

Report from the Center for

PHILOSOPHY & PUBLIC POLICY

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Women in the Military

To make its research easily available to a broad audience, the Center for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Center for Philosophy and Public Policy*. Named after the abbreviation for “questions,” *QQ* summarizes and supplements Center books and working papers and features other selected philosophical work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Center or its sponsors.

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Women are employed more extensively in the American armed forces than in the military forces of any other nation in the world. This increased reliance on women for our national defense is currently facing intense reexamination. The Army has recently ordered a “pause” in the escalated recruitment of female soldiers. And last year Congress, responding to President Carter’s call for renewed Selective Service registration, voted, in opposition to the president’s wishes, against female registration. The constitutionality of the male-only draft has been challenged in the courts, but the Supreme Court has upheld the restriction. Meanwhile, public opinion continues to oppose full integration of women into the military. Through all the controversy surrounding this issue, the moral question remains: Should men go off to war while women weep?

This question resolves itself into several further sets of questions. First, do women have a right to serve in their nation’s armed forces, and if so, what is the source of this right? Second, what limits should be placed on this right? Are there sound empirical grounds for arguing that women’s right to serve should not include a right to full participation in offensive combat? Finally, if men are drafted to serve, should women be drafted as well? Or should the female presence in the military remain voluntary? The answers we give to these questions depend on our views on the significance of sex-related differences, the purposes of the military, and the rights and responsibilities of citizenship.

The Right of Military Service

In the past decade, the percentage of women in the military has risen dramatically from 1 percent in 1971 to 8 percent in the current all-volunteer force. Recruiting goals have called for 12 percent by 1985, for a total of 250,000. Under the new administration, however, the desired levels of female participation are being reevaluated. Field commanders have complained that the increased female presence confronts the military with a host of personnel problems. These range from the provision of housing, uniforms, and adequate day care to sexual harassment and a lack of male peer acceptance. It is expected that the re-assessment will result in a reduction in female enlistments.

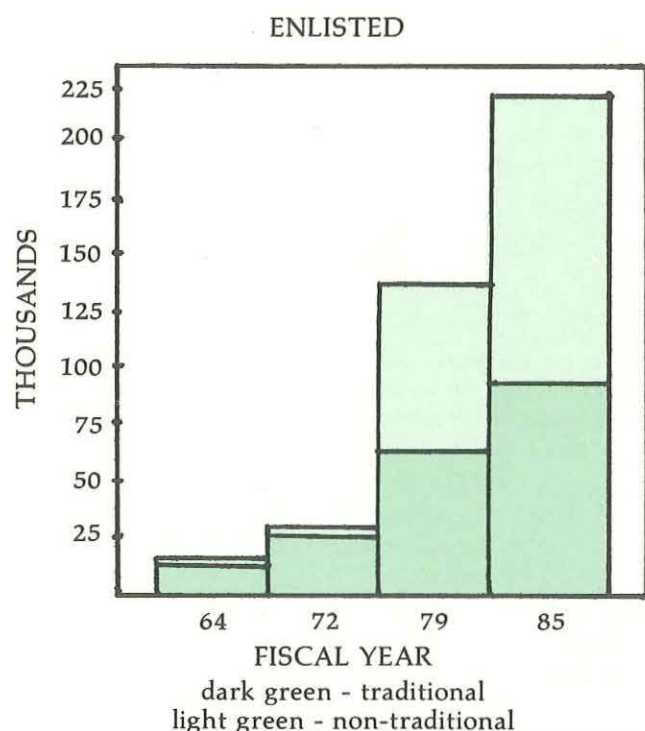
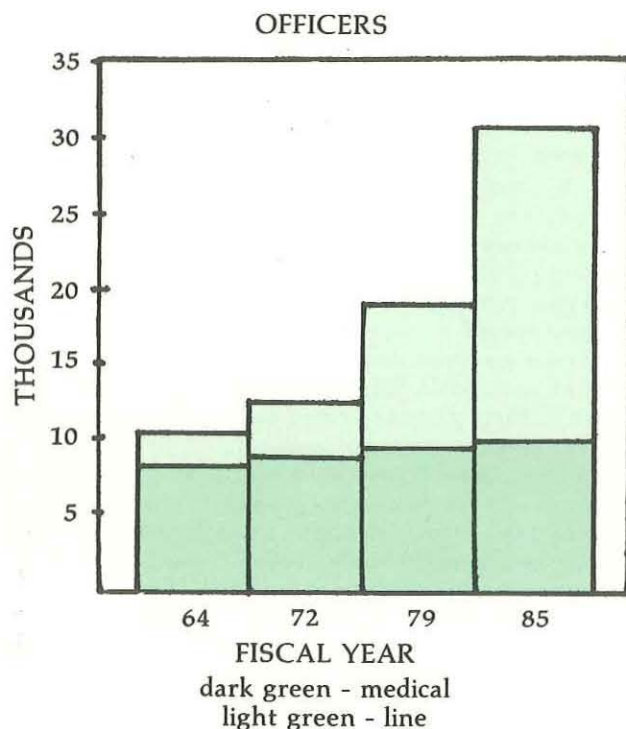
It may seem that the recruitment of women is not worth its social and perhaps even military costs. But denying qualified women the opportunity to serve in their nation's armed forces may have still heavier moral costs. According to Sara Ruddick, a philosopher at the New School of Social Research, to deny qualified women participation in the military is to deny them a *right*, for the right to serve in one's nation's armed forces and to defend one's very way of life is a basic right of citizenship, belonging equally to all citizens. "To fight and to command fighters, when qualified to do so, is a right conferred upon citizens and cannot be denied them because of their membership in a class or group. Women claiming the right to fight are claiming full citizenship." This right, fur-

thermore, is an especially important one for women, bearing a certain symbolic significance. Some of the military's privileges are eagerly seized by all disadvantaged groups: The military provides economic and educational opportunities for women, as it does for racial and ethnic minorities. "But there is a special point [for women] in proving our ability to fight where stakes are high and, hitherto, masculinity has prevailed. Military success would challenge the perception, common in civilian life, that women are weak, dependent, and powerless."

"To fight and to command fighters, when qualified to do so, is a right conferred upon citizens and cannot be denied them because of their membership in a class or group. Women claiming the right to fight are claiming full citizenship."

If military service is a right shared by all citizens, the Pentagon will have to produce weighty arguments for setting it aside. It will not suffice to cite additional expenses or inconveniences, for we ordinarily think that rights can be overridden only by considerations of special societal urgency. The difficulties of providing new uniforms for female soldiers do not tip the balance here. Seriously compromising our national security would.

