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Is the Least Government the Best Government?

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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“That government is best which governs least” is the principle underlying many proposed changes in federal welfare programs. But leading arguments in defense of this principle may actually show why it should be rejected p. 1

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With the rallying cry of “getting government off the backs of the people,” the new administration has launched a comprehensive campaign to reduce the role of government and expand the domain of private enterprise. Thus the president has called for budget cuts of billions of dollars in Medicaid, food stamps, unemployment compensation, subsidized housing, and legal services for the poor. At the same time measures of economic rejuvenation are proposed to stimulate growth in the private sector, with attendant benefits predicted for affluent and indigent alike. Although a federal “safety net” for the very poorest will be retained, private remedies are in large part to replace public remedies for improving the condition of the nation’s needy.

The Reagan program has set off heated controversy on the proper role of government and the appropriate limits to its extent and authority. After nearly half a century of increasing responsibility by government for the welfare of its citizenry, the presuppositions of the New Deal are being radically reexamined. Advocates and opponents of more minimal government are debating: is that government best which governs least? This claim can be understood in two different ways. It might mean that minimal government is most *successful* in promoting the good of its citizens, that minimal government works best to provide its citizens with what they need for a satisfying life. It might also mean that any more extensive government oversteps its legitimate moral authority and trespasses on the rights of those it governs.

Minimal government as an economic remedy will be tested by the success or failure of the Reagan

prescription in curing inflation, unemployment, and lagging productivity. But the second claim, that lesser government is morally preferable on other grounds, can be debated independently of the nation's economic prognosis.

One leading defense of minimal government on moral grounds is libertarianism, and libertarian theories are currently receiving much political and popular attention. According to the libertarian, there are severe limits on the state's authority, and these limits are set by citizens' rights. A libertarian argument of this kind is presented by Geoffrey Brennan

by the state. The most important rights for the libertarian are the rights to non-aggression and the right to property. Brennan and Friedman argue for these rights by attempting to ground them in rights that seem to them to be so basic as to require—or even to permit—no further argument.

They begin with perhaps the simplest and barest of all rights: the right to think and to act when in isolation from others. Surely if we have any rights at all, they claim, we have the right to *think* whatever we please and to act in complete isolation. A minimal extension of this right is the right to act whenever no



Public responsibility for the welfare of the needy has been a feature of American government at some level since colonial times: the statutes of the Plymouth colony stipulated that "Every township shall make competent provision for the maintenance of the poor." Today the Census Bureau reports that a third of the households in this country receive non-cash federal benefits such as Medicare, food stamps, or low-cost housing.

and David Friedman, economists at the Center for Study of Public Choice at Virginia Polytechnic and State University. In "A Libertarian Perspective on Welfare," appearing in *Income Support: Conceptual and Policy Issues* (published by Rowman and Littlefield for the Center for Philosophy and Public Policy), they argue for a very reduced role for government, limited by a strict observance of citizens' basic rights. In this same volume, Allen Buchanan, Associate Professor of Philosophy at the University of Minnesota, replies that the libertarian view of rights is inconsistent. Even on his own account of rights, the libertarian is compelled to recognize as well a broader set of rights, imposing obligations beyond the capacity of minimal government to fulfill.

A Libertarian Account of Rights

At the heart of libertarianism is an account of human rights as defining moral constraints upon all action—most significantly, on all action undertaken

harm is done to anyone else, even though one does not act in total isolation. Here, the libertarian must provide an account of what is to count as harming another, for if the relevant notion of harm is too broad, the right to act will be correspondingly weak. On the libertarian view, your action does not harm another simply by making him worse off than he would have been had you not acted. Your action *harms* another only if it violates one of his rights. The libertarian right to act, then, is a right to act when this does not violate anyone else's rights, where the further content of these other rights is yet to be specified.

The libertarian right to act includes the right to the direct products of one's own actions, to the fruit of one's own labor. Brennan and Friedman argue that "the moral entitlement of a man to himself" must involve this first minimal right to possess and to use: "Whatever one can produce on one's own one has a moral entitlement to." It seems reasonable as well that the right to possess and to use the products of one's

own labor should entail the right to alienate one's possessions, to enter into voluntary trade with others for their labor and the products of their labor. Thus the libertarian claims to have established the right to an earned share in the product of complex cooperative enterprises. A fairly sophisticated right to property has thus been derived from much more basic and less controversial entitlements.

