defers to the judgment of those who seem more knowledgeable about the issue.

If one accepts the presence of an authority heuristic in technical matters such as dentistry, one might also find reasonable the reliance on an authority heuristic in morally charged matters. Suppose you arrive late to a meeting where a vote is to be taken on a morally significant issue. You have not had time to study the issue, but you learn that a colleague whose judgment you respect is going to vote in a certain way. Trusting her judgment relies on a heuristic that prescribes deference to the authority of another, and in this case the authority heuristic applies to a moral matter.

It is plausible to suppose that the "obedient" subjects in Milgram's experiment acted as they did in part because they relied on an authority heuristic. To see this, imagine that you occupy the position of a Milgram subject. You confront what seems a difficult decision about whether to engage in an apparently harmful act that you would never even consider doing in other circumstances; you are given little time to opt out of it but no resources to make a full evaluation of alternatives and their consequences. Further, you have access to an apparently reliable authority, the experimenter. If you back out, you risk undermining what may be a valuable experiment. Facing a choice between trusting a reliable authority and backing out, it makes sense to trust the authority. While it seems morally wrong to shock your experimental subject, it is also plausible to suppose that the experimenter has considered the moral issue. Although you do not know *how* he arrived at his conclusion that the experiment should proceed, you nonetheless follow the heuristic to defer to the judgment of one who presumably has better information than you do.

Nobody knows whether most, or any, of Milgram's obedient subjects actually employed an authority heuristic. It nonetheless remains plausible that such a

heuristic was at work among some subjects. Further, much ordinary managerial wrongdoing is at least partly explained by the presence of an authority heuristic. Certainly, few situations closely resembling the Milgram experiments occur in the business world. Executives rarely stand over their subordinates and directly order them to harm identifiable and unwilling victims. However, compartmentalization plays an important role in both arenas. Milgram subjects administered shock, even though it was morally problematic, because they trusted the person running the experiment to have made the right moral decision and they accepted their own role to obey orders to shock. A similar rationale is at play in many business settings: one trusts the authority embodied in a person and expressed in a role. When asked why he followed a wrongful order, a person can say: because it was my job.

The Importance of Roles

Legal scholar David Luban challenges this cognitive explanation of the Milgram experiment, rejecting the notion that deference to experimenters' superior knowledge promoted obedience. He points to several of

*Professionals commonly justify their actions
by appeal to the requirements of their
professional roles.*

Milgram's studies that suggest that it was the subjects' intimidation, more than their cognitive error, that explains their obedience. Although we do not think it is possible to determine how much of the obedience Milgram elicited is attributable to cognitive factors, we want to focus on one of the studies Luban cites, because it gives us reason to refine, rather than reject, a cognitive explanation. In this study, two experimenters within earshot of the subject announce that a volunteer, who would have been the possible recipient of electric shock, has cancelled his appointment. After discussing alternatives, one experimenter decides that he will take the volunteer's place, and he soon follows the entire sequence of complaints and screams. Luban argues that if subjects relied on an authority heuristic, the fact that a former authority demanded the experiment be stopped should have diminished the likelihood that the Milgram subject would administer electric shock.

The force of Luban's critique is blunted when one recalls that authority commonly inheres in social and organizational roles, not merely in individuals. An order issuing from an authoritative role may continue to have credibility even when there is a change in the person who occupies the role. Luban's discussion

highlights the occasion on which a subject disregards the orders of a former authority figure. It casts no doubt on the point that subjects continued to find credible the orders that issue from the role. To cite another example, in his account of the Executioner of Paris, Harvard professor Arthur Applbaum describes an official who was executioner for the French government both before and after the French revolution and who clearly found authority in his role. Although his high professional standards compelled him to question orders inconsistent with that role (e.g., when his equipment was not sharp enough, he demanded better), he never questioned the propriety of the executions themselves. He neither doubted the moral legitimacy of his role nor questioned the propriety of acts consistent with that role, even when it meant killing his former employers, whose orders he had once followed. In many ways, the case of the Executioner of Paris is not unusual. Professionals commonly justify their actions by appeal to the requirements of their professional roles. Lawyers routinely defend presumptively wrong actions such as badgering innocent witnesses and tarnishing their reputations by appeal to their roles as zealous representatives of client interests.

Heuristics and Limits of Blame

But if people's harmful conduct can be explained by their reliance on an authority heuristic, does that explanation provide an excuse for their conduct? There is one tempting argument that it does. This argument,

*The mere fact that a reaction is normal does not
show that a person is not blameworthy for
engaging in that action.*

an appeal to normality, is simple: If normal reliance on cognitive heuristics causes specific wrongful conduct, then because that conduct arose from an innocent mental mistake, the person deserves no blame. On these grounds, not only would Milgram's obedient subjects as well as the managers involved in the DES case be judged blameless, but one also could argue that *any* sort of error stemming from normal human decision making excuses wrongdoing.

But this argument from normality is *too* simple. The mere fact that a reaction is normal or common does not by itself show that a person is not blameworthy for engaging in that action. Social philosopher Ferdinand Schoeman illustrates this point nicely. He asks us to imagine that most people would greatly exceed the speed limit, and thus violate the traffic laws, if they were offered some amount of money satisfactory to

them. It would not follow that their actions were not blameworthy or that they should be regarded as morally innocent if they took the money and speeded. And, of course, the same holds true for worse wrongs. Suppose that it turns out that most sons and daughters would beat their parents if offered ten million dollars to do so. In some sense, their action would be normal. One might even say that, in some sense, their being offered such a large sum of money *caused* their actions. Nonetheless, it would hardly follow that these people were not to blame for the actions. If all children behave in this way, it is a sad fact about the human race, and perhaps demonstrates that we as a species are morally defective, but it hardly follows that any individual who has a normal response is thereby not blameworthy.