ACTIVE DUTY WOMEN



Courtesy Dept. of Defense



Women in Combat

Those who oppose women's participation in the military frequently charge, however, that any right of women to serve is indeed overridden, or at least limited, by more urgent national security concerns. David H. Marlowe, Chief of the Department of Military Psychiatry at the Walter Reed Army Institute of Research (speaking in a private capacity and not representing any official view), insists that the right to serve must be measured against "that potential lost war that could alter . . . the integrity of the nation and its security for decades to come." If the presence of women in the military significantly increases the likelihood of losing that war, then it may be morally permissible or even obligatory to reduce their participation, or to limit their areas of performance.

Military service can take many forms, and the right to serve need not imply a right to serve in every military capacity. While women currently serve in scores of nontraditional military positions, they are excluded from strictly combat functions, such as infantry and armor. Defenders of the exclusionary policy argue that full inclusion of women would jeopardize our fighting effectiveness. Others dispute these claims, insisting that women should have fuller access to all occupational specialties.

Women in Combat: No

The case against women in combat often begins with a recounting of the physiological differences between men and women. Women average 86-89 percent of male bulk and volume, and even when size is held constant, women are only 80 percent as strong as men. These differences in scale are accompanied by differences in structure. David H. Marlowe cites a long list of physiological traits distinguishing the sexes: "The greater vital capacity, speed, muscle mass, aiming and throwing skills of the male, . . . and his more rapid rises in adrenaline make the male more fitted for combat." Opponents of women in combat also point to anthropological evidence that women play less aggressive roles than men in all observed societies, with aggressiveness differentials manifesting themselves in very young children prior to any significant socialization. Aggression has been linked to testosterone, the male sex hormone, and has been shown to fluctuate with hormone levels.

Even if these putative sex differences turn out to be more myth than fact, the existence of the myth itself works against the inclusion of women in combat units. Marlowe cites World War II studies "[demonstrating] that the performance of military units is, in part, governed by soldiers' perception of the unit and its members." According to Marlowe, many male soldiers who currently train in sex-integrated units suffer a loss in self-esteem, feeling that they have been subjected to less intensive training than soldiers in exclusively male units, even when objective examinations show otherwise. If women could do all the

things they could do, how challenging could those things be? This self-doubt could take its toll in combat effectiveness.

Male soldiers who train in sex-integrated units suffer a loss in self-esteem, feeling that they have been subjected to less intensive training than soldiers in exclusively male units, even when objective examinations show otherwise. If women could do all the things they could do, how challenging could those things be?

Finally, the presence of women in combat units is said to have an adverse effect as well on the attitudes of our allies and enemies. Again, here the myth is as damning as the fact. University of Maryland sociologist Mady Segal points to the belief of many that: "The perception of our military effectiveness by allies and adversaries is crucial to our national security. If our military is viewed as weak because of the inclusion of women in combat roles, our international posture can be just as critically affected as if we were truly weak."

Women in Combat: Yes

Defenders of women in combat concede many of the relevant sex differences charged by their opponents. Men *are* on average bigger and stronger. The anthropological record *does* contain unbroken millennia of male domination across widely divergent cultures. Sexual stereotypes, whether or not grounded in fact, *do* determine to some extent soldiers' self-perceptions and world attitudes toward American military effectiveness.

However, lesser female size and strength may be compensated for by the superior mental aptitude and educational background of average female recruits. The all volunteer force has faced severe criticism for its deteriorating personnel quality, as measured on military qualification tests. The mental and technical abilities women bring to the armed forces may on balance offset any decline in physical standards, for a net gain in fighting effectiveness. Furthermore, an elevated mental profile for our enlisted troops may favorably affect both the self-perception of units and the attitudes of allies and enemies.

Sex-linked differences in strength and physical capacity are, moreover, only differences in *average* ability. Mady Segal cautions, "We must be careful not to confuse a difference in average physical strength between men and women with a situation in which all men are strong enough and no women are. . . . Rather than assuming that all women are incapable of performing by virtue of the average woman's lack of capability, specific requirements should serve as the selection criteria, not gender."



The role of women in the military has changed dramatically during the past decade.

Photos courtesy U.S. Army Photographs (above, CC 80342; top right, CC 98651; bottom right, CC 100358)



This emphasis on actual performance as a gender-free standard is especially important for eliminating discrimination based on unfounded prejudice. Segal reminds us that "many of the arguments currently being used to justify excluding women . . . from combat roles have been used in the past to justify excluding women from other occupations," such as medicine, law, government, and law enforcement. Many of the arguments that "prove" that women should not be fighters equally well "prove" that they should not be doctors, voters, property-owners, or, indeed, independent, strong, autonomous persons. Such unpalatable conclusions lead us to be suspicious of the arguments that generated them.

Finally, it is important to bear in mind the wide range of tasks all falling under the common heading of combat specialties. Service in the infantry and service on board an aircraft carrier, for example, are both forms of combat service from which women are now excluded. But they require very different skills and abilities. Upper arm strength is critical in toting heavy weapons and ammunition across jungle terrain. It is irrelevant to success in piloting fighter planes. The physiological argument against women in combat cannot justify excluding them from combat specialties where their special liabilities are unimportant.

The arguments for and against excluding women from various combat specialties may seem incon-

clusive, with the final choice resting on our views about the essential purpose of the military. On Marlowe's view, "The primary and essential role of the armed forces is to fight and win those wars to which the nation commits them." The national security is too important for us to court the risks of possible combat ineffectiveness. For others, the military is equally important for the role it plays in our national life, as an employer of massive scale and a symbol of citizen rights and responsibilities.

Volunteers or Draftees?

It might be thought that the right to fight and the duty to fight are merely different sides of the same moral coin, that the right to volunteer for service implies the duty to serve when called upon to do so. But rights do not imply duties in this way. Sara Ruddick compares the right to fight to the right to have children. "Neither right entails that a woman in fact choose to participate in the activity to which she is entitled." These rights entail only that, having chosen, one assumes whatever responsibilities—as soldier or parent—are attendant upon one's choice.

The right to fight, then, does not itself directly imply the duty to fight. But many women claim the right to fight as a right conferred upon all citizens. Perhaps in the same way the duty to fight is a duty all

citizens must share. Perhaps accepting the duty to serve is a badge of full and equal citizenship. The important questions now become: should *any* citizen be drafted? If so, do the reasons justifying such a draft apply equally well to the drafting of *all* citizens, men and women alike?