The libertarian faces a considerable problem, however, with deriving rights to land and other natural assets, since these are not produced by the efforts of any individual (nor, Brennan and Friedman add, by the joint efforts of any collectivity, such as "the people"). But, following Robert Nozick, Brennan and Friedman argue that the institution of private ownership of land greatly increases the total productivity of society, thus making almost everyone better off than if all land remained unowned. Thus, since the alternative to private appropriation makes everyone worse off than the system of private appropriation does, no one can complain that he has been injured by any given act of private appropriation. Certainly, Brennan and Friedman conclude, "if the derivation of moral entitlements to one's own person is to be of much practical relevance, some 'private' possession of land is necessary."

Libertarianism's fundamental moral injunction is against violating these recognized rights. Property rights—and rights to "property" in one's own person—serve as constraints on all actions. Aggression against property or persons is as illegitimate on the part of the state as on the part of any private individual. According to Brennan and Friedman, "violation of rights . . . takes on a primacy among sins: If an act violates another's rights, it is morally reprehensible, whatever the desirability of the outcome."

The crucial implication of this stance for our purposes is that it grants the state no legitimate claim against the property of its citizens for the advancement of public welfare goals. However noble the objectives of any governmental program might be, they cannot be promoted by violating individual rights. On this view, most of the current activity of government—and all taxation to fund social programs—is impermissible. "The legitimate role of government within libertarianism is at most the minimal one of protecting individuals' moral entitlements from both internal and external aggression and enforcing contracts entered into voluntarily."

Here the objection may be raised: Doesn't the libertarian minimal government, by seeking to avoid the violation of property rights, end up violating another equally important set of rights? By eliminating all governmental social programs, the libertarian eliminates *all* federal assistance to the nation's needy: all food stamps, income support payments, Medicaid, subsidized housing. Doesn't this violate the right to at least some minimal level of subsistence? Where do welfare rights fit in to the libertarian derivation of entitlements?

The libertarian's answer is: they don't. Brennan

and Friedman state emphatically: "The first-line response to the question 'What welfare rights are legitimate within a libertarian theory?' is the single, simple answer: none!" On the libertarian view, a right to welfare could only be understood as claim by some to the property of another. Brennan and Friedman explain: "The libertarian does not consider the world as a place in which bread falls from heaven, where the proper moral problem is one of dividing it, but as a place where individuals produce things of value—bake bread—and where each thing thus appears not as

