

PHILOSOPHY & PUBLIC POLICY QUARTERLY

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The Institute for Philosophy and Public Policy
School of Public Affairs • University of Maryland



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The Ethics of Retaliation

President Bush's promise to retaliate against those responsible for the attacks of September 11 has received the overwhelming support of the American public. But the moral dimensions of retaliation have received less scrutiny than they deserve.

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Terrorism, Innocence, and War

Following the events of September 11, some have insisted that no matter what its political aims, terrorism admits of no moral justification because terrorists attack "innocent" victims. Terrorists contend that their human targets are not innocent—they participate in unjust state actions and therefore deserve punishment. But to arrive at this conclusion, terrorists must treat themselves as sovereign states authorized to make such judgments and, in the case of bin Laden and his followers, believe their judgments and actions simply follow God's will.

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The Libertarian Critique of Labor Unions

Americans tend to distrust unions, in part because unions seem to place little value on personal liberty, self-reliance, and efficiency. However, libertarian criticisms against unions are flawed and, consequently, widespread distrust of unions is unwarranted.

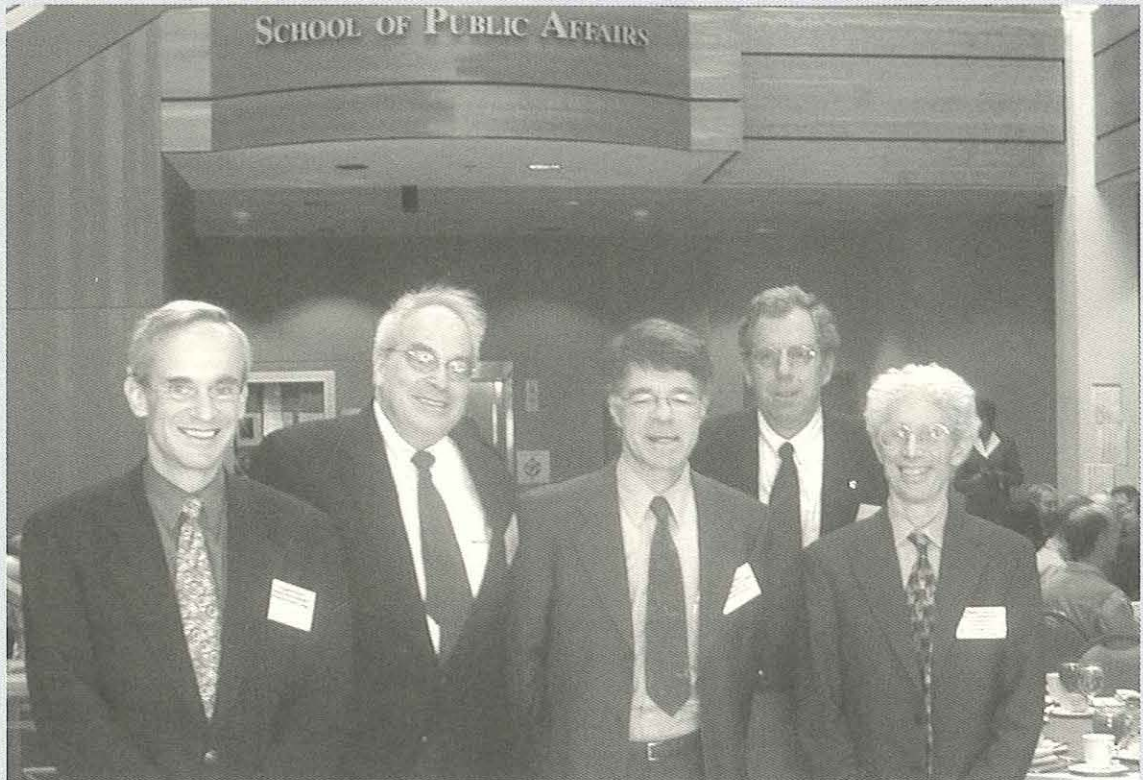
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Understanding the Consumer's Right to Know

The Food Quality Protection Act mandates that consumers be informed of the risks and benefits of pesticide chemical residues in food. But since these new consumer "right-to-know" provisions are not clearly articulated, consideration of the carefully scrutinized medical right to know offers insights into the kinds of information about food that may prove useful to consumers as well as to those charged with carrying out the provisions of the Act.

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The Institute for Philosophy and Public Policy Celebrates its 25th Anniversary



Institute directors past and present (from left to right): Douglas MacLean (1984–1989), Mark Sagoff (1989–1995), Henry Shue (1981–1984), Peter Brown (1976–1981), William A. Galston (1995 to the present).

On Friday, November 9, the Institute for Philosophy and Public Policy celebrated its twenty-fifth anniversary with a one-day conference, entitled "Philosophy and Public Policy: Issues and Challenges," which was held at the School of Public Affairs on the University of Maryland, College Park campus.

Scholars and policy analysts discussed the importance of ethical analysis and normative reflection in addressing policy problems. They also celebrated friendships that have sustained the Institute over the years. In his opening remarks, William A. Galston, Director of the Institute, welcomed the attendees and expressed his gratitude to the Institute's past directors. He also briefly recounted the history of the Institute, which owes its birth in 1976 to Peter Brown and Henry Shue. At that time, many were beginning to see the limits of economic thought and analysis applied to

questions of public policy, and Brown and Shue were convinced that applied ethics and public philosophy raised moral and normative issues essential to public policy concerns. Sam Gorovitz, then chair of the philosophy department at the University of Maryland, contributed funds to sustain the Institute during its first year. With further financial help by the University of Maryland, by 1981 the Institute had added the number of scholars it has today. The basic shape of the Institute was completed that same year, with the addition of Carroll Linkins, the Institute program manager who continues her invaluable help to all, and the first Institute editor, Claudia Mills (who inaugurated the journal now known as *Philosophy & Public Policy Quarterly*).

Judith Lichtenberg, Senior Research Scholar and Associate Professor of Philosophy, enriched the story of the Institute's growth and development. During her talk, "The Institute for Philosophy and Public Policy:

Formation and History," Dr. Lichtenberg unfurled a quilt made by Institute scholars on the occasion of her marriage in 1983 to then-scholar David Luban (now Frederick J. Haas Professor of Law and Philosophy at Georgetown University Law Center).

Two lively morning sessions followed these opening remarks. Henry Shue (Institute Director, 1981–1984), Director of the Program on Ethics and Public Life, and Wyn and William Y. Hutchinson Professor of Ethics and Public Life, Cornell University, chaired the first session, "Applied Ethics: New Challenges and Opportunities." In

her talk, "Ethics, Values, Science, and Technology," Rachelle D. Hollander, Director, Societal Dimensions of Engineering, Science, and Technology, National Science Foundation, described the National Science Foundation's rich array of programs and opportunities for ethicists in a variety of disciplines, and she lauded the contributions of the Institute (whose growth and flourishing was aided by NSF funding) in recognizing the moral dimensions in issues of policy concern. Lee H. Hamilton (U.S. Rep. from Indiana, 1965–1999, and chair of the House Foreign Affairs Committee, among other key positions), Director of the Woodrow Wilson International Center for Scholars, in his talk, entitled "Religion, Politics, and International Affairs," considered the importance of religious belief in shaping public policy. And in the question-and-answer period following his talk, Mr. Hamilton discussed possible repercussions of the September 11 attacks on religious practice.

In the next session, conference attendees turned their attentions to the question "Has Applied Philosophy Come of Age?," chaired by Peter Brown (Institute Director, 1976–1981), who is Director of the McGill School for the Environment, McGill University. In his talk, "Applied Ethics and the Philosophy Profession," Christopher Morris, who will join the Department of Philosophy, University of Maryland (January 2002), discussed the history and sources for the increasing respectability of the field of applied ethics, and the growth of undergraduate and graduate studies in the field. Two Institute Research Scholars gave direct application of the importance of their specialties—in his talk, "Genetic Engineering and the Future of

Nature," Mark Sagoff (Institute Director, 1989–1995) examined the convergence of Institute research on issues concerning environment and biotechnology, with the embattled idea of Nature as a unifying theme.

"Challenges to Ethics in International Affairs," presented by Xiaorong Li, concerned the breadth of the Institute's work on human rights and international justice, and the challenges posed by relativism.

After a lunch held in the Atrium at the School of Public Affairs, the afternoon session of the conference examined "Civic Virtue, Civic Education, and

America's Youth," chaired by Douglas MacLean (Institute Director, 1984–1989), Department of Philosophy, University of North Carolina. Linda F. Williams, who is Associate Professor, Department of Government and Politics, University of Maryland, discussed her work to educate students about their civic responsibilities and opportunities for engagement. Two Institute Research Scholars contributed to the theme of civic engagement. Robert K. Fullinwider

challenged the conventional wisdom that American youth is characterized by civic disengagement and distrust of government, and Peter Levine outlined a new project at the Institute—the Center for Information and Research on Civic Learning and Engagement (CIRCLE). Established with initial funding by The Pew Charitable Trusts, and

with an annual budget of over two millions dollars, CIRCLE will serve as a clearinghouse for information on youth civic engagement and a funder of scholarly research which intends to increase the quality and quantity of youth engagement. (Those interested in CIRCLE are invited to visit www.civicyouth.org.)

Following the conference, presenters and attendees refreshed themselves, made new acquaintances, and renewed friendships at a reception held nearby. Later in the evening, friends of the Institute celebrated at a local restaurant, conversing about projects past, present, and future, and enjoying the company of both friends with whom they work every day and those who now visit from other academic and intellectual homes. Only the light of feet (or the brave of heart) took to the dance floor.



The Ethics of Retaliation

Judith Lichtenberg

From the very first hours after the September 11 attacks on New York and Washington, President Bush vowed to retaliate against those responsible. The American public supported him overwhelmingly, and continues to do so. But what does retaliation mean, and what does it allow? What kinds of actions are appropriate, and on what basis can we justify them? Some people will be impatient with such questions—feeling that, in the wake of these wrenching events, justification is either unnecessary or plain obvious. But the risks surrounding what we do—or fail to do—are great, so it is worth thinking about the moral dimensions of our responses.

Two Rationales for Retaliation

Philosophers have traditionally distinguished between two different sorts of justifications for retaliation or punishment. One is “backward-looking,” the other “forward-looking.” The backward-looking approach looks to what has already happened: it justifies retaliation purely in terms of the justice of meting out punishment to one who has deliberately caused harm to others. This rationale, which philosophers call *deontological* (from the Greek word for necessity), is often linked with the popularly expressed goals of retribution, revenge, vengeance, an eye for an eye. The idea is that one who does harm *deserves* to suffer, that punishment is just and even necessary to “right the wrong” and restore the moral balance. The terrorists, like other criminals, must be brought to justice; justice must be brought to the terrorists.

To describe this approach as backward-looking is not to criticize it. It is only to recognize that what justifies retribution is not any supposed good consequences, such as deterring similar acts in the future, but simply that the guilty party has done wrong and deserves to pay. From the point of view of retribution, it doesn’t matter if any further good comes of punishment; punishing the guilty is inherently right and just, and that’s all it needs to be. Forward-looking justifications, by contrast, are *consequentialist*: they justify punishment or retaliation as a means of bringing about some supposed good consequences, such as prevent-

ing or deterring further violence, or (in some cases) reforming or rehabilitating the wrongdoer.

Our institutions of punishment generally combine a backward-looking retributivist justification and forward-looking consequentialist ones. Most people find the retributivist argument compelling: they think that it’s inherently wrong for people to get away with murder and that we must serve justice by giving people what they deserve. But it is clear that we do, and must, inflict punishment also for forward-looking reasons: primarily to remove dangerous people from society (domestic or international) so they can do no further harm, and to send a message to other potential criminals that such behavior will not be tolerated. We can think of these forward-looking considerations—sometimes called specific and general deterrence, respectively—broadly in terms of self-defense. It’s hard to imagine a system that didn’t combine backward-looking with forward-looking elements.

Retribution: A Closer Look

But matters are more complicated than these remarks might suggest, as we can see if we examine the notion of retribution more carefully. Note first that

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retribution is popularly associated with revenge and vengeance, which, despite their near-universality as emotions and motives to action, have some explaining to do. Two wrongs, we know, don’t make a right, so retributivists have to explain why the second “wrong” is *not* wrong and thus *can* make a right. Typically they do this by invoking the idea of balance, of inflicting suffering on the criminal as a counterweight to the suffering he inflicted on the victim—something that raises the victim’s stature to what it was before the crime, or

that lowers the wrongdoer's to what, in light of his crime, it should be.