Marlowe defends a draft by arguing that the costs of losing a war are greater than the costs of coerced military service. He believes that the all-volunteer force may be incapable of successfully defending the nation, because of a skewed distribution of aptitudes and skills, and that the nation's defense is a high enough priority to justify conscription. "The costs of service as a conscriptee should be accounted . . . against the consequences to the individual and society in the event that a war vital to the national interest or national survival is lost." Against the costs of coercion he weighs "the death of a way of life."

Marlowe's argument in favor of a draft justifies drafting qualified women as well as men. An army capable of victory "requires that it have the most competent and highly skilled personnel available manning its force, its weapons, and its support systems . . . If we are to man our military force in a way that will ensure optimal competence, skill, and ability—given the approaching demographic dip of the later eighties through nineties—women will have to provide a significant part of that force."

Ruddick addresses the legitimacy of drafting women by raising questions about the sources and limits of political obligation, as these bear upon the coerced participation of women in the armed force. Do women and men have the same obligations to their government? Do these obligations include military service?

It can be argued that women are socially, economically, and politically disadvantaged relative to men, and that they are therefore less obligated to support their state and defend its political and economic arrangements. If benefit from and participation in the state ground a duty to serve in the military, they do not, according to Ruddick, "obligate women to the same degree and for the same reasons [as men]." Few contemporary political theorists believe, however, that such a grave duty as military service can be justified on these grounds for the vast majority of citizens.

It is more plausible, on Ruddick's view, to view political obligation generally as grounded in a "natural duty to preserve states in their justice." A citizen of a (relatively) just state accepts obligations to it "because his state is just and he is moral." If this account justifies the drafting of men, it equally justifies the drafting of women, because men and women "are the same kind of moral person." But does a citizen's moral obligation to a just state include military service? Ruddick thinks not: the duty entailed is a duty both to assist in just wars *and* to resist unjust wars. Individuals must be allowed in conscience to decide the justice of the wars their state chooses to wage before deciding to join in waging them; this duty of conscience is

shared fully by citizens of both sexes, and for both sexes it is equally incompatible with currently proposed drafts.

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For this reason, Ruddick views conventional policies of conscription as unjust and unjustified—again, for men and women alike. But if men *are* in fact unjustly drafted, should women be drafted as well? Should a burden that no one should bear be fairly shared? Ruddick believes that the answer may be yes—however socially, politically, and economically advantaged men may be as a group, coerced combat remains a terrible thing: "there is a fundamental fairness that decrees it impermissible that men, solely because of gender, bear the sole burden of combat."

Conclusion

The moral question about the role of women in the military seems in the end to come down to a question about the rights and obligations of citizenship. If the right to fight is a citizenship right, it is a right qualified women share with qualified men. If citizenship carries with it an obligation to serve, women, as full and equal citizens, will have to accept their portion of the military burden. Segal writes: "One of the basic principles on which our nation was founded is the full participation of all citizens in all aspects of the life of the nation. The ultimate question that still remains is to what extent we are willing to treat women as equal citizens of the nation."

The services do not now accept volunteers who cannot meet established standards, and past drafts have exempted those for whom competing moral obligations—to family, church, or conscience—have forbidden military participation. There seems no reason to believe that existing standards and exemptions cannot continue to bar or excuse those men and women who cannot or ought not serve, while encouraging the full participation of all able-bodied and willing citizens, whatever their race, creed, or gender.

The views of Sara Ruddick, Mady Segal, and David H. Marlowe are drawn from papers prepared for the Center for Philosophy and Public Policy's Working Group on Voluntary versus Non-voluntary Military Service. Working papers available from this project are "The All-Volunteer Force and Racial Imbalance," by Robert K. Fullinwider; "If the Draft is Restored: Uncertainties, Not Solutions," by Kenneth J. Coffey; "Military Organization and Personnel Accession: What Changed with the AVF . . . and What Didn't," by David R. Segal; and "The Obligations of Citizens and the Justification of Conscription," by A. John Simmons. See order form, p. 15.

Why We Mistrust Lawyers

People sometimes wonder about lawyers. The legal profession enjoys enormous prestige and respect; yet we also view it with suspicion. Folklore says lawyers are smart; but they are sharpers. They are pragmatic, useful, but unprincipled. Every attorney knows he is not a folk hero. Carl Sandburg's lines reflect the popular attitude: "Why is there always a secret singing/ When a lawyer cashes in?/ Why does a hearse horse snicker/ Hauling a lawyer away?"

Attorneys are indignant, justifiably, at the suggestion that their general run of honesty is lower than that of the common run of humanity. Thoughtful lawyers are apt to suggest that the public confuses the morality of a lawyer with that of his or her client; it assumes that a profession that is willing to counsel dishonest and unworthy clients is itself unworthy and dishonest. But the public is wrong, for if lawyers were to do otherwise they would be setting themselves up as private gatekeepers of the legal system, usurping the functions of judge and jury. For this reason it is the essential condition of advocacy that the attorney's morals and the client's are totally distinct.

A lawyer, then, may have a moral duty to assist in an immoral case. Yet we think that no one is morally bound to assist immorality. We may describe this as a conflict between *ordinary morality* and the *role morality* of lawyers. These do not always conflict, of course: for example, both ordinary morality and role morality would condemn a lawyer who swindles a client. But there will be cases in which the conflict is quite pointed, and these entitle us to ask how the demands of a professional role can override ordinary moral requirements that we thought were binding on everybody.

Lawyers' codes of professional responsibility do not always address these problems. They ignore many of the morally problematic situations that lawyers face in the course of their professional lives. This is not surprising, since these codes specify only the role obligations of lawyers. The course of action they dictate may be inappropriate for cases in which these obligations and ordinary morality come into conflict.

This article is drawn from "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics," by David Luban, Research Associate at the Center for Philosophy and Public Policy, forthcoming in the Maryland Law Review, Vol. 40, No. 3 (1981). We gratefully acknowledge permission of the Maryland Law Review to use this material here. "Calming the Hearse Horse" was originally prepared as the initial survey for an ongoing research project on Lawyers' Ethics, conducted by the Center for Philosophy and Public Policy, with the University of Maryland School of Law.

Examples of Conflict

There are examples aplenty of genuine conflicts between ordinary morality and lawyers' role morality:

- (1) The client is the prosperous president of a savings-and-loan association. In leaner days he had borrowed almost \$5000 from a man working for him as a carpenter. He now wishes to avoid repaying the debt by running the statute of limitations. He is sued by the carpenter and calls his lawyer (*Zabella v. Pakel*, 242 F. 2d 452 (1957)).