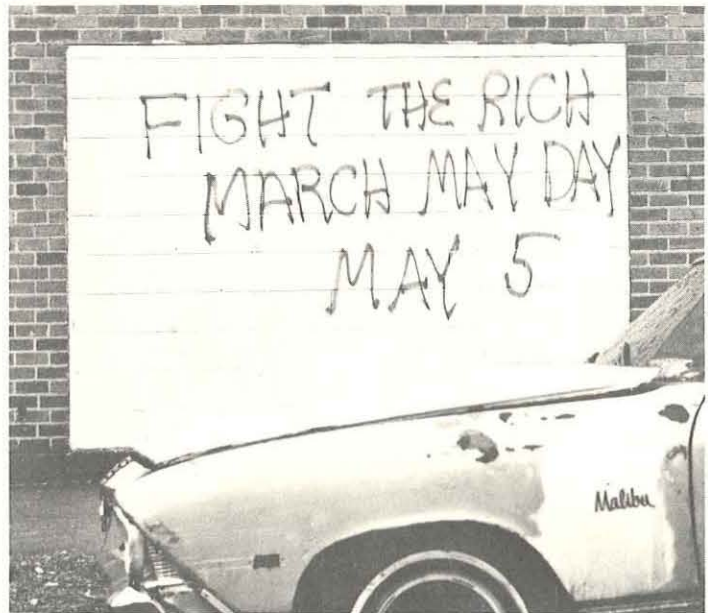
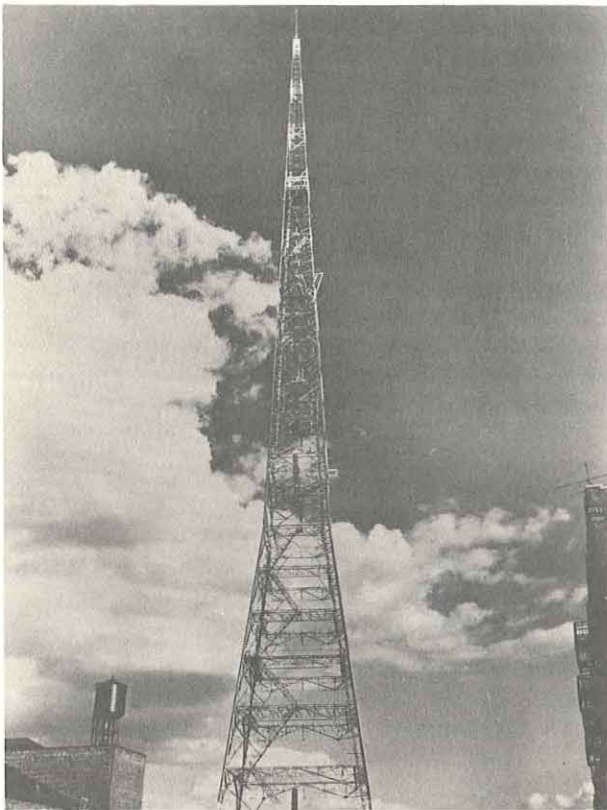
"The first-line response to the question 'What welfare rights are legitimate within a libertarian theory?' is the single, simple answer: none! . . . No redistributive activity through the [coercive] agency of government can be justified."

common property, but as the property of a particular individual." The welfare recipient's claim would constitute a claim to what the production of others has morally entitled them to possess. Private philanthropy may be desirable, and the government may have a legitimate role in organizing and coordinating voluntary philanthropic projects. Private individuals may even have duties of benevolence to those less fortunate. But the needy individual has no *right* against any other individual, or against the state. Therefore, "no redistributive activity through the [coercive] agency of government can be justified."

Deriving Welfare Rights from Libertarian Rights

The libertarian bases his defense of the minimal state on a central account of rights. If the account of rights is mistaken, the political theory may be mistaken as well. In his contribution to the *Income Support* volume, philosopher Allen Buchanan argues that in deriving classic libertarian rights from more fundamental entitlements, the libertarian does not carry his own derivation far enough. The libertarian refuses to acknowledge the existence of welfare rights. But, on Buchanan's argument, the libertarian recognizes certain other essential rights that imply the very welfare rights he would deny. If this argument succeeds in showing that welfare rights can be derived from rights widely accepted by libertarians, Buchanan will have shown that at least this portion of libertarianism is, as it stands, incoherent.

The libertarian rights in question are the right to freedom of expression, the right to the benefits of the legal system (due process rights and rights to legal counsel and representation), and certain limited rights of political participation. The right to freedom of expression is a natural outgrowth of the basic rights of thought and action. The right to the benefits of the legal system arises out of the right against aggression,



Differential access to mass media results in gaping inequalities in the exercise of important citizen rights. Both the vice president of a television station and an unemployed janitor who can't afford a television set have equal rights to freedom of expression. But there is an enormous inequality in the effectiveness with which this equal right can be exercised. Photos courtesy National Archives (L) and Ann Karslen Freud.

especially aggression perpetrated by the state. The libertarian understands these rights, of course, purely negatively, as rights not to be interfered with in certain ways, not as rights to be granted whatever one needs to perform various activities. The libertarian view on rights of political participation is more complex. Libertarians reject unlimited majority rule, since majorities might vote to violate basic libertarian rights, such as the right to property. But many libertarians recognize at least a right to participate in elections to determine the officers of the minimal state. If the libertarian recognizes these three rights, Buchanan claims, he is compelled to recognize welfare rights as well.