A more refined argument than the one from normality suggests that a person's reliance on the authority heuristic does not wholly excuse his harmful acts, but limits the censure he deserves. Schoeman makes precisely this point in invoking the traditional criminal law idea of entrapment, which precludes the state in some cases from prosecuting persons encouraged to commit crimes by state agents. He argues that since we do not prosecute persons whose wrongful action was caused by authority figures such as police officers, we should also treat leniently the Milgram subjects because authority also prompted their wrongdoing. But Schoeman's entrapment defense cannot be invoked by Milgram's subjects, because the value of the defense derives from considerations that do not apply to them. For instance, the entrapment defense seeks to limit the temptation of police to cause people to commit crimes, a consideration irrelevant to the issue of how a wrongdoer should morally assess herself. Most importantly, the decision-making processes of entrapment victims and those of Milgram's subjects differ in morally relevant ways. Milgram's subjects perceive themselves as responding to authority in a morally and rationally defensible manner. Entrapment victims, by contrast, act in part because they think they are not dealing with police or other state representatives and, further, they attempt to do something they recognize as wrong.

Moral Ignorance

Despite the inadequacy of these explanations, there is still some considerable appeal in the idea that Milgram's subjects were less blameworthy to the extent that they relied on the experimenter's authority. Many of Milgram's subjects administered shock under protest and displayed physical symptoms of revulsion at their task, responses suggesting they were torn by conflict. They understood the wrongfulness of inflicting pain on the unwilling, yet felt the legitimacy of their role required acting conscientiously. If, faced with this dilemma, Milgram subjects chose in accordance

with an authority heuristic, then perhaps they made a good faith choice. They tried to do the right thing by assisting in what they concluded was a legitimate experiment; but they made a cognitive mistake and did wrong. How should one evaluate such persons?

Traditional morality and jurisprudence typically excuse persons for ignorance involving fact. If one person unwittingly serves another a poisoned drink, for instance, then the server is excused from wrongdoing on grounds of ignorance. But the Milgram subjects

A person who commits a wrong because of a reasoning miscue is in some important sense not doing what he really wants to do.

knew the *facts* relevant to culpability (they knew that they were administering potentially lethal shock to an unwilling victim); their error lay in their confusion about moral *principle*: they trusted in an authority who suggested that inflicting severe shock on innocent protesting people was the right thing to do.

Both traditional morality and established law tend not to recognize excuses grounded on ignorance of principle. For instance, the person who admits to possessing the *factual knowledge* that a lethal agent laced a drink he served, but *professes ignorance of the moral principle* that it is wrong to poison others, would likely not be absolved from wrongdoing on grounds of ignorance. Some might argue, further, that to whatever extent people such as Hitler and Stalin were ignorant about principles they were violating, they should be judged even *more harshly* for their actions. Individuals are presumed to possess general moral knowledge, in short; to the extent they do not, they are responsible for their wrongdoing.

Jurisprudence, however, does support the notion that ignorance of principle sometimes offers an excuse. Suppose a driver attempting to deliver Thanksgiving dinners to a homeless center is involved in a traffic accident, and a police officer at the scene orders the driver of another vehicle to drive the dinners to the homeless center at top speed to ensure their timely delivery. On the way, that conscripted driver has an accident and is charged with criminal recklessness. It turns out that it was illegal for her to speed, and the policeman lacked the authority to order her to do so. In this case, breaking the law in ignorance and good faith mitigates blameworthiness.

In contrast, one can offer a variety of justifications for treating especially harshly those who act from ignorance *and* bad intention. A utilitarian, for instance, might champion the social benefits resulting from the deterrence of malicious acts, while a nonutilitarian might focus on wrongful behavior grounded in vice.

To the extent that the Milgram subject and DES managers suffered mere mental lapses, they deserve some leniency. A person who commits a wrong because of a reasoning miscue is in some important sense not doing what he really wants to do. Consequently, the evil expressed in doing wrong while trying to do right is of a lesser magnitude than the evil expressed in doing wrong from bad motives. The Hitlers and Stalins of the world deserve censure because, although perhaps acting from ignorance of principle, they embrace evil or warped values. Many of Milgram's obedient subjects, on our interpretation of their behavior, embraced no defective values; they simply made a faulty inference from acceptable values in relying on an authority heuristic.

One cannot conclude that the Milgram subjects and DES managers are completely blameless, however. They failed in their responsibility to avoid making a critical mental mistake, even though it was in their power to do so. At the same time, no one can refrain entirely from relying on heuristics, which would be equivalent to never acting from mental habit. It is only fair, therefore, not to censure them—or ourselves—too harshly for that reliance.

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The American State Lottery: Sale or Swindle?

Verna V. Gehring

Hope is a good breakfast, but a poor supper.

—Francis Bacon

Americans have made state lotteries a part of their civic lives. When New Hampshire introduced the first state lottery in 1964, no one could have predicted that today two-thirds of all Americans could take part in their state's lottery, participate in multi-state "powerball" games, or play a variety of scratch-off or video-display games modeled on keno, blackjack, and other casino or card games. As of 1999, 37 states, the District of Columbia, Puerto Rico and the Virgin Islands have inaugurated some form of state-supported gambling program. Each year, Americans spend over \$36 billion on gambling activities—nearly ten times more than is spent at the movie box office.