The ABA Code of Professional Responsibility is unambiguous about the lawyer's duty in this example: "A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law." Role morality demands that the lawyer assist his client in this project. From the point of view of ordinary morality, however, it is morally wrong to assist someone in reneging on his legitimate debt.

- (2) The client has raped a woman, been found guilty by reason of insanity, and institutionalized. He wishes to appeal the decision by asserting a technical defense, namely, that he was denied the right to a speedy trial. (*Langworthy v. State*, 39 Md. App. 559 (1978), *rev'd*, 284 Md. 588 (1979).

In this example, the client is not attempting to do something immoral, but it is, nevertheless, clearly contrary to the general interest to loose a mad rapist on the public. From the point of view of ordinary morality, the lawyer who asserts this defense is acting irresponsibly. As in the previous example, however, the ABA Code specifies an adamant duty to assert the client's legal rights, including the technical defense.

- (3) A youth, badly injured in an automobile wreck, sues the driver responsible for the injury. The driver's defense lawyer has his own doctor examine the youth; the doctor discovers an aortic aneurism, apparently caused by the accident, that the boy's doctor had not found. The aneurism is life-threatening unless operated on. But the defense lawyer realizes that if the youth learns of the aneurism he will demand a much higher settlement. (*Spaulding v. Zimmerman*, 116 N.W. 2d 704 (1962)).

The lawyer's role responsibilities are again unam-

biguous. He must keep the client's secrets unless the client is contemplating commission of a crime. Secrets are, according to the Code, "information gained in the professional relationship . . . the disclosure of which . . . would be likely to be detrimental to the client." Thus, the knowledge of the aneurism is a secret. Nevertheless, it is plain that ordinarily, without the special duty of confidentiality, it would be incumbent on a person to tell the youth. An innocent life is at stake.

One says in discussions of examples like these: the lawyer is free to refuse the case. Indeed, if the lawyer's outrage is great enough to prejudice his judgment, he is required to do so. Now, it must be admitted that refusal or withdrawal from a morally troublesome case may be the most practical method to relieve a lawyer of an otherwise intolerable conflict. But the fact that such a strategy is available does not resolve the moral issue itself, for our adversary system is based on the proposition that *some* lawyer should take the case. If it is morally *obligatory* for the "last lawyer in town" to do so, it must be morally *permissible* for him. But of course, what is permissible for the last lawyer in town is permissible for any lawyer, else legal ethics becomes a matter of musical chairs in which the last lawyer to opt out of the role is the loser. Thus, the possibility of opting out does not yield a strategy for reconciling the lawyer's role with ordinary morality. Nor does it resolve the examples to note that in each the problem arises from a law that permits morally dubious outcomes. It is too simple to blame the law rather than the lawyer, for in every case the lawyer must decide to be the agent who brings about the outcome. It is the lawyer who pushes the red button.

Resolving the Conflict

We may want to resolve conflicts between ordinary morality and role morality by denying that there is any meaningful distinction between the two. If it is morally wrong to harm an innocent person gratuitously, then how can going to law school, being admitted to the bar, and taking money for the action make it right? The distinction might also be denied by defending the universality of role morality. Sociologists suggest that we always act in some social role or other. Every role carries with it its own behavioral norms. By this reasoning, all moralities must accommodate to roles, and we should be skeptical of the notion of an ordinary morality that fails to make these accommodations. Thus, the distinction seems doubly suspect.

If we allow the distinction, we must explain exactly how an appeal to role morality is supposed to justify an action that would otherwise seem morally unacceptable. An obvious move is to claim that (1) moral responsibility for the action falls on the role itself and not on the role agent, and (2) the role itself is morally desirable. The first of these, however, is simply false. We would not allow a torturer to evade moral responsibility by saying, "I personally would never pull out your toenails, but that's my job." If the role is immoral, its immorality accuses, not excuses, the person who holds it. Thus, the whole burden of the argument falls on the claim that the role is a morally good one.

But even the goodness of the role itself may not turn out to matter. In the second example, for instance, we might find ourselves inclined to say, "Who cares about the role? All that matters is that this lawyer is loosing a mad rapist on the city." However

THE LAWYERS KNOW TOO MUCH

The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
a dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided wheras,
Too many doors to go in and out of.

When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers—tell me why a hearse horse snickers
hauling a lawyer's bones.

—Carl Sandburg

From *SMOKE AND STEEL* by Carl Sandburg, copyright 1920 by Harcourt Brace Jovanovich, Inc.; copyright 1948 by Carl Sandburg. Reprinted by permission of the publisher.

desirable the lawyer's role might generally be, the act it requires in this case certainly leads to an undesirable result. The goodness of the role matters only if we do not evaluate role-derived actions as isolated cases, but think of them instead as instances of policies that are morally good. If we describe what the lawyer is doing as "defending the right of an improperly tried individual to his freedom" rather than "loosing a mad rapist on the city," his act seems to promote the public interest, because the general policy is a beneficial one.

"The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . . In our government of laws and not of men, each member of our society is entitled . . . to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense."

—ABA Code of Professional Responsibility

The question, then, is whether the individual action or the general policy that requires it is the proper subject of moral evaluation. The appeal to role morality assumes that the evaluation of policies rather than individual acts is the right approach—that, for example, if the policy of zealous advocacy is on balance a good one the lawyer should follow it even on occasions when he or she knows it will result in harm. And indeed, there is a good reason for putting policies over acts: it leads to greater predictability and regularity in social behavior. If we could not count on persons occupying certain social roles to act according to the expectations of the roles, we would live in a very capricious society indeed.

A strong case can be made, however, in favor of directing moral evaluation to individual acts instead. An agent confronts his decisions one at a time: if, after balancing the wrong done by breaking role against the wrong done by acting in role, he sees that an action is morally unacceptable, it cannot be correct to sweep this insight under the rug by saying that the individual action is not the proper subject of moral evaluation. But if acts rather than policies are the objects of moral judgments, it may not be possible to justify behavior by appealing to social roles.

An Analogy to Public Officials

The conflict between role obligations and ordinary morality is a familiar one in politics, where the risk of "dirty hands" is especially acute. Moral compromise is the risk if one is to act in the public realm: to try to keep clean hands is self-indulgent. The morality of clean hands is the morality of private life; it is superseded by a role morality when one becomes a

public official because the community interest is more important than one's own private interest, even one's private *moral* interest. That, at any rate, is the most plausible justification of political morality.

Now, the lawyer resembles the public official in certain obvious respects. Like the politician, the lawyer seeks to promote certain interests through verbal and persuasive means, in a situation frequently marked by maneuvering and threats. Most importantly, the lawyer, like the politician, is acting on behalf of someone else; both lawyer and official represent a constituency.