Buchanan calls his argument "the argument from fairness." It begins with the assumption that libertarian rights are to be understood as *equal* rights, possessed equally by all competent, adult citizens. There is a distinction to be drawn, however, between equal rights and equal effectiveness in the exercise of these rights. Due to inequalities in wealth, in access to health care, and in educational opportunities, some persons are able to exercise their libertarian rights much more effectively in pursuing their goals, whatever these goals happen to be.

Suppose, for example, that Mr. Jones is vice president of a major television station. His corporate responsibilities include preparation of televised editorials, broadcast at the end of each evening's news program. These editorials have considerable political impact, and Jones can point in several instances to legislation directly influenced by his views. Mr. Smith,

on the other hand, is an unemployed janitor who can't even afford a television set. Both Smith and Jones have equal rights of political participation and freedom of expression. But there is an enormous inequality in the effectiveness with which their equal rights can be exercised.

Differential access to mass media is only one of the more dramatic instances of gaping inequalities in the effectiveness of equal libertarian rights. Poor nutrition and lack of health care, compounded by cultural deprivation and inferior education, produce millions of citizens who are unable to communicate their own interests. These same factors contribute to similar inequalities in the effectiveness of the equal right to the benefits of the legal system. Buchanan points to the evidence that poor persons who commit crimes are more likely to be prosecuted, if prosecuted are more likely to be convicted, and if convicted are more likely to get stiff sentences—all of this at least in part a result of severely restricted access to sound legal advice and able legal representation.

Buchanan can now present his argument: "The system of libertarian rights has a crucial feature which the libertarian tends to overlook. The institutions which provide the libertarian rights constitute procedures by which individuals may pursue their goals and defend their interests. But these procedures are inherently monopolistic. They impose severe limits on the ways and means by which a person may pursue his goals and defend his rights and interests. . . . It is not just that I have the *right*, for example, to protect my rights and interests through litigation. The system of

legal rights prevents me from attempting to protect my rights and interests in certain other important ways."

Buchanan asks us to consider the case of a black activist. He exercises his right to free speech in his struggle for civil rights—but in exercising his right he is also required to recognize the same right of the Klansman, exercised in racist opposition to the civil rights movement. The activist may use his freedom of expression to combat racism, but he is precluded from fighting the Klan's propaganda in other ways. The reasonableness and fairness of this restriction, Buchanan suggests, depend to a large extent on the effectiveness of freedom of expression as a means for the activist of defending his cause: how literate and informed he is, what funds he has for access to mass media. It is not reasonable or fair to expect him to sacrifice effective methods of self-defense in exchange for methods that are, for him, far less effective. "At least where certain extreme inequalities exist," Buchanan concludes, "compliance with the system of libertarian rights requires too much from some persons. They are unfairly expected to accept a

With political rights come obligations to refrain from certain other means of defending one's interests. If there are enormous inequalities in the effectiveness of political rights, many citizens are thus unfairly disadvantaged. The existence of political rights therefore implies the existence of welfare rights. And if there are welfare rights, redistributive activity by government to meet the requirements of those rights is not illegitimate.

system of procedures that significantly limits their resources for defending their rights and interests, without receiving the compensating benefits that others enjoy.

The libertarian might reply that all that fairness requires is that the loss of these options for protecting one's rights and interests actually be outweighed by the gain in security that the state-enforced system of libertarian rights provides. If we would all be much more secure and much better off under the libertarian minimal state than we would be under no state at all, then the black activist has no business complaining.

To this Buchanan replies that the libertarian argument does not take the requirement of fairness seriously enough. The libertarian seems to assume that there are only two choices between which the black activist is asked to decide: a brutal Hobbesian state of nature with unbridled aggression threatening the life and liberty of all, or a political system permitting unrestrained inequalities in the exercise of libertarian rights. But unless these bleak alternatives are the only possibilities, then, in Buchanan's words, "fairness at least demands that we consider ways of

ensuring that the system [we choose] does not place unacceptable burdens on the poor." Fairness at least demands that we not choose a system in which structural and institutional inequalities make such a tremendous difference.

Those disadvantaged in the effectiveness of their equal libertarian rights by extreme social and economic inequalities therefore have a legitimate claim to have those inequalities reduced. This means that they have a right to a more equal redistribution of wealth and opportunity, either through problem-specific measures, such as the provision of public funds for access to media or legal services, or by a more global approach of ensuring some minimum standard of living to all. This clearly counts as the sort of welfare right the libertarian would deny.