The popularity of gambling does not, however, lessen the unease many Americans feel about the role states play as sponsors of lotteries. Critics worry that states in some way cheat citizens. Yet they have a hard time identifying what is fraudulent about state sponsorship or promotion. In his classic work *Swindling and Selling*, legal theorist Arthur Leff points out a number of similarities between swindles and legitimate sales transactions. He nevertheless concludes that "a lottery is not a swindle if for a dollar ticket, it pays off nothing to 99,999 wagerers, so long as one gets the promised \$100,000." Those who support the notion of state lotteries often rely on an insight similar to Leff's: because lotteries do what they claim—make the promised payout (assuming a properly randomized drawing)—one has taken part in a sale, not a swindle. Critics of state-sponsored lotteries, by contrast, commonly follow up their intuition that lotteries are unfair by looking at how they are marketed. They do not claim lotteries are unfair because they are fixed (although this certainly has happened, most recently in Pennsylvania). Rather, critics believe that deceptive advertising is the source of fraud. For instance, advertising greatly exaggerates the happiness associated with winning, or encourages prospective players to disregard the vanishingly small odds of success.

Both opponents and proponents seem to have misunderstood the problem, however. One cannot conclude that lotteries are sales transactions simply because fair procedures of play lead to a winner. But one also cannot conclude that lotteries are swindles simply because advertising promotes play. I will argue that lotteries fail as legitimate sales transactions because the state fundamentally misrepresents their nature. States *falsely* claim that lotteries are prudent financial tools and that they promote worthy social causes such as education and care for the elderly. Although advertising often is the *conveyer* of these claims, I do not argue that the source of the swindle lies simply in the promotional aspects of lotteries. Instead, I suggest that if a lottery is claimed to be something that it is not, then one has been swindled, regardless of what one gets for one's money and regardless of whether the false claim is conveyed in a flashy television ad or a sober government report. Therefore, although there indeed may be a winner, all

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citizens are swindled by state lotteries. Furthermore, states exercise monopolistic power in legalizing lotteries. They also enjoy considerable moral authority, entrusted by citizens to act for the common good. States abuse their unique power and authority in order to effect their deception.

The first part of this essay explores the role of advertising in promoting lotteries. The second part evaluates the claim that lotteries are prudent financial management tools and that they promote worthy goals. The concluding section examines how states rely on their monopolistic power and moral authority to successfully promote lotteries.

The Power of States to Promote Lotteries

One cannot simply look to advertisements of lotteries in order to decide whether lotteries are sales transactions or swindles. It is true that state lottery offices run less as an arm of government and more like a business, with marketing departments which treat the promotion of its lottery products as an indispensable part of its work. Promotional opportunities abound: advertisements can be found on television, radio, in newspapers and magazines, on billboards and posters, and at venues of sale. In fact, America's inhabitants are exposed to lottery advertisements of one form or another more than any other type of message, including state-sponsored public service messages.

Critics of state lotteries look to the inaccuracies and inducements in advertisements to form the nexus of their claim that lotteries are swindles. They worry, for

One cannot conclude so quickly that state-sponsored lotteries are swindles based on grumblings about their advertising methods.

instance, that advertising encourages superstitious beliefs, since false causality commonly underlies such advertising appeals. New York's campaign: "You Can't Win if You Don't Play," Virginia's "You Never Know," and Maryland's "Play Today. Cash Tonight," are prominent examples. Television spots sponsored by Maryland feature a fairy, accoutered in Cinderella dress and star-topped wand. The advertisements suggest that lotteries can be foretold and that one might be chosen to win by a controlling entity, in this case a cheerful fairy. Further, critics point out that fantasy is also used to encourage individuals to dwell on what it is to be rich, lending legitimacy to the wish to escape the workaday world.

Although one might reasonably find suspect the variety of suggestive appeals used to promote lotteries, one cannot conclude from these elements that lotteries are swindles. Two points are worth keeping in mind. Similar appeals are made in many types of advertising, and one need not rush down the slippery slope to the conclusion that nearly all advertising promotes a swindle. Most importantly, the effectiveness of a product remains undiminished, even if its advertisements rely on emotional manipulation. For instance, television ads for the campaign, "Milk. It Does a Body Good," display plenty of washboard abdomens and bikini-clad hips. While it is true that much advertising methodically blurs the distinction of the product as a necessary but not sufficient condition for its outstanding effects, the products advertised are minimally effective. Milk is a healthful food, even if I cannot count on milk drinking alone to have *me* in a bikini by summer.

This point leads us to the camp of the lottery supporter, who concedes that lottery winners may not live charmed lives ever after. Regardless of the inducements to purchase tickets, however, there *is* at least one prizewinner—which is Leff's point precisely.

But is Leff's contention, that because lotteries produce winners they are sales transactions, any more sound than the view of lottery opponents, whose arguments relied on the power of marketing appeals? Just as one cannot conclude so quickly that state-sponsored lotteries are swindles based on grumblings about their advertising methods, one cannot conclude at this point that lotteries are sales either. Consider the case of a man who purchases a tie in order to match his new suit. If he buys a rayon tie that was hawked as "genuine silk," then he has been cheated, even though the tie can serve the intended purpose of accompanying his new suit. Because he has purchased something *other than* what he agreed to, he is swindled. Concerning state lotteries, I suggest that if people are encouraged to believe that they are buying one product when they are really buying another, then we must conclude that a swindle has indeed taken place.