Revenge also suggests the unleashing of powerful emotions that may not be easily contained: the punishment may exceed the crime, and violence may continue and even escalate. The Hatfields and the McCoys, the Israelis and the Palestinians. Defenders of retribution answer this objection by distancing it from its suspect cousins revenge and vengeance. Two features can tame retribution and render it respectable. One is the idea that the punishment must fit the crime, an idea that is essential to retribution but not necessarily to the emotionally-based revenge and vengeance. And while it is common to emphasize that the punishment must be severe enough to fit the crime, it is equally crucial, retributivists insist, that punishment not exceed the crime in severity.

Furthermore, while the principle of retribution says that the guilty must be punished, equally important is its demand that *only* the guilty may be punished. Punishment must be tailored to reach those who have done wrong and leave untouched those who have not.

Despite these crucial qualifications, retribution still seems to some people pointless and incomprehensible. Why add injury to injury? Unless punishment does some good, what rationale can be given for it? Ironically, when we consider crimes on the scale of the September 11 attacks, retribution can seem especially meaningless. Many of the criminals are already dead, and moreover they and their allies seem not to regard death—for most of us the worst punishment—as punishment at all. Even if they did, the deaths (or other punishment) of a few score guilty murderers pale in comparison with the crimes they have committed.

Yet most people find in the idea of retribution something satisfying and morally sound. Clearly they are more justified in this opinion once the strict requirements of retribution are understood. The fit of punishment to crime (not too little, not too much) and the requirement of guilt transform retribution from a potentially brutal idea to one constrained by strict limits. Indeed, the principle of retribution can be conceived to be as much about the limits of punishment as about its necessity. So it's not as ironic as it may seem that, despite its usual associations with a certain

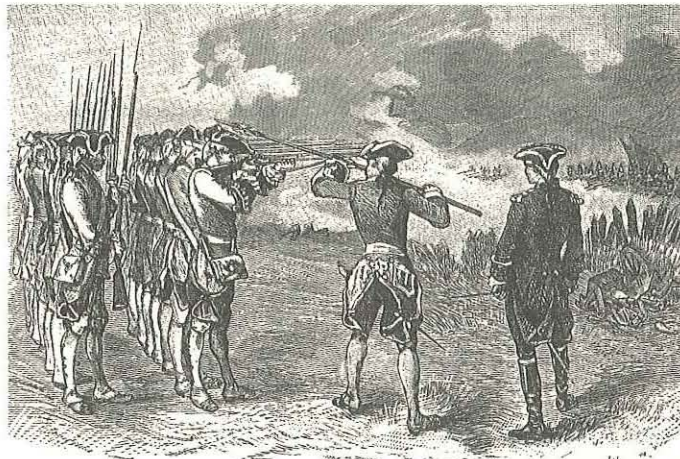
unflinching hardness, retribution is inadequate to justify the broad actions that have in fact been undertaken since September 11. These actions and their clearly foreseeable consequences—the waging of war and the suffering and hardship it imposes on many people not guilty of terrorism—are much too indiscriminate to be justified in terms of retribution.

Making the World Safe

But retribution is only part of what the current retaliation efforts—and most retaliation efforts—are about. Here we may note a certain ambiguity in the word “retaliation.” Much of the post-September 11 rhetoric suggests that the goal of retaliation is identical with the goal of bringing the terrorists to justice. But clearly there is another goal: to reduce the threat of terrorist attacks as much as possible. We retaliate not only to punish, but also to prevent: to disable potential terrorists from successful action, to deter them if possible, to make the world safe from terrorist violence. Indeed, even those who care nothing for retribution are concerned about prevention. We are engaged in acts of collective self-defense.

Few people would disagree that preventing such violence is a legitimate and worthy goal. But prevention raises questions very different from those confronted by retribution. One is *how* to prevent such violence. We know much better how to punish than how to prevent. If, as some people argue, violence breeds violence, then war is not the way to achieve our goals. Even if this pacifist view is wrong, the policy of employing war as a tool involves countless guesses and gambles about just which of myriad possible causal chains our actions will set off. It thus raises empirical questions whose answers we can never be certain of. Retribution, by contrast, raises no comparable questions of fact.

But the goal of prevention also raises an explicitly moral question: what means may be employed to prevent terrorism? We can imagine extinguishing it by indulging in a degree of violence that would be excessive and reprehensible. “By any means necessary” is not an adequate answer.



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Despite its harsh reputation, the principle of retribution imposes strict moral limits—the requirement to punish only the guilty and to do so in proportion to the crime. But it's not clear what limits the goal of prevention imposes. It suggests only that the actions contemplated have the desired effect, and that could sanction the unleashing of great brutality and violence. In the domestic context, the preventive aims of the criminal justice system are for the most part constrained by respect for the civil rights and liberties of American citizens. Excessive and invasive means to prevent or reduce crime would evoke sharp reactions from many quarters. But when the goal of preventing violence involves action beyond our borders, respect for the rights and welfare of other countries' people looms much less important—if it figures at all.

Just war theory—the accumulated body of thought regarding the moral constraints on the conduct of war—offers two relevant principles. One is the principle of proportionality. The other is the principle of non-combatant immunity.

Proportionality demands that we weigh means against ends. Which ends justify which means? When a country is attacked, and the end in question is a nation's survival or the survival of its people, proportionality may seem to rule out very little. For what can

We retaliate not only to punish, but also to prevent. . . . We are engaged in acts of collective self-defense.

be a more worthy or legitimate end? Spelling out the meaning of proportionality, the nineteenth century philosopher Henry Sidgwick argued that in the conduct of war it is not permissible to do "any mischief which does not tend materially to the end [of victory], nor any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief." As Michael Walzer points out, Sidgwick's argument seems to rule out only purposeless or wanton violence. Although, as Walzer also notes, in war this is no small achievement, still it does not take us very far in limiting the conduct of war.

Noncombatant Immunity

Much more central to limiting the destructiveness of war is the principle of noncombatant immunity. The core idea is that in war one may not target civilians. In keeping with this principle, President Bush at the beginning of the war in Afghanistan made "low collateral damage"—the military euphemism for civilian casualties—a criterion for the conduct of the war. At

the same time, since September 11 a large majority of the American public has favored military action even if it means the killing of civilians.

The *Washington Post* reported that "as many as 10 times" in October and November "the Air Force believed it had top Taliban and al Qaeda members in its cross hairs in Afghanistan but was unable to receive clearance to fire in time to hit them because of a cumbersome approval process" and disagreements with the U.S. Central Command "over how much weight to give to concerns about avoiding civilian casualties." Now it's clear that at least part of the reason for American leaders' concern about protecting noncombatants is strategic. They understand the importance of winning—certainly of not losing—the war for public opinion in the Muslim world. They know that nothing is more likely to turn opinion further against the United States, and to disturb the fragile relationships the U.S. has with its Islamic allies, than the killing of civilians. But even this strategic reason rests at bottom on a moral one: it is because people believe it is morally wrong to kill noncombatants that it is useful to respect the prohibition. There is another important moral consideration: our condemnation of terrorist attacks on civilians would ring hollow if we ourselves committed such acts.

But the principle of noncombatant immunity raises several questions. First, how should we draw the line between those who are legitimate targets of military attack and those who are not? Second—and this question is inseparable from the first—*why* should we draw such a distinction? Third, just what does the principle of noncombatant immunity prohibit and what does it allow?

In ordinary discourse we often use the terms "non-combatants," "civilians," and "innocent people" synonymously. What makes such people morally immune from attack? In "War, Innocence, and Terrorism," (published in this issue) and elsewhere, Robert Fullinwider has noted an important ambiguity in the word "innocent." We tend to use the word to mean "morally guiltless" or "morally good." In this sense it is clear that the distinction between combatants and noncombatants is perfectly distinct from the class of noninnocents and innocents. Some combatants are morally good, some noncombatants are morally bad. Some conscripts are unwilling soldiers who do not support their country's cause; some civilians applaud their country's murderous actions from the sidelines. But the relevant meaning of "innocence" in war, Fullinwider suggests, has to do with the absence or presence of threateningness, not moral guilt. Typically, combatants are threats—they have and use weapons to try and kill their enemies—while noncombatants are not. It is because they are nonthreatening, not because they are morally innocent, that noncombatants are morally immune from attack.

It's easy to confuse moral guilt and threateningness, because in typical crimes the two go together. The ordinary murderer threatens his victim, and he is morally guilty. But in war and some other situations the two concepts can come apart. Philosophers once had to dream up fantastic examples to illustrate this point, but recent events have rendered the examples merely realistic. Passengers on the planes that crashed into the World Trade Center were what philosophers call innocent threats or shields. Through no fault of their own, they threatened the lives of those in the buildings. It is plausible to think that if government officials could have prevented the deaths of thousands inside the buildings by shooting down the planes, they would have been justified in doing so. The passengers on the plane (minus the terrorists) were—we may suppose—morally unstained, but they posed a mortal threat to the lives of other people, and this rendered them legitimate targets.

So we can draw the line between legitimate and illegitimate targets via the notion of a threat. Combatants are ordinarily armed and threatening, noncombatants are not. (There will, of course, be borderline and unclear cases.) Another basis for the distinction can be found in an intriguing discussion by the philosopher George Mavrodes. Mavrodes argues that the distinction between combatants and noncombatants depends not on an intrinsic moral difference between the two groups but on a convention: a pragmatic calculation that in the long run less carnage and destruction will result if we limit battle to a circumscribed class of people. It's as if warmakers got together and agreed that they could achieve the same goals at lesser cost by playing the war game in a restricted rather than an unlimited way, declaring some people players and others off limits. More specifically still, we can imagine the leaders of each nation consenting to such an agreement on the grounds that if they vowed not to target the other side's civilians, their enemies might do so as well.

The idea that war is a rule-governed activity and not a free-for-all has always seemed somewhat strange, but the conduct of states in the international arena shows that, fortunately, it is accepted most of the time. The particular rule limiting combat to agreed-upon players is one of the most important, preventing war from infiltrating every corner of people's lives.

So we find two bases for the immunity of noncombatants: one resting on threateningness as the central justification for violence in war, and the other on a pragmatic calculation that a rule protecting noncombatants can reduce the carnage and destruction of war. Still, war is messy, and inevitably military actions will sometimes kill civilians. And so the question is how to decide when such actions are justified.

The Doctrine of Double Effect

Catholic theologians in the Middle Ages devised the "doctrine of double effect" to answer this question. According to the doctrine, it is never permissible to kill civilians directly; one may never aim at or intend their deaths. But suppose some civilians are killed in the course of a legitimate military operation—an operation directed only at a military target. Suppose also that one knows or foresees that they will be killed. Whereas intending to kill civilians is never permissible, according to the doctrine of double effect, foreseeing civilian deaths as an effect of a permissible action (such as aiming at a military target) is not prohibited.

A great deal has been written both defending and criticizing the doctrine of double effect. On the one hand, much about the doctrine seems highly suspect and sophisticated, and almost all the examples used to illustrate it outside the war context (concerning abortion and euthanasia, for example) only heighten that suspicion. On the other hand, its use in making moral distinctions in war seems almost indispensable. Military personnel intend to hit military targets, but they know that some civilians in the surrounding area will be hit as well. If killing civilians were sufficient to render such missions morally impermissible, wars could not be fought. But wars will be fought and must be fought; therefore some way of making the distinction must be allowed.

Michael Walzer has done much to remove the aura of sophistry surrounding the doctrine of double effect. The original doctrine distinguishes between an action one intends (say, the bombing of a munitions factory) and an effect one foresees as the result of this action (say, the killing of civilians who live in the neighborhood). It says that the action is allowable, as long as you don't intend the other effect—the deaths of the civilians. But as Walzer argues,

Simply not to intend the death of civilians is too easy; most often, under battle conditions, the intentions of soldiers are focused narrowly on the enemy. What we look for in such cases is some sign of a positive commitment to save civilian lives. . . . And if saving civilian lives means risking soldiers' lives, the risk must be accepted.

To illustrate the point, Walzer recounts a World War I soldier's story: when they were about to toss a bomb into a cellar or dug-out, he and his comrades would first shout down to make sure no civilians were inside, thereby jeopardizing their own safety.

Walzer's proviso saves the doctrine of double effect from abuse and trivialization. Properly understood, the doctrine does not allow people to escape responsibility for the fatal effects of their actions simply by averting their minds. It's not enough not to try to kill civilians; you have to try *not* to kill them.