So, Buchanan concludes, if there are political rights, there are welfare rights as well. And if there are welfare rights, redistributive activity by the government to meet the requirements of those rights is not illegitimate.

The Role of Government

If there are legitimate welfare rights, what institutional arrangements are necessary or desirable to meet their requirements? For it is, as Buchanan fully realizes, one thing to recommend a more equal distribution and another thing to recommend how this altered distribution should be brought about.

As libertarians, Brennan and Friedman are especially suspicious of redistribution via political institutions. Even if we agree on the desirability of a more egalitarian social and economic system, it does not follow, they argue, that the government should be assigned responsibility for effecting these changes. The existence of a right to welfare need not mandate large-scale governmental assistance programs of the sort the current administration is beginning to dismantle. On their view, governmental redistributive programs create "a rather chaotic lottery, in which some of the poor are made rather poorer and some of the rich much richer." This is to interpret the equation of least government with best government as a trustworthy factual generalization.

Non-libertarians would ask whether we have any reason to believe that the invisible hand of the capitalist free market is any more likely to produce an egalitarian outcome. The choice between the legislative and market approaches, judged by the criterion of effectiveness, is an empirical one, to be settled by an evaluation of what facts can be found. But if Buchanan's argument is correct, the terms of the evaluation are at least clear. If welfare rights are genuine rights, the best government is one that provides for their fulfilment. Whether a less extensive government will have more success here remains to be seen.

Income Support: Conceptual and Policy Issues, edited by Peter G. Brown, Conrad Johnson, and Paul Vernier (Totowa, N.J.: Rowman and Littlefield, 1981) is available from the Center for Philosophy and Public Policy. See order form, p. 15.

Human Rights and the "National Interest": Which Takes Priority?

No one is ever *against* human rights. No (reasonably sane) person mounts a soapbox to urge that a greater number and variety of human rights should be violated, or violated more thoroughly. Such an attitude would seem almost incoherent: to declare that something is a right implies a positive attitude toward its protection and promotion.

Likewise, no (reasonably patriotic) American is against furthering the U.S. national interest. One might maintain that it should be furthered only in certain ways, constrained by certain crucial conditions, but no citizen, unless animated by a peculiar antinational venomousness, takes the fact that some project promotes the national interest as in itself a reason to oppose that project. It seems fair to say that we are all in favor of human rights, and we all care about our country.

It is not surprising, therefore, that in the recent renewed debate about the role of human rights in American foreign policy, opposing policies are each defended by their adherents on the grounds that they simultaneously promote human rights in developing nations and further our own national interest. United Nations Ambassador Jeane Kirkpatrick, in roundly denouncing the Carter administration's Latin American foreign policy, argues that her proposed alternative "will protect U.S. security interests and make the actual lives of actual people in Latin America somewhat better and somewhat freer." (*Commentary*, January 1981). Tom J. Farer, President of the Inter-American Commission on Human Rights of the Organization of American States, counters that the previous administration's policy initiatives contributed importantly to democratic social reforms. He concludes: "It is in the national interest that Latin Americans succeed in establishing capitalism with a human face." (*New York Review of Books*, March 19, 1981).

Kirkpatrick and Farer hotly dispute each other's claim to the superior human rights policy. Kirkpatrick charges that President Carter's public insistence on unrealistically high human rights standards resulted repeatedly in the toppling of a less repressive regime by a more oppressive regime whose human rights

violations were even more egregious. "The American effort to impose liberalization and democratization on a government confronted with violent internal opposition not only failed, but actually assisted the coming to power of new regimes in which ordinary people enjoy fewer freedoms and less personal security than under the previous autocracy," (*Commentary*, March 1980). She cites as examples Nicaragua and Iran.