Two False Claims Concerning the Benefits of Lotteries

The state-supported lottery offers a prudent personal investment strategy. To determine whether lotteries offer legitimate sales transactions or a swindle, one must examine what one actually is "buying." The introduction of the state-supported lottery commonly is justified by pointing to its role as promoting both worthy personal goals and socially beneficial economic goals. Lotteries are frequently compared with

If people are encouraged to believe that they are buying one product when they are really buying another, then a swindle has taken place.

risky investments, no more perilous or unreasonable than making purchases in the stock market. The investment metaphor extends even farther: people are encouraged in their belief that the habit of buying lottery tickets is as routine—and prudential—as making bank deposits. In fact, the formats of some games encourage precisely this view. Market research shows that very small prizes, those of two to five dollars are usually "reinvested" immediately by individuals who buy more tickets with their winnings. How lotteries are packaged also reinforces an investment mentality. For instance, instant games commonly are bundled into perforated strips of three games,

encouraging an individual to think she is getting good value for her money ("three tickets for the price of one"). When lotteries mimic businesses, players are, to use social scientist Erving Goffman's term, "altercast" in the role of the prudent investor: the steady Friday "investor" in lotto, the dutiful and disciplined "re-investor" in the next scratch-off game using the winnings of this one.

Further, a variety of promotional advertising encourages citizens to believe that their participation in the state lottery is a prudent financial investment. Such promotion reinforces the human tendencies to overemphasize the likelihood of reward, to be overconfident

Mistaken beliefs are necessary to accept the false claim that lotteries are prudent financial investments.

about one's capacity for making educated guesses, and to deny the extent of randomness or serendipity in the world. These mistaken beliefs are necessary to accept the false claim that lotteries are prudent financial investments.

Oregon's campaign: "There's No Such Thing as a Losing Ticket," for instance, deflects individuals from the thought that in all likelihood they will lose the purchase price of their tickets. Instead, they are encouraged in their belief that play allows only for gain and therefore is risk free. (New York's "You Can't Win if You Don't Play" and Maryland's "Play Today. Cash Tonight" also encourage the belief that playing carries no risk of losing.) Some promotions encourage the consumer to believe that she is "closer" to winning because she has faithfully played the same number every day. Or, she might believe her chances of winning are higher because she buys her ticket at the same gas station that sold the last winning ticket. Other promotions encourage the consumer to believe that what appear to be chance events are actually under his control. For instance, recent promotions in New York depict a person who spies numbers in his bowl of noodle soup and in the curls of a fellow bus passenger's hair. These advertisements deflect viewers from considering the random nature of winning lottery numbers. Instead, they are encouraged to believe that winning simply requires observing one's surroundings and acting on one's "knowledge." Finally, even the amount of advertising one is exposed to increases confidence in the occurrence of unlikely events. For instance, student lottery players well acquainted with lottery advertising reported that they did not believe the games were fair and honest; they insisted, nonetheless, that they had a "good chance" of winning.

The state-supported lottery furthers worthy social goals. Lotteries are also presented as promoting worthy social goals. The Jamestown colony and the building of King's College (later Columbia University) are but two prominent examples of endeavors funded by lotteries. In the early days of the state-sponsored lottery, after 1964, it was claimed that lottery revenues would fund enrichment programs for education and for the elderly. Players are still encouraged to consider their participation as the good citizen's contribution to worthy "supplemental" social programs, viewing their gambling as "buying," "paying for," "contributing toward" commendable social goals. These appeals have been successful. Citizens purchase more lottery products than they pay in tuition and fees at their respective state colleges and universities, and they spend more on lotteries than on state liquor, utilities, and hospitals. Lottery revenues exceed even those obtained from taxation of tobacco products, alcoholic beverages, parimutuels, and from property taxes.

The claim that lotteries advance worthy social goals is problematic. Little earmarking actually takes place in revenue allocation. Most state lottery revenues are not earmarked at all and go straight into the general fund, or they are earmarked for such broad purposes as "economic development" or "tax relief." Even in that minority of cases in which revenues do not go into the general fund, it is still questionable whether lottery revenues were needed to fund the "supplemental" programs cited. Fully half of the states that adopted lotteries did so at a

Players are encouraged to view their gambling as contributing toward commendable social goals.

time when they had above-average rates of revenue increase from other sources. Finally, one can only speculate whether revenues for these programs were increased at all by the addition of lottery profits, or perhaps previous sources of revenue simply were eliminated.

Every state with a lottery is operating in effect as a legal monopoly, granting itself the sole right to provide lottery games within its borders. But actual revenues decrease over time. Administrative expenses rise as new games continually must be developed to maintain the public's interest in playing. Players also tend to funnel dollars from one lottery to another and from one state to another in search of larger jackpots. Since lottery tickets are not taxed, money used for lottery play is not spent on other consumer goods or taxable items. Consequently, by some accounts, states might forfeit nearly one-quarter of their lottery profits indirectly through impact on other sources of revenue.



"Those two are recent Powerball money. The people by the table are old state-lottery money."

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Lotteries are an inefficient means of promoting worthy social goals for other reasons. Charitable giving decreases with lottery play, and in lower income households the price of lottery tickets is offset by reductions in grocery and utility expenditures. Further, a minority of the citizenry buys the majority of tickets. A study of lottery play among income classes in Maryland found that adults in the under \$10,000 income group spent nearly three times more than those earning \$50,000 or more. (In fact, twenty percent of players account for sixty-five percent of the total amounts wagered, and ten percent of players account for half.)