Graceful Simplicity: Toward a Philosophy and Politics of Simple Living

Jerome M. Segal

In *Graceful Simplicity*, Jerome M. Segal expands and deepens the contemporary discourse on how to achieve a simpler, less harried way of life. He articulates a powerful conception of simple living—rooted in beauty, peace of mind, appreciativeness, and generosity of spirit. At the same time, he criticizes much of the “simple living movement” for believing that we can realize this conception as isolated individuals if only we free ourselves from overconsumption. Segal argues that, unfortunately, we have created a society in which human needs can be adequately met only at high levels of income. Instead of individual renunciation, he calls for a politics of simplicity that would put the facilitation of simple living at the heart of our approach to social and economic policy.

“*Graceful Simplicity* is a marvelously textured analysis of the elusive ideal of simple living. For those eager to find a way to get off the “more is better” treadmill, Jerome Segal offers insight and hope. Drawing upon philosophy, history, economics, sociology, and psychology, he explains why simplicity is not a simple concept and reveals why it retains its perennial allure. A must read.”

—David Shi, president of Furman University and author of *The Simple Life: Plain Living and High Thinking in American Culture*

“In simple, graceful prose, Jerome Segal explains why less elaborate modes of living would make us happier.”

—Robert H. Frank, Cornell University, author of *Luxury Fever*

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How hard do you have to try? How radical Walzer's proviso is depends on how great the risks we think soldiers must take to minimize civilian casualties. Walzer doesn't say, and clearly there is no simple answer. But it is crucial to see that his proviso requires *our* soldiers taking risks to protect *their* civilians. Given the chauvinism that often comes in war's wake, that sounds like a radical idea.

What justifies it? If all human beings are equal, it may be argued that our people are no more valuable than their people and that therefore we must treat human beings without regard to nationality. But few will be convinced by such reasoning, especially in times of war. More persuasive is a Mavrodes-like pragmatic account of the rules of war. Mavrodes's argument suggests that the best way to avoid annihilation is to observe certain rules—against targeting civilians, in favor of protecting civilians, against nuclear, chemical, and biological weapons—and to treat these rules as nearly sacred. They are not in fact sacred—their justification is largely consequentialist—but the risks that come with their violation are so great that we are better off treating them as more than rules of convenience.

There are other reasons to observe such rules as well. One is the sort of strategic consideration mentioned earlier. Appearing to be sensitive to humanitarian concerns is an important element in persuading the international community, especially those inclined to distrust us, that we are not simply self-interested. We need to ensure that our actions don't create more terrorists than they destroy. But it's not simply a matter of appearances. It's crucial that our conduct not blur the line between ourselves and those we condemn. If we abandon the moral high ground, we risk corrupting the standards that render our country worth defending.

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Sources: Robert Fullinwider, “War and Innocence,” *Philosophy & Public Affairs*, vol. 5 (1975) and “Terrorism, Innocence, and War,” *Philosophy & Public Policy Quarterly*, vol. 21, no. 4; Judith Lichtenberg, “War, Innocence, and the Doctrine of Double Effect,” *Philosophical Studies*, vol. 74 (1994); George Mavrodes, “Conventions and the Morality of War,” *Philosophy & Public Affairs*, vol. 4 (1975); Thomas E. Ricks, “Target Approval Delays Cost Air Force Key Hits,” *Washington Post* (November 18, 2001); Henry Sidgwick, *Elements of Politics*; Michael Walzer, *Just and Unjust Wars* (Basic Books, 1977).

Terrorism, Innocence, and War

Robert K. Fullinwider

The events of September 11, 2001 defy the power of words to describe, console, or even explain. Nevertheless, because the United States must respond in one way or another, and because people must give or withhold their support to any national course of action, words necessarily come into play, words to formulate goals and words to justify the means to achieve them. "Terrorism" is one of the words ubiquitous in the aftermath of September 11, "war" another.

Carlin Romano, a philosopher and critic, writes in the *Chronicle of Higher Education* that a third word, "innocence," should get more attention than it has received. The "clarification and defense of innocence" by intellectuals, social commentators, and public officials, Romano believes, could add an important element to the fight against terrorism.

Innocence

"Innocence" links "war" and "terrorism." Terrorists are counted as murderers because they kill the innocent. Similarly, in war, military forces are prohibited by common custom and international law from targeting civilians. This prohibition "assumes innocence at its core," notes Romano. Perhaps so, but not "innocence" in the sense that underwrites Romano's initial condemnation of terrorists.

Romano insists that terrorism cannot be justified morally, no matter what its political aims, because terrorists select their victims haphazardly, without concern for innocence or guilt. Here, he construes "innocence" under a model of crime and punishment. On that model, punishment should fall on the guilty, not the innocent, on the wrongdoer, not the mere bystander. Just punishment, accordingly, must allow for some sort of antecedent "due process," in which individuals are found guilty according to evidence and only then subjected to penalties in proper proportion to their wrongs. Since the terrorist kills "haphazardly," he doesn't fulfill this minimal demand of just punishment.

In war, however, the notion of "innocence" has nothing to do with lack of blameworthiness. Rather, it divides individuals into two classes: those who may be

directly targeted by military force and those who may not. The former includes uniformed armed forces (combatants), the latter ordinary civilians (noncombatants). This division derives not from the imperatives of crime and punishment but from the imperatives of self-defense. In resisting aggression, a state may direct lethal force against the agency endangering it, and that agency is the military force of the aggressor.

From the point of view of moral-wrongdoing and just punishment, many of the aggressor's military personnel may be innocent; they may be reluctant conscripts with no sympathy for their nation's actions. Likewise, among ordinary civilians, many may actively support and favor their country's criminal aggression. They are not innocent. But *from the point of view of self-defense*, the moral quality of the conscript's reluctance and the civilian's enthusiasm is not relevant. What matters is that the former is a combatant, the latter not.

Consequently, war must be prosecuted by means that discriminate between the two classes. Specifying membership in the two classes is, of course, a difficult and somewhat arbitrary affair. Combatants are first of all those in a warring country's military service. They wear uniforms, bear arms, and are trained to be on guard. Because they wield the means of violence and destruction directed at a defending nation, such soldiers are fair targets of lethal response by that nation, even when they are in areas to the rear of active fighting and even when they are sleeping. However, not all enemy soldiers may be attacked. Those rendered *hors de combat* through injury, capture, or some other means possess the same immunities from being killed as civilian noncombatants. Conversely, individuals not in uniform but actively participating in the war effort, such as civilian leaders and managers directing overall military policy, are fair targets of attack. They count as combatants. The operative language in the Geneva Convention of 1949 and in the U. N. Resolution on Human Rights of 1968—two legal protocols governing the prosecution of war—confers immunity on those "not taking part in hostilities." Obviously, there is plenty of room to construe this phrase in very different ways. Even so, some people—the very old and the

very young, for example—clearly qualify for noncombatant immunity on any construal.

While the two points of view—of crime and punishment, on the one hand, and self-defense, on the other—understand “innocence” in different ways, either of them seems clearly to indict the perpetrators of the September 11 attacks. First, those who used hijacked passenger planes as bombs targeted civilians as such, at least in their attack on the World Trade Center. If the attackers considered themselves at war, they violated one of war’s laws. Second, the attackers provided no advance notice of their plan to exact punishment from the occupants of the World Trade Center and no forum for the occupants to answer any accusations or charges. If the attackers thought of themselves as avenging angels, they violated due process.

Terrorism

That Osama bin Laden and his network stepped across a clear line marking right from wrong seems signaled by the universal condemnation of the events of September 11. Even the League of Arab States expressed its “revulsion, horror, and shock over the terrorist attacks” against America. Nevertheless, matters may not be as simple as the foregoing account suggests.

First of all, the laws of war and the distinctions they draw are creatures of *states* and *state interests*. Individuals and groups who have no states to represent their grievances, or who stand at odds to the arrangements of power imposed by the prevailing state system, are barred from using violence to vindicate their just demands (as they may see them). Indeed, whatever their cause, they are condemned as criminals if they resort to violence. The U. N. International Convention for the Suppression of Terrorist Bombings (1997), for example, makes it a crime to explode a lethal device “in a public place” or even to attack a government facility such as an embassy. These acts, it goes on to say, constitute terrorism and “are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, [or] religious . . . nature.” No cause however good warrants violent response if the actor is an individual or group, not a state.

Since the United States is a country founded on violent rebellion against lawful authority, we can hardly endorse a blanket disavowal of the right by others violently to rebel against their own oppressors. Indeed, Thomas Jefferson offered a small paean to political violence in letters he sent to Abigail Adams, James Madison, and William Smith in 1787. “I hold that a little rebellion now and then is a good thing,” Jefferson wrote, “& as necessary in the political world as storms in the physical What signify a few lives lost in a

century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is its natural manure.” The occasion of Jefferson’s letters was the just-suppressed Shay’s Rebellion, the violent resistance by desperate farmers in western Massachusetts against the due process of law that, in a time of economic distress, was grinding them into dust. Only a handful of lives were lost in the short affair, but it lent a degree of urgency to delegates from various states scurrying off to Philadelphia to replace the Articles of Confederation.

Nor is Jefferson alone in looking favorably at a “little rebellion” by people who resort to violence in the name of a great cause. John Brown remains for many Americans a martyr in the fight against slavery, though his actions would count as terrorism under contemporary definitions and international conventions. While leading a gang of anti-slavery guerilla fighters in eastern Kansas in 1855, Brown took revenge for an assault by slavers on the town of Lawrence by dragging five men out of the small pro-slavery settlement of Pottawatomie Creek one night and hacking them to death. In 1859, in his ill-fated attempt to seize the United States armory at Harper’s Ferry, and precipitate (he fancied) a vast slave rebellion, Brown seized sixty hostages from the neighboring precincts.

Killing “innocents”—Brown’s victims at Pottawatomie Creek were not accorded any due process, nor were they combatants in uniform—and taking civilian hostages: these are the very deeds deplored and condemned by U. N. resolutions and conventions.

No cause however good warrants violent response if the actor is an individual or group, not a state.

They make Brown a quintessential terrorist. Yet many people refuse to view Brown this way because they don’t accept the uncompromising U. N. position that “irregular” violence—violence initiated by individuals and groups—is “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, [or] religious . . . nature.” They believe that in some circumstances a cause *may* be sufficiently weighty to justify shedding blood, even “innocent” blood.

So, too, believes the League of Arab States. Though it condemned the September 11 attack as “terrorism,” it refuses to accept an unqualified version of the U. N.’s view that, for example, exploding a lethal device “in a public place” counts always as terrorism. In its 1998 Convention for the Suppression of Terrorism, the

League starts with a definition pretty much in line with the United Nations. Terrorism is

[a]ny act of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger....

A "terrorist offense" is any act in furtherance of a terrorist objective.

So far, so good (though we may wonder about the force of the modifier "criminal" in reference to the terrorist's "agenda"). But the Convention then adds:

All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, *shall not be regarded as an offense.*

What does this added qualification mean? Read one way (putting emphasis on the clause "in accordance with the principles of international law"), it can be taken as proscribing the same deeds outlawed by U. N. conventions. Read another way (taking account of the fact that the definition of "terrorism" is prefaced by an initial affirmation of "the right of peoples to combat foreign occupation and aggression by whatever means, in order to liberate their territories and secure their right to self determination"), it can be taken as licensing some irregular violence (that directed against foreign "occupation" and promoting Arab "self-determination") while precluding other violence (that on behalf of a "criminal agenda"). Moreover, the matter is muddled further by the fact that the U. N. itself recognizes a fundamental right to self-determination, a right to resist "colonial, foreign and alien domination." Through Osama bin Laden's eyes, the attack of September 11 fell upon an alien dominator of Arabia and bespoke a campaign that would not end "before all infidel armies leave the land of Muhammed." What could the right to self-determination mean if it tied one's hands against the very source of "humiliation and degradation" imposed upon the Islamic world from the outside for eighty years?

Carlin Romano writes that it probably never occurred to bin Laden "how awful it is to kill innocent people." But bin Laden's own self-justification indicates the contrary. "Millions of innocent children are being killed as I speak," he declared, children who are dying in Iraq as a putative consequence of the economic embargo imposed on that state by an American-led coalition. Osama bin Laden purported to act on behalf of innocence. Why should he not calculate, as Jefferson implied, that shedding the blood of a few now may save the lives and liberty of many others in the long run?

Moreover, why should he feel restrained by the conventional views of innocence? Isn't it arbitrary to immunize from attack people who may be causally

implicated in the oppression one is resisting? By convention, the civilians of an aggressor nation who buy their country's war bonds are noncombatants and immune from attack. But without those war bonds, the aggressor nation would not be able to buy the guns and planes and bombs that enable it to prosecute its aggression. Why should those citizens be counted as "innocent" or made immune? (Judith Lichtenberg explores answers to these questions in her contribution to this issue of the *Quarterly*.)