Farer replies that Kirkpatrick's rosy comparison of "traditional" to "revolutionary" autocratic governments emerges from distorted political perceptions. The forced relocation of large numbers of people in a revolutionary state is condemned as a severe violation of human rights, while the analogous displacement of millions of hungry peasants in a traditional dictatorship is simply overlooked. The greater flow of exiles from revolutionary states such as Cuba is not a product of the greater misery of the Cuban population, Farer maintains, but of the warmer welcome extended in the United States to "political" refugees fleeing Communism than to "economic" refugees fleeing even bleaker life prospects under more conservative regimes. He gives the Carter administration considerable credit for specific human rights advances, such as fair elections in the Dominican Republic, and for encouraging the recent growth of national human rights movements throughout Latin America: "Carter helped to shape this more promising situation by insisting that the way a regime treats its own people has to affect the quality of its relations with the United States."

This debate about the human rights implications of differing foreign policies is heated and apparently inconclusive. The relevant data are often obtained only with great difficulty and with correspondingly great doubts about their accuracy: if other rights are being systematically violated, there is little reason to expect the right to the free exchange of information to be impeccably observed. There is also disagreement about what is to be counted as a right and how different rights are to be balanced in the final evaluation. Kirkpatrick, for instance, seems to judge economic rights, if she recognizes these as rights at all, to

be less weighty than political rights, while Farer perhaps reverses this weighting. Still, there remains a basic consensus on a core group of rights, containing such indisputable rights as the rights not to be killed or tortured, and, while records of violations are not easily obtained, at least it is fairly clear what kind of evidence would be required to document a success or failure in decreasing the occurrence of these activities.

This is much less the case in the debate over the national interest. Here the disputing parties disagree not only about how best to serve the national interest, but about just what it is they are supposed to be serving. Kirkpatrick tends to identify the national interest with military security and flourishing business, while Carter administration spokesmen have identified it perhaps as much with the promotion of certain moral values and political ideals. It is hard, in fact, to think of *any* positive national goal that could not be construed as a pursuit of the national interest, just as it is hard to think of any personal benefit that would not be in our own self-interest. It is in the national interest to prevent a Soviet first strike at our defense installations and population centers. But it is also in the national interest for American citizens to be able to drink coffee at \$2.00 a pound. Arguments about the national interest are not arguments about the choice of effective means to reach a common end, but about the pursuit of a multiplicity of different ends under the same broad and perhaps hopelessly vague label.

Factual disputes on what policies best serve the national interest will be settled, if they can be settled at all, only in the far longer run. But the vagueness in the concept of the national interest may be even more

important to resolve. It appears particularly troubling if we consider the very real possibility of the national interest, thus broadly understood, conflicting with our other goal of protecting and promoting human rights. Kirkpatrick and Farer both claim to be proposing policies that serve our nation's special interests while respecting human rights internationally. But what if they are wrong? What if their notions of the national interest do indeed bring the national interest into conflict with our moral aims?

The Congress, alert to this dilemma, has passed legislation designed to provide guidelines for its resolution. In 1976 it added this amendment to the Foreign Assistance Act of 1961, Section 502B, which states:

The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. . . . Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

The "circumstances specified" are circumstances in which it is in the "national interest" of the United States to provide the otherwise forbidden assistance to the human-rights-violating nations. Our policies regarding human rights, then, are to be constrained



Photo courtesy McDonnell Douglas Corporation

Should the United States give military aid to foreign governments that systematically violate the human rights of their citizens?

by considerations of the national interest, and not vice versa. When the two conflict, the national interest has the higher priority.

Peter G. Brown, Director of the Center for Philosophy and Public Policy, argues that this ranking exactly reverses the proper ordering of our foreign policy goals. In his article, "... in the National Interest," appearing in *Human Rights and U.S. Foreign Policy*, edited by Brown and Douglas MacLean, he examines more closely the disparate collection of interests grouped together under the umbrella of the "national interest" and concludes that we are required to give human rights priority over many of these concerns.

Some of our interests, Brown points out, are simply that: mere interests, things that would satisfy our preferences and make our lives more comfortable and easy. Our interest in paying low prices for gasoline so that we can continue to cruise the freeways in large-model cars is an interest of this sort. But other interests significantly affect our rights, and not just our general well-being. Our interest in not being aggressively attacked, or our interest in having some feasible energy source to fuel our economy, are matters of rights, as well as preferences. We have, at some level, a right to security as well as a desire to be secure, a right to food as well as a desire to eat.