But there's the rub. The conflict between political and ordinary morality is resolved in favor of the former only because of the importance of the public interest. The lawyer, however, typically represents private and not public interests. Even so-called public interest lawyers treat the public interest that they hope to represent through the persons of private clients. How can the attorney claim to be bound by the "dirty hands" morality of public officials when he or she is acting on behalf of a merely private interest? How can a lawyer ever be permitted to do for a private client what neither would be permitted to do for himself?

"Every man is, in an unofficial sense, by being a moral agent, a Judge of right and wrong, and an Advocate of what is right. . . . This general character of moral agent, he cannot put off, by putting on any professional character. . . .

If he mixes up his character as an Advocate, with his character as a Moral Agent, . . . he acts immorally. . . . He sells to his Client, not only his skill and learning, but himself."

—William Whewell, 1844

Conclusions

This is not intended to deny that overriding role obligations may justify otherwise suspect legal practices. But if the notion of a role morality that can at times supplant ordinary morality is to be made coherent, a sophisticated account must be offered of this distinction, an account that spells out exactly how role morality is to be appealed to in offering justifications for action. If the analogy to public officials is to be pressed, similarities between the concept of legal and political representation must be carefully explored.

If such clarification is not forthcoming, it may turn out that role morality grants the lawyer no moral privileges or immunities. It may turn out that anything that is morally wrong for a non-lawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The legal profession may have to find another exculpating plea to offer Sandburg's hearse horse.

The Limits of Cost-Benefit Analysis

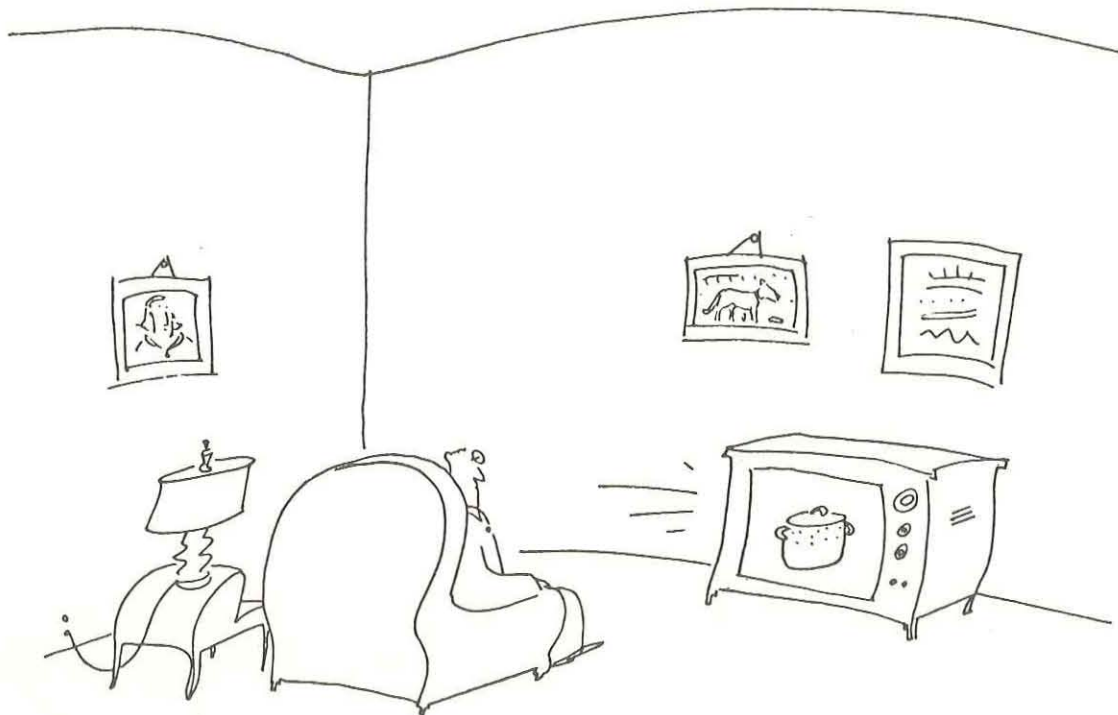
On June 17, 1981, the Supreme Court, in a 5-3 decision, held that the health of workers should outweigh "all other considerations" in regulations implementing the Occupational Health and Safety Act of 1970. "Any standard based on a balancing of costs and benefits . . . would be inconsistent with the law, the majority opinion said. This decision insists that market outcomes and economic analyses should not determine the goals and values regulatory agencies seek to achieve. This runs counter to efforts of the Reagan administration to base regulatory policy on economic techniques of cost-benefit analysis.

In what follows, Mark Sagoff, Research Associate at the Center for Philosophy and Public Policy, explores the limits of cost-benefit analysis in implementing laws that have political and moral, rather than economic, objectives.

President Reagan has ordered all federal agencies to refrain from major regulatory action "unless the potential benefits to society from the regulation outweigh the costs." Executive Order 12291, published in the *Federal Register* on February 10, may help to reform the nation's cumbersome regulatory process. Its critics contend, however, that it will add only another layer to mounting bureaucratic paperwork.

Who is right? Does cost-benefit analysis offer a neutral and rational approach to sound regulatory policy? Will it bias or delay hard choices instead?

Economists in the 1940s and 50s, who developed cost-benefit analysis, did so to apply the theory of the firm to the government. They thought that public investments should return a profit to society as a whole. These economists compared the market value of irrigation and hydroelectric power, for example, with the capital costs of building dams. The Flood



MASLIN

"How much would you pay for all the secrets of the universe? Wait, don't answer yet. You also get this six-quart covered combination spaghetti pot and clam steamer. Now how much would you pay?"

Drawing by Maslin; © 1981
The New Yorker Magazine, Inc.