Lotteries as Free-Ride Tax Relief

If state lotteries are poor mechanisms for personal financial management, if they provide little funding for worthy social programs, and if in fact they rely on low-income players for their revenues, then what can we conclude regarding the actual nature of such lotteries? In short, what is one "buying" with the state-supported lottery? In fact, lotteries exist not to fund enrichment programs but to avoid tax increases and

taxation altogether. Since state revenue sources tend to decline in proportion to the growth of lottery revenue, the survival of services increasingly depends on funds generated by lotteries. Through time, actual funding of even necessary programs decreases, and states must more aggressively advertise lotteries to offset a plateau in revenues and to avoid raising or instituting other forms of taxation. Jack Gordon, sponsor of a lottery bill in the Florida Senate in 1985, hints at this unpleasant reality: "There is no question in my mind that a personal income tax would be a more efficient way of getting money. The question is, who is going to pass it? Not me . . . every time we talk about a tax, people say try a lottery." Although lotteries fail as efficient personal or social financial management tools, they do succeed as an expedient political tool.

The free rider dilemma is most generally framed as a problem of a selfish—or even thoughtless—few partaking of a common good that requires voluntary contribution to preserve it. Even when lottery revenues support governmental programs, it is the lowest income groups that pay the largest percentage of their income to play and who receive the least benefit. For instance, the poor use services such as higher education to a lesser extent

than do the moderately well off. Citizens who seldom or never play, particularly if they are in the moderate- or upper-income groups, receive more value in services, gaining the most benefit of tax relief.

In all likelihood, most who refrain from play do not intend to free ride. Some nonplayers might simply believe that their actions—whether they play or not—are too inconsequential to effect any larger group. Others might be following the logic of the “sucker effect;” they fear others will benefit more from their lottery play than they themselves can hope to gain. Still other nonplayers might believe that their enjoyment of goods and services funded by lottery play is deserved because their contributions to society takes other forms. While I certainly would not require every citizen to be knowledgeable about the fiscal realities that underlie state sponsorship of lotteries, the *awareness* of free riding is less important than its existence. More disturbing is that states themselves frame and shape the beliefs of the free rider by allowing her to believe lottery revenue to some extent increases the funding of social needs and worthy goals, but in any case these needs and goals are funded by state revenues. Most worrisome, finally, is that state-supported lotteries permit abrogation of one’s responsibility to contribute to the common good. Seen in this light, state-supported lotteries erode citizenship in two ways: the non-player enjoys goods and services for which she has made little or no contribution. More importantly, she may begin to think of her contributions to the wider community as optional and, in fact, acts of supererogation.

States claim falsely that lotteries are prudent investment tools and that they achieve worthy social goals. Instead, they offer free-rider tax relief. It seems, therefore, that lotteries are not the “painless tax” one might initially believe them to be. The lottery tax system extracts what little money the poor do possess and, through ever-decreasing direct taxation, also allows the social sphere to abrogate its responsibility for providing basic services. Leff’s conclusion that lotteries are simply a means of producing one winner, among an indefinite number of losers, must be abandoned.

States Exercise Monopolistic Power and Abuse Their Moral Authority

States with lotteries operate as legal monopolies, granting themselves the sole right to provide lottery games within their borders. To maintain interest in play, states find they must continually create new games and produce new advertisements for existing games. While these efforts are costly, there is yet another cost to monopoly power—a moral cost. States repeatedly assail citizens with advertisements that present false claims. States also deliberately encourage citizens to draw mistaken or unrealistic judgments about lotteries.

Some might argue that, on balance, state lotteries are harmless pastimes, but if a person cannot afford to participate in them, then he or she should make the judgement to refrain from play. Others have accepted lotteries as a reality of American life and look to ways of minimizing the social costs of lotteries. Political philosophers William Galston and David Wasserman, for instance, argue for a strategy of “containment.” Among other proposals, they suggest a moratorium on the introduction of new lottery games, and the elimination of non-informational advertising as practical ways to minimize harm. Such approaches to lotteries are reasonable, since it would be naïve, if not paternalistic, to suggest that people could be made to consistently act in their own best interest, or that they would cease gambling if only states abandoned lotteries.

Nonetheless, I find it improper for a sovereign authority to create a device dependent on deceit and more improper still to conclude that those who are harmed have acted freely to their own detriment and therefore bear the moral responsibility for those harms. Nearly four centuries ago the political philosopher Thomas Hobbes discouraged a civic life that relies on a duplicitous relationship between state and citizen. Although “force and fraud are in [the state of nature] the two cardinal virtues,” the state is created for the good of the people. Furthermore, he argues, the state has a responsibility to act in a “perspicuous” way for the good of the citizenry.

Perhaps you have tossed coins in the cup of a man dressed in monks’ robes, believing your donation would benefit the monk’s order or support its good works. None of this may be true, and you might come to find out that the man merely poses as a monk, and that he squanders all the money he receives. Pretending to be a cleric is an added injury, since effective impersonation violates trust and diminishes the good reputation of the genuine article. Similarly, states with lotteries doubly harm their citizens: not only are lottery proceeds not used for the purposes claimed, but states with lotteries also abuse their trust as agents for the common good.

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"Robert Shiller's terrific new book . . . makes a powerful case that the soaring stock market of recent years is a huge, accidental Ponzi scheme in progress, one that will come to a very bad end. . . . It's a book that I hope many people will read."

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Irrational Exuberance

Robert J. Shiller

The high valuations we have seen recently in the United States stock market have come about mostly for no good reason. The market is high because of the combined effect of a lot of indifferent thinking across millions of people, very few of whom feel a need to do careful research about the longterm investment value of the aggregate stock market, and who are motivated substantially by their own emotions, random attentions, and perceptions of conventional wisdom. Their behavior is heavily influenced by news media that are interested in attracting viewers or readers, with little incentive to report regularly on quantitative analysis that might give a correct impression of the aggregate stock market level.