This classification of various components of the national interest into mere interests and interests that are also rights bears importantly on our foreign policy priorities. For it is an uncontroversial feature of a right that it cannot be set aside for the purpose of satisfying or advancing something that is an interest only, or for reasons of promoting overall societal well-being. In the terminology of philosopher Ronald Dworkin, a right can serve as a veto over an interest. This is part of what we mean by calling something a right: that its importance in staking out the boundaries of someone's very humanity and personhood is so great that it cannot be outweighed by any collective social goals.

Brown suggests replacing the priority ranking of the Foreign Assistance Act with this principle: "In every case of conflict between the promotion of an interest to which no one has a right and the promotion of a right, the right takes priority over the mere interest." We cannot, on this principle, disregard the rights of citizens of other countries in order to advance American interests that are only mere interests. When we can promote the human rights of the citizens of other nations we cannot fail to use the effective means at our disposal, such as refraining from mutually advantageous arms trade, because they conflict with elements of our national interest to which we have no right. Their rights in such cases veto our interests, and veto them absolutely.

The only thing that can override a right is another, more weighty right. Human rights may be set aside only to secure other rights of higher priority. This principle would permit the U.S. government to set aside opportunities to improve the human rights

situation in other nations only if such policies would adversely affect the rights of Americans (assuming that the rights of Americans take priority over comparable rights of non-Americans) or if such policies are in fact counter-productive. It leaves open the possibility that Kirkpatrick may be right that we do not promote human rights by replacing a bad dictator with a worse one.

We cannot disregard the rights of citizens of other countries in order to advance American interests that are mere interests. Their rights veto our interests and veto them absolutely.

But it also shows that Kirkpatrick cannot take it as a valid criticism of the previous administration's rights policy that: "Sanctions could be employed to punish human-rights violations, but not to aid American business" (*Commentary*, January 1981)—not if the use of such power involves some disregard of human rights. For on the rights-over-interests principle, human rights can be disregarded only to promote or safeguard other rights, and not to promote or safeguard a "favorable business climate" for multinational corporations.

The principle does not require us, however, to sacrifice American business interests in the making of ineffective, symbolic human rights gestures. If arms suppliers to dictatorships are in abundant supply, the principle does not require that we alone should allow our aircraft industry to collapse. But it does place on us a heavy burden of proof to show that our threat of reduced arms assistance would indeed be ineffective, and, furthermore, that we have energetically pressured other arms suppliers to join us in a boycott, whatever the effect of such pressure on our economic interests.

Nor, certainly, does the principle require us to abandon our commitment to national security. If Americans have a right to anything, it is to freedom from unprovoked attack. But we are required to scrutinize the concept of national security just as we earlier sifted through the concept of the national interest: to sort out genuine from fanciful threats, and threats to American lives and liberties from threats to the security of American investments. For our right to security may take priority over the rights of Latin Americans not to be tortured by the dictators we help to support. Our interest in a favorable balance of payments does not.

Human Rights and U.S. Foreign Policy, edited by Peter G. Brown and Douglas MacLean (Lexington, Mass.: Lexington Books, 1979), gathers together a series of essays by philosophers, lawyers, State Department officials, Congressional representatives, clergy, and others, growing out of an extensive project on human rights conducted by the Center for Philosophy and Public Policy. To order, see p. 15.

Why the Draft Is Hard to Justify

"And suppose the laws were to reply, 'We brought you into the world, we raised you, we educated you, we gave you and every other citizen a share of all the good things we could . . . you ought to obey in silence if (we) send you to battle to be wounded or die.'"—Socrates

"(We have) a national duty to serve in return for the privilege of being an American. I can conceive of no fairer way to spread the obligation of protecting our country."—Rep. Paul N. McCloskey, Jr.

It seems to many critics that America's all-volunteer military policy is a rather spectacular failure. There are too few recruits, of very low quality, with very high attrition rates, recruited at great expense and with grave doubts about their ability to serve. Furthermore, under the all-volunteer policy, minority participation in the military has become disproportionately high. Thus, it is charged, the all-volunteer force is unfair as well as inefficient, placing an unduly heavy burden of service on those most disadvantaged in the society they are expected to serve.