Terrorists, writes Romano, must believe in some "philosophy of innocence, however pinched." They assume the guilt of their victims, but on "transparently flimsy grounds" Obviously, their grounds won't line up with the considerations operative in the conventions of international law, but those conventions weren't endorsed by the terrorists in the first place and don't take their perspectives to heart.

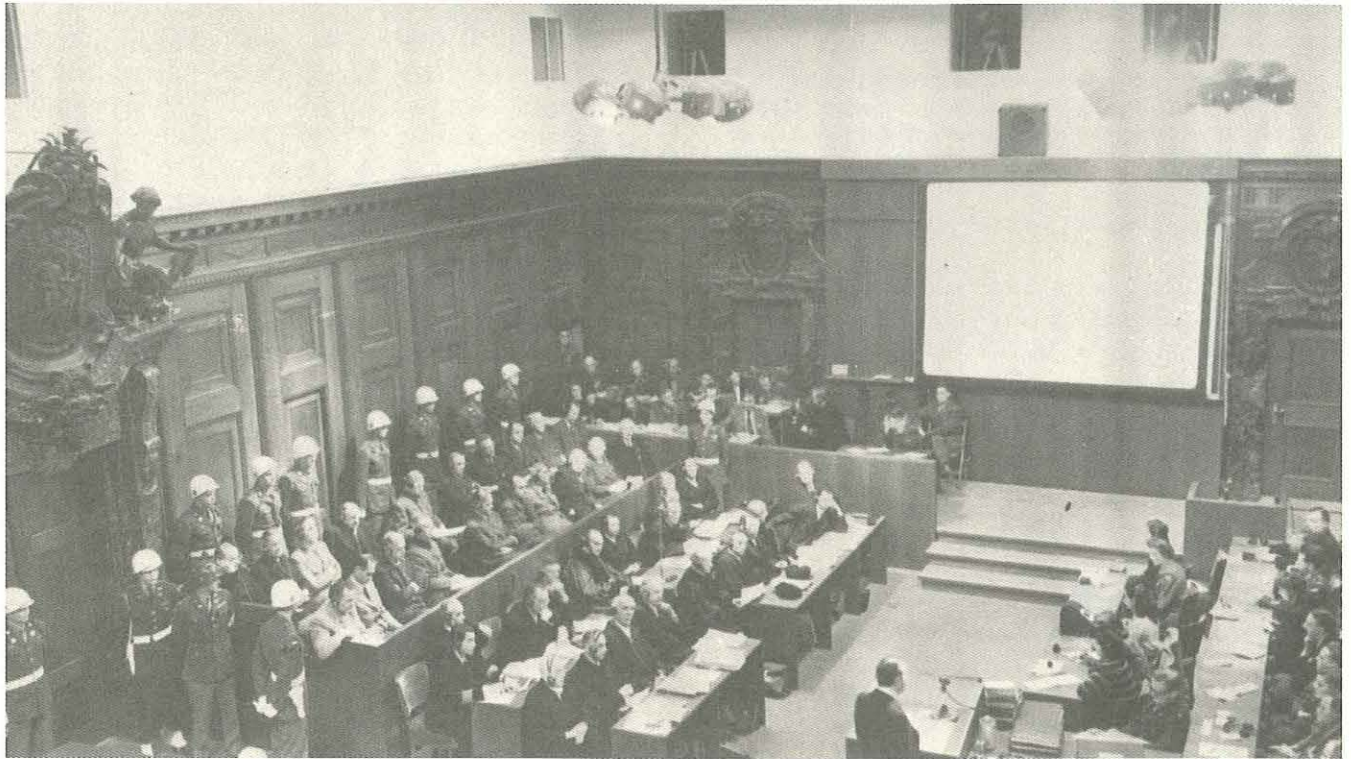
Consider the infamous massacre of Israeli athletes at the 1972 Munich Olympics by Black September, a Palestinian terrorist organization. Weren't those athletes uncontroversially innocent? From the point of view of Black September, they were not. They were the knowing and willing representatives of Israel to an international affair where their presence would lend

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further international credibility and legitimacy to their state. From the point of view of their attackers, the athletes were active and informed accessories to a continuing "crime"—the support of the "criminal" state of Israel. These are not flimsy grounds for charges of "guilt," although they are grounds thoroughly contestable and clearly lying outside the scope of considerations allowed by international law.

The Rule of Law

It is too easy to dismiss the terrorist as evil incarnate, as a demon beyond the human pale. "The terrorist," claims one writer, "represents a new breed of man which takes humanity back to prehistoric times, to the times when morality was not yet born." But this characterization seems wrong. If anything, terrorists are throwbacks to a "prehistoric time" when morality was not yet under control. What is scary about terrorists is that they appeal to morality without appealing to law. They act as a law unto themselves. Let me explain.



View of the courtroom inside the Palace of Justice on November 21, 1945, the second week of the Nuremberg War Crimes Trials. America's Chief Prosecutor, Robert Jackson (on leave as a justice of the U.S. Supreme Court) addresses the bench. The judges are seated on the far right, with their clerks seated in front of them. Defendants are seated in two rows on the far left, with their counsel seated in front of them. (The prosecution section is barely visible at the bottom of the photo. The press and visitors' sections, which are not shown here, are located behind the prosecution.) (AP Wide World Photo/ AP Pool)

Political theorists tell a story about the "State of Nature" to explain and defend government. The State of Nature proves to be intolerable for its inhabitants, whose lives are "solitary, poore, nasty, brutish, and short" (according to Thomas Hobbes). Contrary to common impressions, however, the problem in the State of Nature is not that people are so immoral, so lacking in any sense of justice or decency, that they prey wantonly upon one another. The problem is that people are *so moral*, so determined to vindicate rights or uphold honor at any cost that they become a menace to each other.

The distinctive feature of the State of Nature, as John Locke points out, is not the absence of morality but the absence of *law*. It is a circumstance in which the "law of nature"—the moral law—must be enforced by each individual. Each is responsible for vindicating her own rights and the rights of others. All prosecution of crime and injustice in the State of Nature is free-lance. Such a situation is the spawning ground of the never-ending chain of retaliation and counter-retaliation of the blood feud. "For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own

Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Men's."

Even if persons were not biased in their own favor, the problems of enforcing justice in the State of Nature would remain deadly. How would crime be defined? How would evidence for its commission be gathered and validated? Who would be punished, and in what manner? What would constitute legitimate self-defense? Who would calculate the rectification due from unjust aggression? Nothing in the State of Nature ensures any common understanding about these questions. The contrary is the case. Private understanding pitted against private understanding produces an escalation of response and counter-response that lets violence erupt and feed on itself.

The solution, of course, is, as Locke proposed, "an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies," and "a known and indifferent Judge, with Authority to determine all differences according to the established Law." This solution prevails, more or less, in the domestic case. In most states, a common law tolerably resolves disputes, even if that law is not always the product of common consent. The law does

not always work well enough, however, and rebellious violence against its inflexibilities and oppressions as often elicits our sympathy as it invokes our fear and antipathy. "Irregular justice"—or vigilantism—can redirect the law toward a more just course. Moreover, sometimes the existing regime of law is so oppressive that outright revolution seems in order. At the end of the eighteenth century, a great many Americans, newly born of their own "revolution," sympathized with the revolution in France that destroyed a decadent monarchy and substituted republicanism; a great many others recoiled in horror at the revolution's excesses as it tumbled into tyranny. In the years since, Americans have both supported and resisted revolutions abroad. Our ambivalence is rooted in twin impulses: to warm to the oppressed in their liberation struggles and to fear the disorder of Private Judgment substituting for law.

At the international level, the rule of law likewise rescues the community of states from intolerable anarchy, though unlike domestic law, international law is a

patchwork of treaties, conventions, and understandings among independent actors, each jealous of its sovereignty. Few tribunals exist where "a known and indifferent Judge" possesses full "Authority to determine all differences" among nations; nor is there a common agent of coercion to enforce the judge's rulings on recalcitrant parties. Still, laws and conventions bring some order to international affairs, including the laws of war and the conventions against terrorism referred to earlier. Admittedly, these laws and conventions stack the deck against non-state actors. And—as the posture of the League of Arab States indicates—some people and some states will want to support non-state actors in violent response to perceived wrongs and oppressions. But even behind such sympathizing and support lies the worrisome specter of Private Judgment. Osama bin Laden, in his isolated redoubts in the Afghan mountains, elects himself as the vindicator of Islamic honor and rights. He answers to no one or no community but to his own sense of justice. Self-elected vigilantes on the international scene may be tolerated—or



General view of the World Court on the opening day of Germany's lawsuit against the United States at The Hague, November 13, 2000. Speaking from the podium is Bruno Simma, representative of Germany, which accused the United States of violating international law in detaining two German citizens, who later received the death penalty and were executed in Arizona. (AP Wide World Photo/Michael Porro)

even supported—by states when their vigilantism remains a mere thorn in the sides of enemies; but when the vigilantes hold in their hands the power to destroy people by the scores and hundreds of thousands, the face of Private Judgment is hideous even to those who join in its chosen cause. When the League of Arab States proffered its condemnation of the September 11 attacks, it had not suddenly forgotten the experience of eighty years of “humiliation and degradation” noted by bin Laden, it had not suddenly abandoned the cause of Palestinian justice, it had not suddenly converted to non-violence. Rather, it had suddenly lost its taste for Private Judgment. Osama bin Laden is beholden to no one, not even to the Arab states themselves. Consequently, he is a peril to all.

Private Judgment is not only a menace when exercised by individuals but when exercised by states as well. Countries undermine the efficacy of international law by reserving to themselves Private Judgment about its application. For example, in 1928, Western powers agreed in the Kellogg-Briand Pact to outlaw war as a tool of national policy. They determined that armed aggression was henceforth a crime. But each of the Pact’s signatories reserved to itself final judgment about when its acts were proper self-defense and when improper aggression against a neighbor. As a consequence, the Kellogg-Briand Pact inhibited war the way matches inhibit fire.

In the aftermath of World War II, when Nazi leaders were put on trial for war crimes, they interposed a potentially fatal objection: the Nuremberg tribunal before which they appeared had no standing to judge Germany’s war policy since the Kellogg-Briand Pact

This new principle was an important step for international law, since a system of law in which each party can veto the application of the law to itself is no system of law at all. So long as each party remains the sole judge of its own case, the State of Nature remains in place.

Having struck a notable blow for the principle of law at Nuremberg, the United States has not always honored its own vital handiwork. For example, in 1985, when Nicaragua alleged in the World Court that we were guilty of aggression for supporting the Contras, we did not defend our support by arguing that it constituted collective self-defense. We argued instead an interpretation of the United Nations charter that made the question of whether we were acting in self-defense nonjusticiable. We argued that our actions could be reviewed only by the Security Council of the U. N., where, of course, we have a veto. In effect, the United States argued that only it could judge whether its actions were aggression or self-defense. Having so argued, our subsequent insistence that other, smaller states—states without a veto in the Security Council—must submit to the bar of collective judgment looks self-serving rather than principled. Private Judgment—whether manifested in the person of a terrorist like Osama bin Laden or in the agency of a rogue state like Iraq—increasingly reveals itself for the hazard it is. Our own interests as well as our principles demand that we put a stake through its heart. We must not claim it as our special prerogative.

Innocence Revisited

Suppose that the ideas of due process and non-combatant immunity referred to by Carlin Romano are nothing but conventions accepted within and among states. Still, they are precious ideas, hard-won in their application. They require that legitimate institutions resort to violence in ways that discriminate between those adjudicated guilty and those not, between those taking part in hostilities and those not. These are the rules fallible humans have fashioned to keep us out of the State of Nature. They issue, in part, from our collective recognition that the partiality toward our own interests and the unconcern we feel for the interests of others—those two facets of human nature remarked on by Locke—invariably distort Private Judgment and make it unreliable.

But what if you were assured of reliable judgment? What if you were assured of infallibility? Then you would need no conventions of innocence to guide you. No conventional limitations withstand the conceit that God is on your side, since whatever God does must be right. If God orders you to war against, and to “save alive nothing that breatheth” among, an enemy; if He commands you utterly to destroy the Hittites and the

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reserved to each country final judgment about whether it was acting lawfully. In rebuttal, the United States joined Great Britain in arguing that although a state may be free in the first instance to decide whether it is acting in self-defense, its exercise of the right of self-defense is nevertheless ultimately subject to review by the international community. Whether this was an ingenious construction of the Kellogg-Briand Pact or an invention from whole cloth, the argument won the day and established an important principle of international law: that no state can take complete refuge in Private Judgment. Ultimately, states must face the bar of collective judgment and justify their violent conduct in terms acceptable to the common moral sense of mankind.