It is a serious mistake for public figures to acquiesce in the stock market valuations we have seen recently, to be silent about the implications of such high valuations, to leave commentary to the market analysts who

The market is high because of the combined effect of a lot of indifferent thinking across millions of people.

specialize in the nearly impossible task of forecasting the market in the next few months and who share interests with investment banks or brokerage firms. The valuation of the stock market is an important national and international issue. All of our plans for the future hinge on our perceived wealth, and plans based on value that might not be there tomorrow could be dangerous. The tendency for speculative bubbles to grow and then contract can make for very uneven distribution of wealth. It may even cause many of us, at times, to question the very capitalist and free market institutions we have. We must be clear on the prospect for such contractions and on individual and national policy towards this prospect.

The 1990's Bull Market

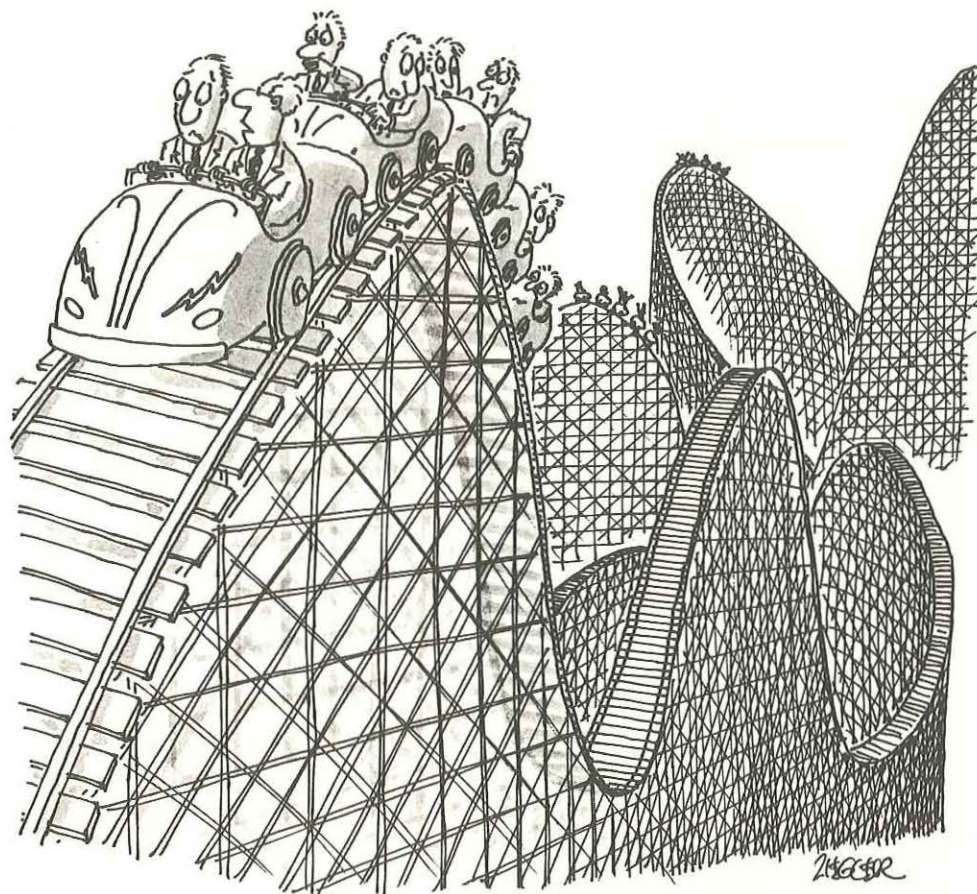
Of all of the factors that have promoted the recent bull market—including the financial clout of baby

boomers, the decline of foreign rivals, and the economic opportunities made possible by the Internet—it is the prominence of the Internet that appears most likely to see further growth in the opening years of the twenty-first century. The Internet is a “visible” invention in the sense that individuals themselves directly participate in it and find it opens new horizons for them. The Internet also has room for growth. As of 1998 only 168 million individuals globally had some access to the Internet, and most only at work. But the effect on the stock market of further growth in Internet use will probably be limited: wealthier people, who are more likely to invest in the stock market, are already connected to the Internet. The symbolic value of the Internet also likely will fade as we become accustomed to it. As time goes on, the Internet may seem less and less like a symbol of the promise of new technology, and more and more like the old phone book.

In addition, it is uncertain whether the really low rates of inflation we have seen can be expected to continue. For now, continuation of low inflation appears a likely prospect, but low inflation is at best a stable factor, not a factor encouraging further growth of the stock market. In addition, other factors supporting a high market are quite likely in the future to falter. The salutary effects of baby boomers on the stock market in the United States will most certainly weaken. We know that there will be many more retired persons in 2030

All of our plans for the future hinge on our perceived wealth.

than there are now. Although retirees will live longer because of improved medical technology, they also will face increased dependency, requiring them to cash in on their stock market investments. As important, the sense of American “victory” that developed after some of our close competitors abroad began to falter after 1990 is unlikely to persist. In particular, if attention is drawn to some flaw in American corporations by some big event, the sense of victory could fade



"Dow Jonesy enough for you?"

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quickly. One of the most likely aspects to change, finally, is the emotional frame of investors. If stock returns become more modest, there gradually will be less excitement, less attention paid to the stock market, and quite possibly less willingness to take risks in the stock market. As time wears on, the sense that one is "playing with the house's money" with one's investments will certainly fade.