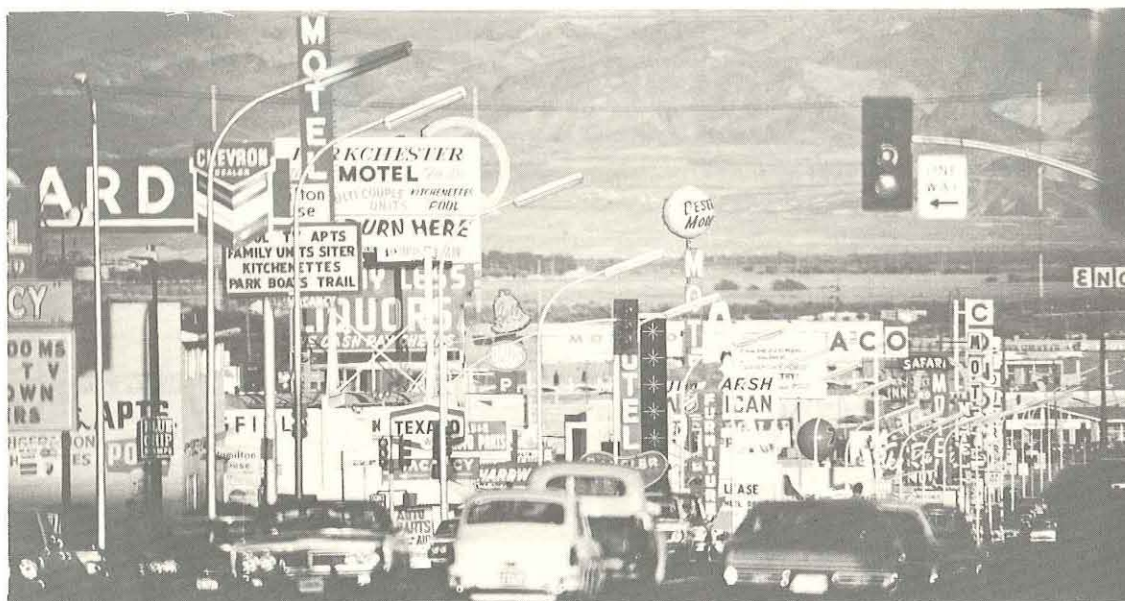
Control Act of 1939 insisted upon this weighing of economic pluses and minuses. It permitted the government to finance water projects only when "the benefits to whomsoever they accrue [are] in excess of the costs."

The environmental and civil rights legislation of the 1960s and 70s dramatically changed this situation. Congress passed these laws—as it had earlier approved child labor legislation—for political or ethical rather than for primarily economic reasons. Even if child labor were profitable for society as a whole we may still want to outlaw it. Similarly, the Clean Air and Clean Water Acts were passed to improve air and water quality and not necessarily to achieve economically "optimal" levels of pollution. We may insist upon a cleaner environment as a matter of pride even if the resulting economic benefits would not balance the costs.

paying visitors a day—far more than go there now. What could be more cost-beneficial? Yet Congress, in response to ethical and political arguments, outlawed this profitable scheme.

Interior Secretary Watt has now promised to give concessionaries a greater role in managing our national parks. These entrepreneurs know how to market a park—to turn unprofitable wilderness areas into money-making golf courses, motels, bars, discos, swimming pools, restaurants, gift shops, and condominiums. These are things that we want and are willing to pay for as consumers—no matter what we might think of them as citizens. A free market calls for these things; they sell; consumer benefits outweigh consumer costs.

The problem, as many people point out, is that although markets reveal our consumer interests, they may fail to measure our countervailing ethical or



Do our consumer preferences measure our aesthetic principles?

Courtesy U.S. Environmental Agency

The Occupational Health and Safety Act of 1970 requires that the exposure of workers to toxic substances be set at standards as low as are "feasible." In two recent cases—one involving benzene and the other cotton dust—the Supreme Court has heard industry argue that exposure standards are "feasible" or "reasonable" only if they are cost-beneficial. Critics of this view say that if it were adopted workers would be maintained as machines are—to the extent that is profitable. Workers would then not be treated as ends-in-themselves, but as mere means for the production of overall social profit or utility.

The same debate arises with respect to the protection of wildlife and the preservation of wilderness environments. In 1969, for example, the Forest Service approved a plan by Walt Disney Enterprises to develop a vast resort complex in the middle of Sequoia National Park. This would have attracted 14,000

aesthetic principles and our convictions and concerns as citizens. Markets exist for bowls of porridge but not for birthrights. Must we, then, act only as consumers, to turn every arcadia into an arcade and all our free natural beauty into money-making commercial blight?

Economists respond to this question in two ways. Some recognize that cost-benefit analysis simply cannot be used to settle ethical or political controversies. Others are developing a "new" economics to create surrogate or imaginary markets to "price" ethical values and political convictions.

Economists of the first sort allow that Americans are not just consumers with interests they want satisfied in markets; these economists recognize that we are also citizens who have opinions legislatures are supposed to represent. These economists concede, therefore, that pollution, health, and safety standards

should be determined through political argument and compromise. Economic factors are important, of course; they may not be decisive but they should be taken into account. These economists contend, moreover, that the regulatory agencies should do the will of the legislature at the least social cost.

Economists of the second kind believe that cost-benefit analysis can take the values, arguments, and convictions of citizens into account. These economists sometimes try to estimate moral and ethical values on the basis of market data, for example, by looking at prices paid for property in the range of a protected species. The primary technique, however, is to ask citizens how much they are willing to pay for the satisfaction of knowing that the government has acted consistently with some principle, for example, to preserve wilderness. Even if citizens would pay only a few dollars each for these moral "satisfactions," the aggregate sum might be very substantial.

This approach to cost-benefit analysis—which regards the ideals and aspirations of citizens as "externalities" consumer markets have failed to "price"—rests on three mistakes. First, it allows economists to justify virtually any policy at all or its opposite, for it is easy to find "fragile" values, "intangibles," and "moralisms," to support almost any position.

This ambitious approach to cost-benefit analysis rests also on what philosophers call a category-mistake. This is a mistake one makes in describing an object in terms that do not appropriately apply to it, as when one says that the square root of two is blue. It is

nonsense to test the worth of an ideal or a principle by asking what people are willing to pay for it. As well try to establish the truth of a theorem by asking what it is worth, in economic terms, to mathematicians. Nobody asks economists how much they are willing to pay for their view that cost-benefit analysis should form the basis of regulatory policy. No, the views of economists are supposed to be judged on the merits not priced at the margin. Why shouldn't this courtesy extend to contrary opinions as well?

Third, cost-benefit analysis, insofar as it "prices" our convictions as citizens along with our interests as consumers, confuses the economic with the political process. Political decisions have to be cost-conscious; they need to take economic factors into account. But this does not reduce them to economic decisions. To think otherwise would be to suggest that economic "experts" should take the place of elected representatives as interpreters of the public interest. This would replace democracy with a kind of technocracy. It would deprive us of our most cherished political rights.

Conflict in our society involves ideological contradiction as well as economic competition. The one cannot be understood in terms of or reduced to the other. Cost-benefit analysis may be used to give us information about values for which markets exist and are appropriate. But this use is limited. We must otherwise rely on political argument and compromise in Congress ending in a vote and not resort to cost-benefit analysis terminating in a bottom line.