Amorites, the Canaanites and the Perizzites, the Hivites and the Jebusites; then you destroy without compunction and without distinction.

When Christians, who from the Middle Ages on have developed a profoundly influential doctrine of just war that puts special emphasis on noncombatant immunity and on the innocence, particularly, of those too young, too old, and too ill to be "taking part in hostilities"—when Christians, I say, read Deuteronomy 20, they must feel a considerable indignation. Still, the text says what it says, and if "God by revelation made the Israelites . . . the executioners of His supernatural sentence" then the "penalty was within God's right to assign, and within the Israelites' communicated right to enforce"—so reads a passage from the *Catholic Encyclopedia*. As "Sovereign Arbiter of life and death," God can take or give as he pleases, and it must be just. But we who are without God's eyes "cannot argue natural right" from these Biblical cases of wholesale slaughter, the *Encyclopedia* passage goes on to say. Indeed we cannot. We must hew to those distinctions and discriminations embedded in the conventions on war and terrorism and we must wholeheartedly strive to see them everywhere honored.

The delusion that he and God act in concert is what makes Osama bin Laden's self-election as avenging angel a special threat to humanity. Had he the power, he would not hesitate to kill all that breathes among his "enemy." He would not hesitate to destroy whole cities, entire populations. America was "hit by God," declares bin Laden in his taped message after the September 11 attacks. God has made America the enemy and bin Laden merely executes His will.

Two days after the September 11 horrors, an unnerved Jerry Falwell intemperately offered his own version of bin Laden's delirium. God, announced Falwell, had lifted the curtain of protection around America, angered by the ACLU, gays and lesbians, abortionists, pagans, secularists, and the Federal court system. "God will not be mocked," he declared. But Falwell quickly repudiated his remarks in the face of widespread criticism. He apologized for his words, pleading weariness for his thoughtlessness. "[My] September 13 comments were a complete misstatement of what I believe and what I've preached for nearly 50 years," Falwell said in an interview. "Namely, I do not believe that any mortal person knows when God is judging or not judging someone or a nation." He repeated the point: "I have no way of knowing when or if God would lift the curtain of protection" around America. "My misstatement included assuming that I or any mortal would know when God is judging or not judging a nation."

In his recantation, Falwell is surely on the mark. He does not know God's will or God's plan. Neither he, nor you, nor I know, nor does Osama bin Laden.

Civil Society, Democracy, and Civic Renewal

Robert K. Fullinwider, Editor

Civic society is receiving renewed attention from academics, politicians, journalists, community leaders, and participants in the voluntary sector. *Civil Society, Democracy, and Civic Renewal* brings together several of America's leading scholars—of history, sociology, political science, and philosophy—to explore the meaning of civil society, its positive and negative effects, its relation to government, and its contribution to democracy.

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In limning the salutary effects of a little political violence, Thomas Jefferson posed a standard against which to reckon its justification. "What signify a few lives lost in a century or two?" he asked. He meant: the favorable course of events will let us look back from afar and tolerate the violence that set it in motion. If this is the right standard, then the United States has it within its power now, by prudent and measured

Truth v. Justice: The Morality of Truth Commissions

Robert I. Rotberg and Dennis Thompson, Editors

The truth commission is an increasingly common fixture of newly democratic states with repressive or strife-ridden pasts. From South Africa to Haiti, truth commissions are at work with varying degrees of support and success. To many, they are the best—or only—way to achieve a full accounting of crimes committed against fellow citizens and to prevent future conflict. Others question whether a restorative justice that sets the guilty free, that cleanses society by words alone, can deter future abuses and allow victims and their families to heal. Here, leading philosophers, lawyers, social scientists, and activists representing several perspectives look at the process of truth commissioning in general and in post-apartheid South Africa. They ask whether the truth commission, as a method of seeking justice after conflict, is fair, moral, and effective in bringing about reconciliation.

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action, to make sure that in a century or two the lives lost on September 11 continue to signify something—a profound and everlasting wrong.

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Sources: Carlin Romano's comments occur in "Why Innocence Matters," *Chronicle of Higher Education*, 48 (October 12, 2001). The texts of the Nuremberg Laws, the Geneva Convention of 1949, and the 1968 United Nations Resolution on Human Rights can be found at www.dannen.com/decision/int-law.html. The U.N. Convention on the Suppression of Terrorist Bombing (A/RES/52/164) along with other pertinent documents such as Measures to Eliminate International Terrorism (1994) (A/RES/49/60), Human Rights and Terror (1997) (A/RES/52/133/), and Universal Realization of the Right of Peoples to Self-Determination (1997) (A/RES/52/113) can be found at www.un.org/documents/resga.htm. The statement of the League of Arab States and its 1998 Convention on the Suppression of Terrorism are available at www.leagueofarabstates.org/e_LASToday.asp. Judith Lichtenberg, "The Ethics of Retaliation," *Philosophy & Public Policy Quarterly*, vol. 21, no. 4. The characterization of terrorists as a throwback to prehistoric times is by Ben Zion Netanyahu, "Terrorists and Freedom Fighters," in *Terrorism: How the West Can Win*, edited by Benjamin Netanyahu (Farrar, Straus, Giroux, 1986). Osama bin Laden's statement can be found in the *Washington Post* (October 28, 2001). For the inconveniences in the State of Nature, see Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge University Press, 1996), Chapters 13, 15, & 29, and John Locke, *Two Treatises of Government* (Mentor Books, 1965), Book II, Chapters 2 and 9. For Jefferson's letters, see Thomas Jefferson, *Writings* (The Library of America, 1984), pp. 881, 889, 911. For the life of John Brown, see Stephen B. Oates, *To Purge This Land with Blood: A Biography of John Brown* (Harper & Row, 1970). My discussion of the Kellogg-Briand Pact draws upon Paul W. Kahn, "From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law," 12 *Yale Journal of International Law*, vol. 1 (1987). The gloss on Deuteronomy 20 is taken from the 1913 edition of the *Catholic Encyclopedia*, accessible on the Web at www.newadvent.org/cathen/. Jerry Falwell's remarks can be found in Peter Carlson, "Jerry Falwell's Awkward Apology," *Washington Post* (November 18, 2001). A few paragraphs in the text above are taken from R. Fullinwider, "Understanding Terrorism," in *Problems of International Justice*, edited by Steven Luper-Foy (Westview Press, 1988), pp. 248–259 (used by permission).



The Libertarian Critique of Labor Unions

Peter Levine

Many Americans, including some who would benefit economically from union membership, view unions with ambivalence or even hostility. Fewer than half of respondents to a poll recently conducted by Fox News thought that unions were good for the country. This skepticism may reflect disapproval with the alienating style and performance of the AFL-CIO in modern times. But American individualism also plays a role. Americans tend to distrust organizations that seem to put solidarity, security, and fraternity above personal liberty, innovation, and competition. Therefore, despite generations of struggle, labor unions remain cultural anomalies. Labor lawyer Thomas Geoghegan describes union meetings as events at which "paunchy, middle-aged men, slugging down cans of beer, come to hold hands, touch each other, and sing 'Solidarity Forever.' O.K., that hardly ever happens, but most people in this business, somewhere, at some point, see it once, and it is the damndest un-American thing you will ever see."

Most prominent union supporters take for granted that the labor movement benefits workers. They often assume that opponents have selfish economic motives, while anti-union workers must be victims of coercion or misinformation. This attitude ignores the possibility that moral values (such as liberty, self-reliance, and efficiency) motivate distrust of unions. Meanwhile, public figures on the other side of the debate generally assume that unions are harmful and talk darkly about bosses, strike-related violence, and rent-seeking bureaucracies.

To their credit, libertarians approach the question with less partisanship. While they are receptive to unions as non-governmental associations, they are also skeptical of institutions that interfere with "free" markets. Since the libertarian position captures certain widespread American attitudes in a refined (and radical form), it is a good starting point for philosophical analysis. If libertarian arguments against unions are strong, then maybe public skepticism is justified. If, however, libertarians employ flawed arguments, then perhaps the widespread distrust of unions is misguided.

Unions Against Individual Rights

Libertarians strongly defend freedom of choice and association. Thus, when workers choose to act collectively, negotiate together, or voluntarily walk off the job, libertarians have no reasonable complaint—even if other people are harmed—because they support the right to make and exit voluntary partnerships.

But unions gain strength by overriding private rights. They routinely block anyone from working under a non-union contract, and they prevent employers from making offers—even advantageous ones—to individual workers unless the union is informed and consents. Unions declare strikes and establish picket lines to prevent customers and workers from entering company property; they may fine employees who cross these lines. They also extract fees from all workers who are covered by their contracts. Although cov-

Americans tend to distrust organizations that seem to put solidarity, security, and fraternity above personal liberty, innovation, and competition.

ered workers may avoid paying for certain union functions (such as lobbying) that are not germane to contract issues, they must pay for strikes and other activities that some of them oppose.

The great libertarian theorist Friedrich Hayek concluded that unions "are the one institution where government has signally failed in its first task, that of preventing coercion of men by other men—and by coercion I do not mean primarily the coercion of employers but the coercion of workers by their fellow workers." Hayek may have been thinking mainly of corrupt and unaccountable union leaders. But even a completely democratic union sometimes supplants private rights. As libertarians like Morgan O. Reynolds point out, majorities within a union are able to ignore minorities' preferences.



**"I feel I should warn you, sir. Budlong, in personnel,
is starting a pro-democracy movement."**

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Libertarians are especially critical of "closed shop" contracts (which require businesses to hire only union members) and "union shop" contracts (which require all employees to join a specified union after they are hired). Libertarians see such arrangements as state-sanctioned violations of private contract rights. Both closed shops and genuine union shops are now illegal in the United States, but if libertarian arguments are flawed, then perhaps these institutions deserve reconsideration.

In any case, "agency shops" remain in the 29 states that have not passed so called "right-to-work" legislation that bans this kind of contract. In an agency shop, the union negotiates one collective-bargaining agreement that covers a whole class of employees. Workers do not have to join the union, but they must pay dues and work under the union contract. Proponents argue that employees ought to pay fees for a service (union representation) that benefits them tangibly, just as they may be required to pay for food in the company canteen. But this also means that workers in agency shops cannot avoid their union's jurisdiction.

Although organized labor is popular among covered workers—only 8 percent would vote to "get rid of" their unions—libertarians insist that if even *one person* pays dues but opposes the existence of her union, then she is not a member of a voluntary association. As Senator Barry Goldwater (R-AZ) told the union leader Walter Reuther in 1953: "There is only one question in this whole field in my mind. What about the man who does not want to belong to the union?" Goldwater spoke in the days of the "closed shop," when union membership could be compulsory. But more recently, Representative Ron Goodlatte (R-VA) claimed that even an "agency shop" violates individual rights, because "compelling a man or woman to pay fees to a union in order to work violates the very principle of individual liberty upon which this nation was founded."

At times, unions have overridden some of their own members' economic interests. In one important case, African American workers, dissatisfied by their union's efforts to end discrimination at a department store, attempted to picket without the union's

approval. The Supreme Court ruled 8-1 (in a decision written by Justice Thurgood Marshall) that only the union could take such actions, because the principles of *organized* labor and *collective* bargaining implied that unions were entitled to gain power from disciplined action.

Unions have also abridged their members' individual freedom of conscience. Justice Potter Stewart once noted that a worker's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan.

American unions owe some of their power to government recognition, so libertarians view any harms that they cause as impermissible violations of liberty.

One person might disapprove of unions negotiating limits on the right to strike, believing that such policies guarantee the serfdom of the working class, while another person might object to unions on purely economic grounds."

Unions can harm outsiders, too, including the customers, managers, and owners of any company involved in a labor dispute. In general, libertarians believe that non-governmental organizations should be able to act freely in the marketplace, even if their behavior imposes costs on others. For instance, firms are within their rights to run competitors out of business or to lay off their employees. By the same token, it would seem that unions should not be stopped just because their tactics cost other people money. However, American unions owe some of their power to government recognition, so libertarians view any harms that they cause as impermissible violations of liberty. In particular, the libertarian economist Milton Friedman complains that unions raise labor costs and thus increase unemployment, to the detriment of poor people who are not their members. He insists that unions have "made the incomes of the working class more unequal by reducing the opportunities available to the most disadvantaged workers." Although unions often strive to protect poor people in order to narrow the pay differential between their own members and the rest of the workforce, Friedman's hypothesis is true in some cases.