Issues of Fairness and Resentment

Many of these potential causes of earnings reversal have ultimately to do with changes in morale, loyalty and a sense of fairness. Currently, overt resentment by American citizens against their own corporations appears to be at an unusual low. Businessmen are lionized, and labor unions are very weak by historical standards. But deteriorating income distribution, and the increasingly frequent stories of fabulous wealth earned by the dealmakers, may make public opinion less favorable toward business. Further, according to calculations of economist Ray Fair, if market expecta-

tions for earnings growth are to be realized (assuming US gross domestic product growth of 4% a year) then corporate profits as a fraction of gross domestic product must be over 12% in 2010. This fraction is almost twice as high as we have seen since 1948. It is hard to imagine that the public would tolerate such levels of corporate profit. Resentment by foreigners towards the United States is another potential limiting factor of the bull market. Something may seem unfair about America's dominance in, among other areas, high technology. How, one might ask, did Microsoft attain such dominance? The company is often described as cutthroat and grasping. And why does the United States dominate the Internet? The World Wide Web was a European invention, developed by a British and a Belgian scientist working in a Swiss lab. Resentment against the United States and its strong free enterprise system has moral overtones too; people in many other countries not as strong economically wonder if their relative lack of economic success is due to their greater concern with equity, fairness, and human values. If such a moral basis for resentment gains solid ground

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in public thinking, it could lead to heightened efforts to compete with American corporations or exclude them entirely.

What Should Individuals Do Now?

If the market declines to the point it was a few years ago or even lower, then people are going to find themselves poorer, in the aggregate amount of trillions of dollars. The real losses could be comparable to the total destruction of all the schools, farms, or houses in the nation. One could say that such a fall is really harmless, since nothing is physically destroyed by the fall, which only brings us back to where we were a few years ago in terms of market value. Losses will not be

*We can imagine the effects on those who
had become too dependent on stocks
as investments.*

borne equally, however. Some who rode the market up to new prosperity will have lightened up on their holdings and will keep their gains, while others who have entered the market only recently will take the losses. Thus, a substantial fall in the market would make some people really poor, leaving others rich.

We can imagine the effects on those who had become too dependent on stocks as investments, and too hopeful for how these investments would do in future. People who have put away only a modest amount in the stock market for their children's college education may find their savings are inadequate, and that the real value of the portfolio falls far short of the increased cost of a college education. Students may have to take out substantial loans, accept unrewarding jobs to pay for their education, or forgo a dream career. They might decide to not go to college at all. Others, who are a little older, may find that their careers or ambitions are thwarted. With smaller economic resources, the need to maintain an income level and fulfill everyday obligations will be destructive to individual fulfillment.

Those who have saved virtually nothing for their retirement because of their faith in stock market investments held by their pension plans may find that those pension plans, even when coupled with Social Security, cannot provide them with a comfortable living standard in their retirement. The "amazing power" of compounding, which is an article of faith among so many, vanishes if the returns are not there. Thus those with meager savings will have to fend for themselves in a world with greatly more dependent elderly people relative to young people. They may

have to live very simply, and that may mean sitting at home and doing little that they are interested in. So, what can one do today to minimize the impact of a possible market fall?

Savings The natural first thing for an individual to do may be (depending on current holdings and other circumstances) to reduce one's stock holdings. Yet this is advice is problematic, since if large numbers of people divested their holdings in stocks, the market would immediately plummet. An important action that all individuals can take now is to decrease their reliance on the stock market in their future economic decisions, and instead increase their saving rate. The amount of additional saving that must be done to offset a large stock market decline is quite large—on the order of an additional 10% of pretax income each year.

Retirement Plans Since the bottom of the market in 1982, the growth of employer defined-contribution pension plans (where the company makes contributions to an investment fund that is owned by the employee) has far outstripped the older defined-benefit corporate pension plans (where the company guarantees specified pension benefits for the employee

It would be a great error to adopt the policy of investing social security funds in the stock market.

upon retirement). With it, this transition marks a *shift away* from the notion of a shared responsibility to care for the elderly, and *toward* a feeling that each person is responsible for his or her own welfare. Further, 401(k) plans, which are designed to give ordinary people economic security in retirement, simply encourage them to imitate the portfolio strategies long pursued by the wealthy. Commonly, however, little attention is given to the fact that wealthy people had less reason to worry about losing substantial amounts in a market decline, since their wealth was already so high.

The change towards defined-contribution pension plans is likely in many respects to have been a good thing, since people who retired and lived a long time under defined-benefit plans often saw a substantial part of the real value of their pension eroded by inflation. Although the switch to defined-contribution plans eliminated this problem, what is lost is the sense of group responsibility for the standard of living of pensioners. Participants in pension plans must now simply choose their investments and take their chances. Further, although the Labor Department has ruled that there be at least three choices for 401(k) plan participants, virtually no government regulations exist

concerning what these choices need to be. Further, plans that include government inflation-indexed bonds are a rarity, despite the fact that they are riskless, an obvious choice for those planning for retirement. Yet there is no leadership to encourage a shift to bonds as a part of 401(k) plans. Finally, because so much of the 401(k) investments are in the stock market, a sharp market decline would have important consequences for many retirees. Given the meagerness of most social security benefits, and given that most retirees have little more than their pension plan, their house, and their social security benefits, these declines would be noticeable. There is a curious lack of public concern about this risk. If anything, concerns are expressed that some plan participants are not putting *enough* in the stock market.

Social Security The current bull market has prompted some to advocate investing the Social Security Trust Fund in the stock market. Those who have realized high returns on the market are wondering why they have earned so much less on their contributions to Social Security than they could have earned. However, governmental implementation of any sort of proposal to invest Social Security funds in the stock market would compromise another important national risk-sharing institution.