—Mark Sagoff

How Fair is Workfare?

As the Reagan administration budget is debated in Congress and the media, much of the discussion concerns the relationship between welfare and employment. The president supports optional workfare programs, in which individual states are permitted to require food stamp recipients to "work off" the value of food stamps received. AFDC (Aid to Families with Dependent Children) recipients are already required under the WIN (Work Incentive) program to register for and accept training and employment as a condition of eligibility (if not needed at home for the care of a young child). Such requirements have generated heated arguments for both their expansion and elimination, on both moral and pragmatic grounds.

Arguments for Work Requirements

A first argument for work requirements, which may implicitly underlie many other arguments, is that

a welfare recipient owes something to society in exchange for a guarantee of subsistence. On this view, food stamps, housing assistance, and the like are privileges extended by the taxpaying public to the indigent, and it is only fair that those conferring a privilege should be able to set conditions governing its receipt.

A second cluster of arguments appeals to the many benefits to be obtained through a system of work requirements:

(1) *Benefits to other, more needy recipients.* If we assume that the welfare budget is relatively fixed, a greater number of recipients means a smaller share for each. If the welfare pie is sliced thin enough, the neediest recipients may be threatened with inadequate benefits. If able recipients are required to work in the regular labor market, their wages free welfare funds to aid their needier fellows. (The creation of public



Courtesy USDA

service jobs, however, may actually raise rather than lower welfare costs.) Baruch Brody, chairman of the philosophy department at Rice University, argues that this alone should justify imposing such requirements: "In a just society . . . the sole goal of the requirements to seek work and accept it is to make more available to those who are truly needy."

2) *Restoration of equity.* AFDC recipients are a favored target for the imposition of work requirements. The AFDC program was originally instituted to permit mothers deprived of male support—usually widows—to remain at home to care for their children. But as more and more mothers work outside the home, this objective has seemed increasingly unfair to middle- and lower-income taxpayers. James A. Rotherham, Deputy Associate Director for Human Resource Programs on the House Budget Committee, points out that "AFDC recipients with children under age six are not expected to work outside the home even though more than one-third of the women in the general population with children under age six do work outside the home." Many of these working mothers regret that economic necessity forces them to abandon traditional roles. They also resent subsidizing other mothers' full-time child care. Work requirements are perceived as reducing the overall tax burden while restoring fairness between the two groups of mothers.

3) *Benefits to working welfare recipients themselves.* Work requirements are also claimed to bring considerable gain to the workers themselves. Many welfare families remain below the poverty level, and any move toward their economic self-sufficiency is to be welcomed. As Martha H. Phillips, Assistant Minority

Counsel of the Committee on Ways and Means in the U.S. House of Representatives, observes: "A young woman or teenager with several small children can look forward only to a life of being ground down by the welfare system, inadequate income, and eventual unemployability years hence when her youngest children are grown if she does not find employment now." The benefits of work are psychological as well as economic. Active participation in the work force is a source of pride and satisfaction, and work is an important ingredient in positive self-image and morale.

4) *Benefits to welfare children.* The children of working welfare recipients benefit from the additional income their parents bring home and the broader opportunities it makes possible. They also benefit from having "the cycle of dependency" broken, by having as role models parents who are attaining self-sufficiency.

Arguments Against Work Requirements

Opponents of work requirements reply that welfare is not a *privilege* for which labor is owed in payment, but a *right*. Brody insists, "Our fundamental assumption is that welfare is a right of the indigent, and not a privilege, so no appeal to the rights-privileges distinction can justify enforcement of the work requirement."

They charge furthermore that work requirements will not in fact provide any of the benefits cited by their defenders, because work requirements simply don't work. The indigent are for the most part uneducated and unskilled, unable to compete in the private market or to perform public service jobs of any great value. Thus their work is unlikely to provide any savings in government expenditures. (The workfare plan has not been assigned any savings value at all by the administration.) Taxpayers will not gain, except in smug self-righteousness, and fellow welfare recipients would not have gained under the current system anyway, since any savings would not have been divided up among the needy.

The benefit to the workers and their families is also dubious. Phillips notes, "It is doubtful that the family will come out ahead financially, at least in the



Courtesy USDA

short run." This is especially true under the administration's proposals, which call for reducing assistance to the working poor, thereby penalizing them economically for their efforts. Since most public service jobs are "make work" jobs with no realistic future, they are not meaningful or satisfying enough to provide any psychological rewards to welfare families.

Finally, opponents of work requirements argue that they punish the victims of injustice or discrimination for their poverty or unemployment, holding them responsible for social conditions for which they are not to blame. Norman Daniels, Associate Professor of Philosophy at Tufts University, argues that in a society that is seriously unjust, as he takes ours to be, "the assignment of responsibility—even blame-worthiness—to those who fail to work seems highly problematic. It is certainly problematic when jobs are scarce or unavailable, and it remains problematic when available jobs are hard, burdensome, unrewarding, and often dead-end. . . . We may be making the worst-off members of a society pay twice for their circumstances."

Rotherham agrees. The poorest groups in America—blacks, Hispanics, and women—are the groups most discriminated against in our society. "The fact that welfare is a form of compensation to victims of discrimination [becomes] increasingly evident. Viewed from this perspective, the emphasis on work requirements . . . may be misplaced. An extreme categorization of the work features . . . is that they blame the victim for the crime."

Conclusions

Many defenders of work requirements hold that welfare is a privilege for which payment is owed in return; opponents claim it is a right. But it may be the case that welfare is both a right *and* that something is owed for it in return. Many rights are contingent upon one's respecting the rights of others. The right to be assured a minimal level of well-being may likewise be contingent upon the responsibility to assist others in need if able to do so. Henry Aaron, Senior Fellow at the Brookings Institution, explains: "The argument that a work requirement constitutes

'forced labor' rests on the presumption *both* that the government ought to provide a guarantee against destitution *and* that nothing should be expected in return from the beneficiaries for that guarantee. . . . The idea that . . . nothing is expected in return for such a guarantee seems to me to have very little justification."

The second charge, that work requirements don't work, seems more serious. If work requirements are to meet the goals of benefiting needier individuals and allowing workers to become self-sufficient, steps must be taken to ensure that the work performed is indeed of some genuine worth and that revenues received from it are indeed returned to the welfare pool. Manpower programs like WIN are specifically designed to meet this first condition, by aiding in the development of marketable skills, and a full 20 percent of AFDC recipients leave the rolls as a result of increased earnings. The second condition is not met at present, thus considerably undermining the justice of current work requirements. Surely at the very least, work requirements should not be imposed at the same time that job training programs are cut or curtailed, and workers should not be financially penalized for their contributions.