Unions in Defense of Rights

Libertarians cite natural or individual rights, such as freedom of property and choice, that militate against unions. But unions also have the potential to *safeguard* freedom and due process. Some workers may see the job market as a "state of nature," a ruthless competition that endangers legitimate individual rights, and

they may believe that a lone individual cannot secure through her own efforts a living wage, job tenure, freedom to criticize and dissent, and some measure of self-rule. Such workers may view their employer as a despot with absolute and arbitrary power. Although one way to guarantee rights is to pass and enforce appropriate legislation, employees may trust another strategy: unionization. A worker who is treated unfairly cannot expect her fellow workers to take effective action in defense of her (and their) rights unless they are organized into a disciplined organization such as a union.

This argument hinges on the notion that employers are "despots," since their power to discipline and fire workers is comparable to the police powers of a state. Charles E. Lindblom, a Yale professor of economics and political science, writes that the "mere threat of termination can be as constraining, as coercive, as menacing as an authoritative governmental command." Losing one's livelihood, especially through layoff or demotion, can be catastrophic and arbitrary, entirely lacking in due process or rational justification. Thus, unskilled workers in a glutted labor market may need a union to give them any semblance of rights. But workers who command a high price in the market may feel that they are more free without a union—which will impose its own rules, officials, and bureaucracies.

In addition to the balance of power between labor and capital, a second factor is also relevant: the degree to which supervisors act in the overall interest of their companies. Assume that you can trust your boss to help maximize the firm's profits. Then you may be happy without a union if your skills give you some leverage in contract negotiations. But your own supervisor may not be competent or responsible. He may be lazy, arbitrary, discriminatory, or motivated by completely selfish goals (as in cases of sexual harassment). Since it is dangerous to challenge a supervisor directly and difficult to change jobs, even workers with high market value may want enforceable and inflexible rules to govern salaries, promotion prospects, grievance procedures, and job descriptions. For people who distrust managers, a union is not an unwelcome bureaucracy but an independent institution to which they can appeal in defense of their rights.

Although unions support due process, fair treatment, and other rights for workers, they are typically seen as the enemy of *property* rights. However, some have argued that jobs should be seen as the property of workers, since their labor creates value. Late in the nineteenth century, political economist Henry C. Adams contended that, in appropriate circumstances, employees should "be given tenure of employment," so that they "cannot be discharged except for cause that satisfies a commission of arbitrators." Further, he believed that workers ought to be "consulted whether

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hours of work or the numbers employed shall be reduced," and given preference over those outside the industry. These steps would make jobs into "workmen's property." Adams added that the state could not be trusted to intervene fairly and, consequently, unions were the best means to redefine property.

As Adams (among others) realized, "property" admits of no universal, self-evident definition. Some have claimed that a class of objects should be defined as property because doing so encourages such positive consequences as increased investment and effort, or the efficient use and distribution of goods. At present, jobs are considered the alienable property of employers, who use them to maximize profits. If instead jobs were seen as the (non-transferable) property of workers, then although investment and innovation might

Although unions support due process, fair treatment, and other rights for workers, they are typically seen as the enemy of property rights.

suffer, employees might also feel deep satisfaction when positions became *theirs* because of their work. In short, Adams' proposal has both positive and negative implications, and the net change would be difficult to assess.

In my view, only the state has the authority to decide what is the best system of ownership in the labor market. The marketplace itself cannot make such decisions, because any market presupposes the existing system of property. Nor should we allow unions to determine property rights unilaterally, since they do not allow outsiders to vote. But elected legislatures could decide that jobs shall become workers' property under certain circumstances, and an appropriate means to that end would be to strengthen unions. After all, if investors can create entities such as corporations, with a well-defined set of property rights, then perhaps workers ought to be able to form entities such as bargaining units, with similar claims to property.

Unions and Competitive Markets

Mainstream economic theory contends that a competitive market generally produces the greatest possible quantity and desired goods and services; in this sense, it is efficient. However, unions reduce competition in labor markets by preventing employers from firing unionized employees and by blocking job-seekers from accepting offers below the union rate. They may thus protect unproductive workers, raise costs, distort incentives, and frustrate entrepreneurship.

Furthermore, organized labor is specifically exempted from antitrust laws whose general goal is to promote competition. Judge Richard A. Posner (who is often called a libertarian, although his views are idiosyncratic) concludes that American labor law is a device to promote the "cartelization of the labor supply by unions." Because it confers power on unions, the law "is founded on a policy that is the opposite of the policies of competition and economic efficiency that most economists support."

One economist has calculated that unions cost the country 4.9 percent of GDP annually. Other estimates are much lower, and some cite evidence that unions are good for the economy—boosting morale and trust, reducing turnover, offering senior workers incentives to share knowledge with novices, and improving the flow of information between workers and managers. One recent study by Sandra E. Black and Lisa M. Lynch found that productivity in unionized firms was ten percent higher than in comparable non-unionized firms. Still, unions must at least sometimes reduce the nation's supply of goods and services. Of course, the same could be said of many private activities (smoking, gambling, early retirement) that libertarians consider well within the bounds of personal liberty. But Hayek distinguished between harms—which free people inevitably cause as they pursue their own interests—and coercion, which is impermissible. Hayek thought that unions acted coercively, so whenever they caused economic damage, they also violated rights and freedoms.

Contrary to what libertarians assume, freedom is not just a matter of selecting among choices in a marketplace. Imagine that workers have won some leverage over an employer because of a union. As a result, they can lay claim to a larger portion of the profits that their work generates. Now they must decide how tough to be in contract negotiations (considering possible damage to the company) and how seriously to risk a strike. They must also decide whether they want to use their collective muscle to pursue salary increases, equity among their membership, additional leisure time, job security, or insurance against catastrophic losses that would only affect their least fortunate members. This type of political deliberation and self-government is a form of freedom that is impossible without the union.

Libertarians sometimes argue that unions damage people's interests in a different way: by diminishing wealth or the supply of consumer goods and services. As economists David G. Blanchflower and Andrew J. Oswald note, "The idea that income buys happiness is one of the assumptions—made without evidence but rather for deductive reasons—in microeconomics textbooks." However, actual data reveal that, while money has a positive effect on happiness, its impact is "not as large as some would expect." Other variables—such as

marriage, employment, and race—have more powerful effects. Indeed, while Americans have grown much wealthier in the aggregate since 1945, according to political scientist Robert Putnam, we have also seen a tenfold increase in the depression rate, a quadrupling of the teenage suicide rate, and dramatic increases in "headaches, indigestion, and sleeplessness" among younger people, even affluent ones.

Putnam argues these maladies can be traced to a decline in social connectedness. Interpreting data on self-reported happiness, he finds that "getting married is the 'happiness equivalent' of quadrupling your income" and that "regular club attendance, volunteering, entertaining, or church attendance is the happiness equivalent of getting a college degree or more than doubling your income." If the goal is the maximization of happiness or welfare, then one should strongly favor unions—even if they reduce aggregate money income—because they provide civic connections, which "rival marriage and affluence as predictors of life happiness."

Unions as Parts of Civil Society

Unions are more than economic actors that negotiate with employers; they are also communities of workers, forums for debate, and lobbying organizations. They can thus be described as parts of "civil society," a social sector that enjoys strong support from libertarians—and most other ideological groups as well. However, this terminology raises a new set of questions about the proper role and scope of civil society.

Libertarians believe that civil society should consist of institutions that people can join and exit freely depending on their values and preferences. But Americans usually join unions because the company where they want to work happens to be unionized—not because they support the labor movement or want to frequent the union hall. Quitting the union would then mean waiving their right to vote without escaping the obligation to pay dues and to work under the union contract. Therefore, unions serve the goal of free association less well than other organizations do.

However, libertarians' equation of civil society with freedom of association overlooks some of its most attractive features. For instance, some people argue that the purpose of civil society is to offer the moral and psychological advantages of *community*, which are missing in a competitive market. Unions commonly meet political theorist Thomas Bender's definition of a "community," which involves a limited number of people in a restricted social space who are "held together by shared understandings and a sense of obligation." Bender observes that relationships are "close, often intimate, and usually face to face," with individuals bound together by emotional ties rather

than individual self-interest. He concludes that "there is a 'we-ness' in a community; one is a member." As philosopher Richard Rorty notes, "You would never guess, from William Bennett's and Robert Bork's speeches about the need to overcome liberal individualism, that the labor unions provide by far the best examples in America's history of the virtues these writers claim we must recapture. The history of the unions provides the best examples of comradeship, loyalty, and self-sacrifice."

Rorty is right: cultural conservatives should concede that unions exemplify some of their favorite virtues. Nevertheless, conservatives may reasonably prefer other institutions that promote different virtues as

Perhaps unions generate virtues that are particularly neglected in our culture.

well—such as religious faith, military discipline, and individual initiative and responsibility. It is not obvious that unions are especially good at generating the most valuable virtues as ranked by conservatives, by liberals, or (least of all) by libertarians. However, perhaps unions generate virtues that are particularly neglected in our culture.

A third understanding of "civil society" views this sector as the source of "social capital." Robert Putnam and his colleagues use this phrase to refer to habits, skills, and attitudes—especially trust and a propensity to join organizations—that expedite collective action and lessen the burdens on government.

Union members have much more social capital than those who belong to no groups at all. According to the General Social Survey, union members are 10 percent more likely to trust other people, 19 percent more likely to express an interest in politics, 16 percent more likely to vote, 17 percent more likely to influence others about elections, and 22 percent more likely to talk to several people about important issues—a pattern that remains even when one controls for income, education, and employment status. Further, large numbers of union members report having contacted the government (18.3 percent), attended conferences (56.5 percent), or served as committee members (49 percent) and officers (36.8 percent) as a result of their membership.

However, union members are not very active in civil society compared to people who belong to at least one association, but not to a union. Union members perform at least five percent worse than these other participants on all the measures listed above except "influencing people about elections" (where union members are more active than other members). It seems, then, that unions boost civic participation, but

to a lesser extent than the average association. Union membership is also a weak predictor of overall associational membership—unionized workers are not avid joiners the way that Rotarians and PTA volunteers are. Thus, although unions contribute to civil society and cultivate civic behavior, they are not outstanding contributors of civic life.

A fourth theory views "civil society" as the domain of interest groups, political factions, or lobbies. This definition clearly covers unions, since they lobby government officials, litigate, communicate to their own members about elections and issues, spend money on grassroots political campaigns, buy advertising, make endorsements, and donate to candidates and parties. Especially in recent decades (and especially in the United States), these political activities have been much more effective than such traditional tactics of labor unions as organizing workers, bargaining with employers, and striking.

One could object that unions do not "speak" for all their members, since they often take one public position instead of reflecting the diverse views of their members. Further, although unions are generally popular with their own rank-and-file, they score the lowest levels of support for their "positions on national issues" and their "endorsements of candidates in political campaigns." In a series of cases since 1977, the Supreme Court has ruled that union members may resign without penalty and that non-members who are required to pay dues need not pay for lobbying or organizing efforts. These rulings have not gone far enough for libertarians, who worry about the status of workers who want to retain their union memberships (so that they can vote on bargaining issues) and yet disagree with the union's political agenda. Libertarians also complain that dissenting dues-payers must seek refunds instead of receiving automatic exemptions from the costs of political speech.

On the other hand, supporters of organized labor argue that the Court is overly concerned about dissenters' rights, especially since corporations are not similarly regulated. For instance, owners of companies are free to take a position on any issue and fire workers who disagree. And majorities of stockholders can dictate policies that minorities abhor. The right not to speak would be protected if *all* organizations were prohibited from lobbying, but this approach would undermine rights of association and petition. And allowing corporations to lobby while banning political action by unions would be discriminatory and arbitrary. Thus the current treatment of union lobbying seems defensible.

Indeed, unions often enhance public deliberation about national priorities by adding a disciplined, well-funded alternative to the influential views of corporations. In some cases, speech is a public good that cannot be produced by uncoordinated, individual

action. Since many employees may be tempted to act as free riders, relying on others to speak for the interests of workers as a class, the few who do speak (or voluntarily pay for speech) will see weak results from their efforts. But if workers form a union for collective-bargaining purposes, and if it can *compel* everyone to pay for political activities, then all workers will gain a strong voice at a small cost to each. In many poor communities, unions are among the only institutions that have the power to fund themselves without outside assistance from either government or philanthropy. The benefit to the larger community is robust public debate, which libertarians prize.