For ages, young people have felt a sense of obligation to care for their aging parents, in return for the care they received as children. Routinely, middle-aged people care simultaneously for their elderly parents as well as for their children. Since morals and feelings rather than legal bonds dictate the precise obligations for care giving, this old family system encouraged effective intergenerational risk sharing. We divide our attention between our dependent children and elderly parents according to their (and our) needs, and not by some contract formula. But in the United States and many other countries, social security is primarily a pay-as-you-go system, meaning that the contributions made by working people are not invested in any real assets, but are given immediately to the retired people who need the money now. In a pay-as-you-go system, social security simply *mimics* the traditional family system, and because of exaggerated public confidence in stocks, we wrongly accept that we can invest in the future care of elders.

It would be a great error to adopt the policy of investing social security funds in the stock market. Variations on this plan abound; yet *any* such plan would replace current societal commitments to the elderly with only a *hope* that financial markets will do as well as in the past. We must reform the social security system in the direction of making it more like a system that would seem just and humane within a family, a system that shares risk and that does not leave anyone bearing an inordinate share of economic risks.

Ways to Reduce Volatility

At times, tightening monetary policy is introduced in order to burst a stock market bubble. For example, on February 14, 1929 the Federal Reserve raised the rediscount rate from 5% to 6%, with the ostensible purpose of checking speculation. In the early 1930s, the Fed continued the tight monetary policy and saw the initial stock market decline turn into the largest US depression ever. While precise causal links are hard to disentangle even in these dramatic episodes, one thing we do know about interest rate policy is that it affects the entire economy in fundamental ways, and is not focused on the speculative bubble it might be used to correct. A small, but symbolic, increase in interest rates by monetary authorities at a time in which markets are perceived by them to be overpriced may be a useful step if the increase is accompanied by a public statement that the increase was done to restrain speculation. Authorities should not, however, try to burst a bubble with aggressive tightening of monetary policy.

The Stabilizing Authority of Opinion Leaders

Another time-honored way of restraining speculation in financial markets is for intellectual and moral leaders to try to call public attention to overpricing and

Authorities should not try to burst a bubble with aggressive tightening of monetary policy.

underpricing errors when they occur. This approach has been used repeatedly in the history of our financial markets, with success that is hard to judge. In a 1996 statement intended to warn against stock market excesses, Alan Greenspan suggested that "irrational exuberance" was driving the very high market levels. There is no way to judge the success of such rare statements, but the real trouble with such appeals to moral authority is that such views express only an opinion that is in accord with a larger or smaller number of financial experts. Further, the person who makes such statements makes an intuitive judgment about the state of the market fundamentals and psychology, a judgment so hard to prove that he probably feels it is an act of courage to speak out at all.

Interrupting, Discouraging, and Encouraging Trade

Another method to reduce market volatility has been to shut down markets at times of rapid price change. These "circuit breakers" are intended to give traders time for reflection, thereby reducing panic trading. But it is not clear that these closings do much to restrain one-day price changes. (The two biggest stock market

crashes in history, the crashes of October 1929 and October 1987, occurred on Mondays after price declines of the previous trading day were interrupted by a weekend.) Further, these policies of closing the market for a matter of seconds, minutes, hours or days do not address longer-term price movements.

Other proposals have been to slow down the pace of trade by discouraging frequent trading, that is, to "throw sand in the wheels" of speculative markets. James Tobin, for one, suggests that speculative price movements in the market for foreign currencies can be restrained by placing a transaction tax on such trades. The idea is that such transaction taxes will discourage short-run speculators in favor of investors concerned with long-run fundamentals. While I feel that there

No one today knows what the United States economy, or any other economy, is worth.

may be some merit in a Tobin-style transaction tax in reducing speculative volatility, I have not found the case strong enough to recommend any such action.

It may be that the best stabilizing influence on markets is to broaden them, allowing as many people to trade as often as possible. This is just the opposite of the previous proposals. (In my previous book, *Macro Markets: Creating Institutions for Managing Society's Largest Economic Risks*, I offered arguments justifying expansion of the number and variety of markets. These macro markets are international markets that include, for instance, markets for long-term claims on national incomes for each major country in the world.) Besides the obvious benefits of creating new risk management opportunities, creating new markets would have a salutary effect on speculative excesses by broadening the scope of market participation. The creation of such markets would also allow us to discover the prices of assets as yet unmarketed. No one today knows what the United States economy, the Japanese economy, or any other economy is worth. There appear to be unseen speculative bubbles in unobserved prices, as people go through waves of optimism or pessimism for their own economies, and as they individually make career choices based on current fashion. At times these changes encourage excessive investment in real and human capital and, at other times, inadequate investment. The diversity of investment opportunities and attention focused on fundamental risks permitted by macro markets around the world ought to be generally stabilizing to our economies and our lives.

Conclusion: Speculative Volatility in a Free Society

The problems posed for policy makers by the tendency for speculative markets to show occasional bubbles are deep ones. Policy makers will have to take full account of our evolving understanding of the nature of these bubbles when formulating measures to deal with the problems they cause. Unfortunately, the nature of the bubbles is sufficiently complex and changing that we can never expect to document the particular role of any given policy in bringing about the objective of long-term economic welfare.

Ultimately, in a free society, we cannot protect people completely from the consequences of their own errors. We cannot protect them without preventing them from the possibility of achieving their own fulfillment. We also cannot protect society from the effects of the waves of irrational exuberance or irrational pessimism, emotional reactions that are part of the human condition. Policies to deal with speculative bubbles should take the form of allowing more opportunities for people to take positions in more and freer markets. By designing better forms of social insurance and creating better financial institutions, real risks can be managed effectively. The most important thing to keep in mind as we experience today's speculative bubble in the stock market is that we should not let it distract us from such important tasks.

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