Finally, it seems indisputable that the poorest members of our society are all too often the victims of racial, sexual, and linguistic discrimination. But work requirements constitute a *punishment* for society's victims only if work itself is a punishment. But this need not be the case, unless the work required is exceptionally soul-wearying. The Spanish philosopher and theologian Miguel de Unamuno wrote, "That saying, 'In the sweat of thy face shalt thou eat bread,' does not mean that God condemned man to work. . . . It would have been no condemnation to have condemned man to work itself, for work is the only practical consolation for having been born."

The views of Baruch Brody, James A. Rotherham, Martha H. Phillips, Norman Daniels, and Henry Aaron are drawn from their contributions to Income Support: Conceptual and Policy Issues (Totowa, N.J.: Rowman and Littlefield, 1981), a collection of essays by philosophers, social scientists, and policymakers on issues in the recurring welfare-reform debate. To order, see p. 15.

Book Review

Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics by Stanley Hoffmann (Syracuse, N.Y.: Syracuse University Press, 1981).

Duties Beyond Borders is a book about compromise. Confronted with the grim realities of contemporary international relations, Stanley Hoffmann raises Kant's question: can one be a moral politician, "who

employs the principles of political prudence in such a way that they can coexist with morals"? His response is a cautious, qualified optimism. In every area of international diplomacy, the statesman is caught in a vicious web of incompatible obligations and interests. But "the duty of the moral politician is to turn the evil circle gradually into an ascending spiral."

Two compromises emerge from Hoffmann's discussion as central. The first bridges the idealistic demands of morality and the realities of international competition, the ends toward which we aspire and the means of attaining them. In the domain of inter-

national policy, Hoffmann warns, "the best is the enemy of the good, and the good is measured by the possible. . . . It is not enough to state what our duties are. Moral politics is an art of execution; principles unaccompanied by practical means or by an awareness of possible trade-offs remind one of Péguy's famous comment about Kant—his hands were pure, but he had no hands."

The second central compromise concerns the significance of national boundaries in determining the scope and object of moral rights and obligations. Is the statesman's duty to promote the national interest or to work instead for the betterment of the world community? Does international justice deal with the rights and duties of states, or only of the individual human beings who compose them? Hoffmann defends an intermediate view. The goal is a more cosmopolitan world order; the reality is still clearly nationalistic. Thus, "a policy that aims at protecting the nation's interest while minimizing the risks for all others is morally preferable to a more ambitious attempt at transcending the game, which weakens the international order and leaves all states less secure." Likewise, "international justice is a matter both of rights of states and rights of individuals. . . . States have rights and duties as the main actors in world affairs . . . [but] states exist only as communities of people." We are currently in a time of transition toward a cosmopolitan morality, and ours must be an ethics of transition.

Hoffmann illustrates this strategy of compromise in three crucial areas of international policy: the use of force, the protection of human rights, and worldwide distributive justice.

Just War

The justification of war goes to the heart of Hoffmann's second compromise. If individuals alone are the bearers of rights, then states have no right of self-preservation, and it is permissible to intervene in an internally unjust state on behalf of its victimized citizens. If states themselves have rights as members of international society, however, then some principle of non-intervention must be respected. Hoffmann rejects the first view as "blissfully unpolitical," and defends the second on the grounds that "it is only in and through the state that (so far) individuals can assert and exert their own rights." He argues for a qualified principle of non-intervention, on pragmatic grounds: "the impartiality of the foreign sword is dubious." But he mitigates the rigor of this principle in various ways—most importantly, by advocating nonmilitary intervention in the service of an international human rights policy.

Human Rights

There are, on Hoffmann's view, powerful legal, moral, and political arguments in favor of human rights as a foreign policy concern. The most serious argument against a human rights policy, however, is its likely ineffectiveness. Inconsistent administration

of a human rights policy may actually erode morality, and inconsistency seems inevitable if we also seek to protect American business and security interests abroad. The alternative is to weaken our own strategic position by entering into conflicts with allies as well as enemies: "When a nation asks for a government to improve human rights, . . . it really strikes at the heart of the other country's political legitimacy . . . and its economic system." A human rights policy thus faces the dilemma of concern for individual rights within a framework of sovereign states.

Hoffmann counsels "modesty in purpose" and "generality in action." Our demands should be limited enough that a wide coalition of countries can join us in pressing them. We cannot insist on "the whole bag." Instead, Hoffmann asks for "a common floor and a moveable ceiling— . . . because different countries have different cultural traditions, are at different stages of economic and institutional development, and face different realities." Better to win a cautious struggle against torture and starvation than to lose a strident crusade for universal democracy.

Distributive Justice

The debate over international distributive justice is formed by the problem of cosmopolitanism. One camp argues that sovereign states, as states, have a right to greater equality in wealth and power—regardless of how that wealth and power is distributed among their citizens. The opposing view is that the crucial inequalities are precisely those among individuals, feasting in one hemisphere, starving in another. On this view, "the problems of state inequality . . . are either irrelevant or subordinate."

Hoffmann, unsurprisingly, defends a middle view. State sovereignty is not absolute or impermeable. Wealthy nations are obligated to share their wealth with poorer nations "only if that wealth is used toward justice for those communities of people." But the claims of states cannot be irrelevant in the world as we know it: "we cannot reach those poorer people directly: we have to work through the states as they are."

Hoffmann repeatedly denounces extreme political positions as unattainably idealistic, utopian, even frivolous. He then proposes his middle course of gradual movement from the real to the ideal. The reformist approach he recommends juggles the competing claims of what is and what ought to be, while recognizing as well that there is no consensus on either of these. At times, Hoffmann's own solution of a calm, clearheaded, resolute sorting out of all contemporary confusions in all their complexities begins to sound as utopian as the utopian visions he dismisses. It is easier to idealize moderation than to show how moderate programs are to be implemented. But to have presented the grim and often dull business of political compromise as a challenge is perhaps the greatest contribution of *Duties Beyond Borders*.

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Human Rights and U.S. Foreign Policy: Principles and Applications, edited by Peter G. Brown and Douglas MacLean (Lexington, Mass.: Lexington Books, 1979—\$16.95; paper, 1980—\$10.95).

Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, by Henry Shue (Princeton, N.J.: Princeton University Press, 1980—\$17.50; paper, 1980—\$4.95).

The Reverse Discrimination Controversy: A Moral and Legal Analysis, by Robert K. Fullinwider (Totowa, N.J.: Rowman and Littlefield, 1980—\$22.50; paper, 1980—\$9.95).

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