In these pages, political theorist Jean L. Cohen has argued that the "concept of the *public sphere* is the normative core of the idea of civil society and the heart of any conception of democracy." The public sphere is the arena in which citizens gather information, form preferences about public policy, encounter alternative perspectives and arguments, and sometimes improve their views. Unions form part of this sphere. General Social Survey data reveal that union members participate in such deliberative activities as writing to newspapers and contacting the government. Unions

If workers form a union for collective-bargaining purposes, and if it can compel everyone to pay for political activities, then all workers will gain a strong voice at a small cost to each.

actually surpass other associations in the percentage of their members who talk about elections.

Unions also force other institutions, such as the mass media and legislatures, to debate issues that may otherwise be ignored. And by protecting freedom of association and criticism inside the workplace, unions give workers a means to *act* on their deliberate beliefs in ways that influence the wider society. As scholar-activists Harry Boyte and Nanci Kari argue in *Building America*, many "deliberative theorists put citizens in the role of judicious audience." That is, they assume a distinction between judgment—the citizens' role—and work or action, which is what rulers do. But when union members debate a contract, decide to strike, and then provide food and childcare for their fellow strikers, they fruitfully combine judgment, work, and action.

Conclusion

These arguments will not satisfy pure libertarians, but they do suggest that unions are compatible with personal liberty. To be sure, the powers and prerogatives of unions must be balanced against individual

rights. Workers should be free to avoid union membership and dues beyond those necessary for contract negotiations, and all members ought to have enforceable rights against discrimination by their unions. But these qualifications (which are enshrined in current law) would not prevent strong unions from forming.

Unfortunately, the actual rate of union membership—15 percent of all employees; less in the private sector—is much lower than in other democracies and below half the level reached in America around 1950. About one third of non-unionized American workers believe that, "were an election held tomorrow, workers

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at their firm would support a union," but they are unlikely ever to have the opportunity to cast a vote.

Congress could respond to the current situation by legalizing "agency shops" nationwide. Research by economist David T. Ellwood and lawyer Glenn Fine suggests that this reform would allow about five percent of the population in current "right-to-work" states to join unions, for a total increase of millions of members.

Federal law could also approach corporate resistance differently. Companies typically rely on illegal tactics to stop an organizing drive by, for instance, intimidating union supporters and firing employees involved in organizing the union. Although federal judges may declare automatic certification of a union if they believe that laws have been broken, in practice, unions arising in this way are weak from the start and managers feel free not to make them serious contract offers. A better solution is to recognize a union as the sole legitimate bargaining agent of a workforce as soon as a majority of the covered workers signs a petition to unionize. Then employees would be spared a struggle against management intimidation, and neither side would know how deeply the rank-and-file was committed to the union or how well the union could weather a strike. This uncertainty would encourage management to negotiate seriously with the union leadership, which (for its part) would have dues money and other resources to use during the bargaining process.

Since this reform is untested in the U.S., one can only speculate on the results. But the proposal is consistent with the philosophical considerations explored in this article. As labor lawyer Thomas Geoghegan observes, "I can think of nothing, no law, no civil rights act, that would radicalize this country more, democratize it

more . . . , than to make this one tiny change in the law: to let people join unions if they like, freely and without coercion, without threat of being fired, just as people are permitted to do in Europe and in Canada."

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Understanding the Consumer's Right to Know

Robert Wachbroit

Five years ago, President Clinton signed into law the Food Quality Protection Act (FQPA), which passed the House of Representatives by a vote of 417-0 and the Senate by unanimous consent. The Act fundamentally changes national goals concerning pesticide regulation and use. It eliminates the Delaney clause, an over forty-year-old federal standard that had outlawed even minuscule amounts of pesticides in processed food. FQPA substitutes a safety standard for all foods treated with pesticides that requires "a reasonable certainty of no harm"—defined as the consumer risking no greater than a one-in-a-million chance of getting cancer from a lifetime of exposure to a treated food.

As the vote on the bill indicated, the legislation enjoyed broad support from a number of constituents, including farmers, food processors, and pesticide manufacturers. Environmentalists and consumer advocates also welcomed the legislation, in part because FQPA includes a consumer right-to-know provision. Although the provision mandates providing consumers with information regarding "risks and benefits of pesticide chemical residues in or on food purchased by consumers," a more important aspect of the legislation is that it is presented as a right to know.

Implementation of the various aspects of FQPA has fallen to the Environmental Protection Agency (and its Office of Pesticide Programs). The Environmental

does not properly understand the scope of the right to know.

Questions Concerning the Right to Know

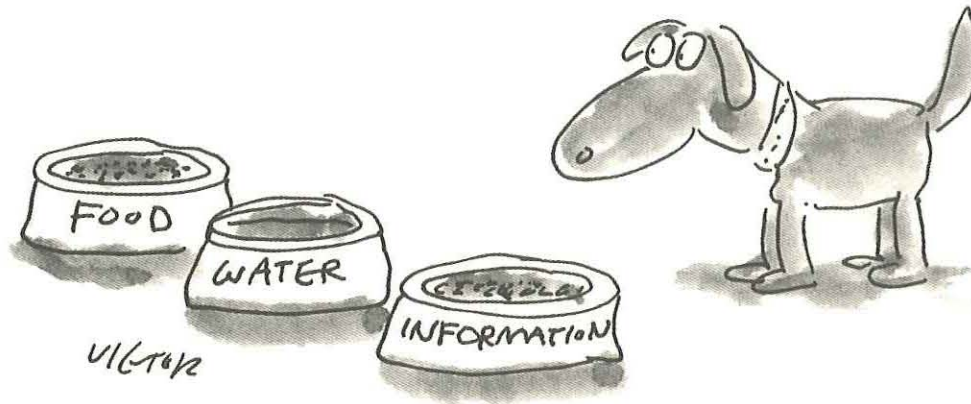
Several questions and concerns arise in considering the notion of a consumer "right to know." For instance, is a consumer's right to know the right to know *anything* of interest to her—including the broadest possible range of risks and benefits of a food or a manner of processing food—or should the "right to know" be understood more narrowly to include *only* those risks and benefits deemed essential to a consumer? To whom does the task of deciding what constitutes essential information belong? How are obligations generated by this right satisfactorily met: by the creation and distribution of informative brochures, the redesign of food labels, the provision of a consumer hot-line?

Nevertheless, one of the first questions one should ask is whether the right to know should be understood in a *weak* sense: does one have the right to be informed about *what is already known* about a food or process; or should it be understood as a *strong* right: does one have the right not only to the available information about a food or process, but also to *the active pursuit of information not yet available*? The difference between a strong and weak understanding of the right to know can have profound implications, particularly in questions at law. For instance, disputes concerning what cigarette manufacturers knew about the health hazards of tobacco often revolve around how active—or inactive—they were in gathering information about the effects of tobacco use.

Although a right to know entails a duty to disclose—which can be understood weakly as the duty to inform, or strongly as the duty to investigate and inform—a duty to inform *does not necessarily* entail a right to know. In order to obtain a patent, for instance, the inventor must disclose the workings of her invention. Disclosure is not based on someone's *right* to know those workings, but, rather, proof of innovation or of uniqueness requires disclosure of the workings of an invention. Disclosure in these cases does not rely

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Protection Agency understands the "right to know" provision of FQPA as the requirement to consult with the Departments of Health and Human Services and Agriculture in "developing consumer information for distribution to large retail grocers and for public display." However, the notion of knowledge as a *right* warrants more careful thought, since one cannot understand properly what FQPA provides for if one



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on any duty to know but on the utilitarian grounds underlying patent protection. In other cases, however, the duty to disclose is based on a right-to-know. For example, the duty of disclosure arising from the "Miranda" warning is not based on any utilitarian beliefs regarding the effect of such disclosures on crime or conviction rates. The Miranda warning rests on the right of individuals to know their legal rights at the time of their arrest.

Medicine is the most prominent area where duties of disclosure are based on a right to know. Both in the clinical setting and in biomedical research, right to

health; but when there is a conflict, the consensus holds that compliance with the patient's right to know should prevail.

Because few other disciplines have more carefully scrutinized—or more strongly endorsed—the right to know, this article examines the right to know as it applies to food consumption by drawing upon the better-examined area of the medical right to know. The article concludes by offering practical suggestions for implementing the right-to-know provisions of FQPA.

The Right to Know in Medicine

Perhaps the most important consideration that has shaped the right to know in medicine is the acknowledgement that patients have a right to autonomy or self-determination. The patient's right to decide how to live her life is based on the fact that it is *her* life. As competent, free adults, patients have the right, in particular, to make decisions regarding medical treatment—whether to undergo treatment, which treatment to undergo, and whether to discontinue treatment. Withheld information might lead a patient to arrive at a decision contrary to the one she would have made with full information—a violation of her autonomy. Though full disclosure may in some cases harm the patient—at

The patient's right to know is arguably one of the pillars of modern medical practice.

know concerns have been defended, acknowledged, and incorporated into explicit disclosure and informed consent policies. Indeed, the patient's right to know is arguably one of the pillars of modern medical practice. Further, a patient's right to know commonly does not conflict with the primary mission of the medical profession to treat disease and to maintain and promote

least psychologically—the possibility of harm does not justify the rejection or abridgment of the patient's right to know. Medical paternalism—the notion that medical professionals “know best” what information to provide patients—not only risks limiting the rational exercise of a patient to decide how to live her life, but deception may be the source of even *more* harm to the patient. Such considerations have led health professionals to recognize that they are under an obligation to respect patient autonomy by providing their patients with relevant medical information.

In medicine, although the right to know extends beyond a right to information that the health professional deems necessary for the patient—which would otherwise reintroduce medical paternalism—patients cannot claim the right to know *anything* they may want to know. Patients have authority over such as matters as how to live their lives and the values they choose to live by, but the health professional is the authority over what constitutes *medical* information. The physician who discovers that her patient has cancer, for instance, is obligated to inform the patient of the different medical options—surgery, radiation, chemotherapy—but is under no obligation to provide information of “alternative” therapies—laetrile, crystals, herbs, or homeopathy, for instance—even if the patient expresses interest in such alternatives. In short, in medicine the patient's right to know is a right to know medical information, and the health professional is the authority over what constitutes medical information.

Furthermore, the principal information that must be disclosed concerns the risks associated with various treatments. When surgery is contemplated, physicians should always inform patients of the risks of infection. But the disclosure does not cover all risks. For example, surgical incisions are commonly closed either by sutures or by staples. Each has its benefits and risks—staples result in faster healing, but sutures result in less scar tissue. The better option is a matter of expertise, a judgment to be made by the surgeon. Although patients can refuse or choose surgery, they typically are not informed of the differences between sutures and staples, and they are not asked to choose between the two.

Disclosure is not limited only to likely risks, however. If death is a possible—although improbable—outcome of a procedure, the risk of death must be disclosed. In this case, medical professionals are obligated to disclose salient risks, where salience is understood from the perspective of the reasonable person. The possibility of death is always a salient risk.

The patient's right to know encompasses more than just information concerning the risks and benefits of various treatments. Medical professionals should also disclose the results and significance of tests and examinations; disclosure must be communicated in a way

Genetics and Criminal Behavior

David Wasserman and Robert Wachbroit, Editors

This volume brings together a group of essays by leading philosophers of science, ethicists, and legal scholars, commissioned for an important and controversial conference on genetics and crime. The essays address basic conceptual, methodological, and ethical issues raised by genetic research on criminal behavior but largely ignored in the public debate. They explore the complexities in tracing any genetic influence on criminal, violent, or antisocial behavior, the varieties of interpretation to which evidence of such influences is subject, and the relevance of such influences to the moral and legal appraisal of criminal conduct. The volume provides a critical overview of the assumptions, methods, and findings of recent behavioral genetics.

Contributors: Robert Wachbroit, Elliott Sober, Kenneth F. Schaffner, Kenneth A. Taylor, Ian Hacking, Allen Gibbard, Marcia Baron, Peter Van Inwagen, Patricia S. Greenspan, Michael Slote, Jorge L.A. Garcia, and David Wasserman

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that the patient can understand. The area of prenatal genetic testing has been particularly successful in establishing numerous practices that enable patients to make informed decisions. For instance, typically those undergoing prenatal genetic testing are assigned genetic counselors, who are both well-versed in effectively describing the tests in terms of a crash course in Mendelian genetics, and who can clearly and sensitively discuss the social implications of various gene

The patient's right to know encompasses more than just information concerning the risks and benefits of various treatments.

conditions—e.g., that some conditions might be subject to discrimination by insurers.

Implementation of this right to know can take various forms, including brochures, face-to-face conversations, and video presentations. Perhaps the most visible implementation of this right is the consent form. These documents are usually worded in such a way that, by signing the form, the patient consents to the treatment and also affirms, in effect, that because she has been informed of information regarding risks and benefits of the proposed treatment, her right to know has been respected. With only a few notable exceptions, no treatment is performed without this kind of declaration.

The Patient's Right to Know and the Consumer's Right to Know: Several Contrasts

The patient's right to know is not a simple matter—many have debated the precise meaning of patient autonomy, and some empirical studies suggest that patients may not fully understand the consent forms they sign. But more than other areas, medicine has scrutinized and developed an understanding of the right to know which has been implemented reasonably well. What can the patient's right to know tell us about the consumer's right to know? It is important to recognize that four crucial differences exist between the two.

Mystery versus Familiarity. Patients typically know little about most medical procedures or medications—and they realize their ignorance. Patients do not typically seek out procedures and medications—they are proposed by their health professionals. And although the patient may have a vague idea of the purpose of a treatment, he commonly is unaware of what risks he should ask about. Patients are often apprehensive and expect their health professional to identify the risks that must be disclosed.

In contrast to the exotica of medical procedures and medications, food consumption is literally an everyday experience. This familiarity leads many to believe that they know and understand the benefits and harms of the foods they consume. Beliefs about their knowledge are not confined solely to matters of aesthetics—this food will taste good, that food will make me fat—many people also believe that they understand the health risks associated with the handling of food, such as how various foods should be stored or cooked. Contrary to common belief, many experts maintain that consumers do *not* know as much as they think they do, and studies show that most health harms from food are the result of improper handling.

General versus Targeted Risk Communication. Because patients are unfamiliar with most medical procedures and medications, health professionals disclose all relevant harms, risks, and benefits. Typically, they develop a standard disclosure of risks and benefits for the particular procedure or medication; this standard disclosure can serve as the basis for a more extended discussion for the patient with more particular concerns.

Because consumers are so familiar with food, by contrast, concerns about a particular products tend to be specific. One consumer might be interested only in fat content, another only in sugar content, while a third cares only whether the item was grown organically, and yet another consumer cares only about whether a

Lack of interest in risks outside one's concern is rational. Since food consumption is an everyday experience, information about food must be understood efficiently. . . .

particular pesticide was used. This is not to say that consumers are closed-minded about learning the risks outside their areas of concern, but unless those risks seem surprisingly significant (to the individual consumer), consumers tend not to broaden their interest.

Lack of interest in risks outside one's concern is rational. Since food consumption is an everyday experience, information about food must be understood efficiently; information about other considerations simply distracts from making food selections with minimal effort. Furthermore, consumers believe that all the food available for purchase passes a certain threshold of safety. With the exception of those with particular food allergies, few believe that any of the food in the stores is lethal. These considerations result in consumer concern over harms that are small, cumulative, and long term. Eating one portion of greasy french-fries may be harmless, for instance, but some con-

sumers believe that a steady diet of greasy foods will, in the long term, be bad for their health.

Professional Relationship versus No Relationship.

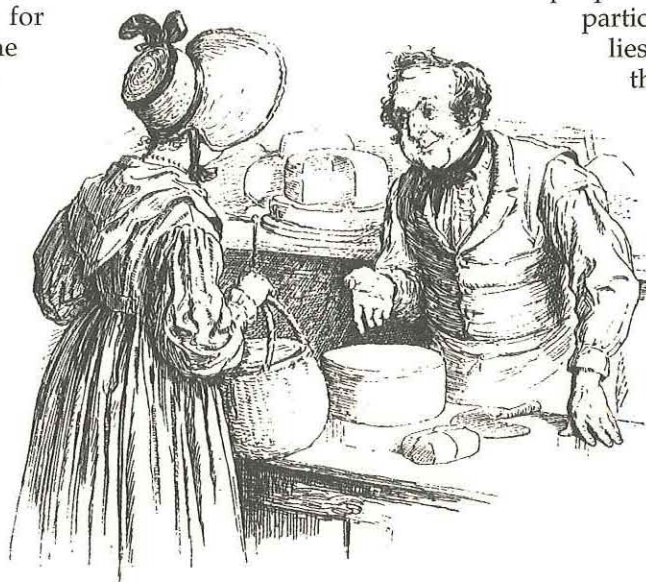
In medicine, a patient typically exercises her right to know within a relationship with a medical professional—she is *somebody's* patient. Her health professional works within a network of responsibilities and obligations, a network which includes not just the patient, but also colleagues and other elements in the health care setting. While a patient can receive relevant information in many ways—via brochures, videos, etc.—the ultimate responsibility for patient consent lies with the designated health professional (whose name is often on the consent form).

No such relationship exists with regard to food consumption. Although there are many people involved in the production and delivery of food—farmers, wholesalers, store owners, checkout clerks, among others—the consumer will typically have contact with only the last person in the chain and that contact hardly constitutes a relationship capable of sustaining important duties and obligations specific to an individual consumer. This is not to deny that the store owner, store manager, and checkout clerk are under the obligation to be honest in their labeling and fair in their pricing. But this is a general obligation.

The Requirement of Understanding. With few exceptions, in medicine no procedure is undertaken without the patient's informed consent. Consequently, the patient's understanding functions as a gatekeeper: understanding the risks and benefits of a procedure are a necessary requirement for allowing the procedure to go forward. The significance of the patient's right to know does not consist simply in receiving answers to her questions. Commonly, treatment cannot go forward unless she acknowledges that she indeed understands what is involved in the procedure or treatment. The requirement of the patient's signature on the consent forms prior to receiving medical services is not some backdoor medical paternalism; rather, it is a strong affirmation of the patient's freedom and autonomy, which cannot be exercised if choices are made in ignorance.

By contrast, consumers need know nothing about the risks or nutritional value of foods—much less affirm such knowledge—in order to make their purchases. Of course, the absence of this requirement can be explained by the belief that, since foods are generally safe, consumer choices can be based on aesthetics or idiosyncratic preference. Because of this presumed familiarity with food, it is assumed consumers understand the various advantages and disadvantages of different foods. If a particular food is harmful to some for special reasons—e.g., some people have an allergic reaction to a particular food—the responsibility lies with the consumer to know this, make specific inquiries if necessary, and choose appropriately. Requiring food consent forms would be an onerous burden with little benefit.

Apparent exceptions to this situation underscore the point: A food store in Delaware that specializes in hot sauces requires customers to sign waivers acknowledging the potency of some of these sauces. The "food consent form" of course promotes the novel character of the store, but some of the sauces are indeed unfamiliar to the (average) customer and can be harmful if not used properly.



Respecting the Consumer's Right to Know

Many of these contrasts rest on contingent differences between the consumption of food and the consumption of medical service. If the general presumption of food safety were challenged, for instance, then one would expect to see heightened interest in risk information. Indeed, the recent public concern over "mad cow" disease in England resulted in butchers throughout Europe generally taking particular care in informing their customers about the source of the beef they sold, and providing details intended to restore confidence in its quality and safety. Detailed information on display became an expectation of customers.

Food scares are exceptional cases, however, and the purpose of the Food Quality Protection Act was not to counter food safety crises but to respond to increasing consumer demand for information on risk and nutrition. Asserting a consumer's right to know is not

directed at some alleged paternalism in the food industry or refusal to respect or acknowledge the consumer's freedom and autonomy. Rather, it is directed at the changing attitudes and sophistication of consumers.

Accepting a consumer's right to know in matters of food does not require a radical break with previous practice. This is perhaps the most important difference

If the general presumption of food safety were challenged, for instance, then one would expect to see heightened interest in risk information.

between the consumer's right to know and the patient's right to know. A few decades ago, medical practice—particularly, the practice of disclosure and consultation—was seen as patronizing, not properly respecting the patient's autonomy and freedom. Medical scandals led to a call for radical change in the physician-patient relationship and for special assurances that the patient's right to know would be respected. Although food scandals and scares may point to problems with particular producers or distributors—or even with particular safety standards or their implementation—they do not point to the need for fundamental changes in our practices of purchasing foods. Implementation of the consumer's right to know does not require radical change, therefore, but it also does not endorse business as usual.

Few would argue that the consumer's right to know provision of the FQPA mandates that consumers must have and understand all types of risk information—a claim that would constitute a radical departure from past practices. The right to know in matters of food selection can be understood as requiring the facilitation of a *targeted interest* in information, including risk information.

Plainly, targeted interests in information cannot be served by a single label or brochure, regardless how well designed. Any brochure that contained information about which pesticides were used, with their known levels of toxicity, *and* information about which fertilizers were used, organic or synthetic, *and* information about what methods of preservation were used (radiation, chemical, or thermal—or a combination of methods), *and* information about the use of any genetically modified ingredients, would be unwieldy and therefore useless. Although each piece of information might meet some particular consumer's interest, the agglomeration of such information would simply frustrate rather than implement the consumer's right to know.

If this discussion were taking place ten years ago, the prospects for implementing the consumer's right to know would not be promising, but advances in information technology now suggest an approach worth considering. The Internet is well suited for the job of implementation of the consumer right to know in matters of food selection.

Consumers and the Web

The general interest and use of the Internet has grown astonishingly in the past few years. One reason for the widespread of the Internet is its many Web sites, which are convenient and extensive resources of information. Web sites are particularly well suited to accommodate the targeted interests of consumers, and placing risk information about various foods on a Web site is a useful way to implement the consumer's right-to-know provision of FQPA. Again, as discussed above, easy availability of medical information is an inadequate response to the patient's right to know: implementing that right demands a determination by a health professional that the patient does indeed understand the medical information being presented to her. But in the case of food consumption, the demand of informed consent seems unjustified—unnecessary because of the general safety of the food available in

Targeted interests in information cannot be served by a single label or brochure, regardless how well designed.

markets, and burdensome because of the everyday need to consume food. Easy availability of food information itself evidences respect for the consumer's right to know.

Since Web sites can easily be made to respond to targeted interests, the question of the scope of the consumer's right to know—does she have a right to know *whatever* she wants to know, or a right to know *only what is deemed important* for her to know—may be moot. If the consumer's right to know is implemented via the Internet, in all likelihood, one will find a variety of information.

This is not to say, however, that all such information would be reliable. The Internet is not only an extraordinary source of information; it is also an extraordinary source of misinformation. Paranoids, cranks, and provocateurs as well as careful and responsible interest groups post on the Internet. Thus, even if there exists some piece of risk information that is arguably not within the scope of a consumer's right to know, those

consumers who are nevertheless interested in that information and search for it on the Internet will find it—or believe that they have found it. The only reasonable response to the danger of the mischief of misinformation is to provide all available information concerning a food and its production. Even food producers and processors who in the past may have been reluctant to discuss unpopular processes—food irradiation, for instance—or production—genetically modified foods—would be better served in speaking directly to their methods, rather than having another constituency construct a Web site with its own presentation of information.

Posting risk information about various foods on a Web site is a useful way to implement the consumer's right-to-know provision of the FQPA.

Although the widespread use of the Internet introduces to food producers an incentive to provide full disclosure, this by itself does not ensure that people will trust that information. There exist three approaches to establishing and maintaining consumer confidence in food information on the Internet. One can extend the legal authority governing food labels to information food producers provide on their Web sites. False, misleading, or inaccurate information on the Web would be subject to the same penalties as false, misleading, or inaccurate information on a food label. Of course, this approach is effective only insofar as there is consumer confidence in food labels generally.

A second approach would be to have an official trusted Web site. In fact, the Environmental Protection Agency, through its Office of Pesticide Programs, sponsors a site on FQPA, though the information presented is confined to the topic of pesticides. A broader information resource is needed. The site should also be designed in a way that searching is easy, and information is provided in a consumer-friendly form.

Both of these approaches treat the issue of providing reliable and credible information as a Web site

matter: the content of the site is either stringently regulated or the domain of the site indicates governmental authority. A third approach treats the issue by placing more responsibility on the consumer. This consists not only of providing information on the site but also of placing links to other sites that would provide "second opinions." These sites would confirm the information, offer alternative perspectives on their interpretation, or present reasonable concerns and challenges to the claims of the original site. It would be the responsibility of the consumer to visit these other sites before forming a judgment about the credibility of the information provided.

The situation is analogous to the case in medicine when a patient seeks a second opinion on a treatment recommendation. Even if the patient has complete confidence and trust in her physician, she may well seek the judgment of another physician in order to get a different perspective regarding her options and their underlying rationales. Although patients have not tried to seek second opinions as much as they probably should have, patients are increasingly going to the Internet to learn more about their medical conditions and treatment options. Inviting consumers to seek risk information for particular foods by providing links to alternative sources of information may well result in a more sophisticated consumer.

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