Proponents of conscription argue that a return to the draft would change all this, boosting the number, quality, and racial representativeness of recruits, while simultaneously reducing manpower costs. Defenders of the volunteer force dispute the accuracy of many of these claims. More importantly, they insist that these claims fail to take into account the essential coerciveness of the draft and its severe violation of individual liberty.

But if citizens have an obligation to serve in the military, this objection to conscription is no longer a valid one. If we have an obligation to serve, conscripted service no longer constitutes an invasion of liberty and a violation of rights. Arguments for the draft, then, rely on the assumption that there is such a burden of obligation, to be distributed as fairly and efficiently as possible. For it will not do to distribute fairly and efficiently a burden that ought not be distributed at all.

Do we have an obligation to serve in the military? Is this one of our political obligations as citizens, along with the obligation to pay taxes and obey other kinds of laws? If so, what is the source of these other obligations? On what grounds do we have any political obligations at all? The entire justificatory program for the draft turns on these central questions.

It seems that all moral requirements fall into one of three classes, and so if we have political obligations, they must fall into one of these three classes as well:

- Requirements generated by some voluntary performance, such as making a promise or signing a



Courtesy National Archives

In what follows, **A. John Simmons**, Assistant Professor of Philosophy at the University of Virginia and currently Visiting Professor at Johns Hopkins University, argues that this central assumption is false. His argument is summarized from his paper "The Obligations of Citizens and the Justification of Conscription," prepared for the Center for Philosophy and Public Policy's working group on *The Morality of Compulsory Military Service*. A fuller discussion of Simmons's views on political obligation can be found in his book, *Moral Principles and Political Obligation* (Princeton, N.J.: Princeton University Press, 1979).

contract—these include obligations of fair play, which arise when persons voluntarily enter into cooperative projects

- Requirements arising simply from the moral character of the act in question, and so binding on all persons regardless of any special performances or relationships (for instance, "natural" duties not to lie or assault others)
- Requirements based in some special, but not necessarily voluntarily assumed, relationship (as obligations of children to parents and beneficiaries to benefactors).

Are political obligations requirements of any of these three kinds? If not, it seems doubtful that political obligations are really obligations at all.

(1) Requirements generated by voluntary acts

Classical political theorists such as Hobbes and Locke argued that political obligation—and the legitimacy of all government—arises out of the voluntary consent of citizens to be governed. Realizing the great advantages of organization into a state, persons freely contract to take on the obligations of citizenship in exchange for its benefits and protections.

It is now widely recognized, however, that the political participation of the vast majority of citizens cannot be regarded as fully voluntary. Naturalized citizens are virtually the only non-officeholders who expressly consent to anything in the political sphere, and the kinds of genuine choice situations that would provide opportunities for native-born citizens to give binding consent are all but unheard of in modern political communities. Continued residence in a country need not, and routinely does not, occur in response to any fairly presented choice.

Neither does it seem plausible to characterize the average citizen as voluntarily participating in some ongoing political cooperative scheme with his fellow citizens, and bound by considerations of fairness to serve in the military. While there are surely some persons who can be taken to be voluntary participants in a fairly strong sense, many others clearly cannot—the poor, the alienated, those who are trapped and oppressed and denied opportunities for a decent life. For these citizens political participation consists of making the best of a situation to which there are no options worth considering. Participation of this sort will not ground obligations based on a stronger voluntariness.

(2) Requirements based on natural moral duties

Natural duties, however, are not based in any voluntary transactions, relationships, or performances, but arise simply because of the moral character of the required act or forbearance. I am bound not to murder, for instance, not because of anything I have done (like promising not to), but because of the moral significance of murder. Similarly, duties not to steal or lie, to give aid to those in need, or to promote justice are equally shared by all persons, regardless of their voluntary acts.

Is the obligation to serve in the military a natural duty? There is good reason to think that it is not. First, because these duties are binding on *all* persons, the content of any natural duty must be perfectly general: I am bound not to kill *anyone*, not just certain specified individuals. If our duty to serve in the military were a natural duty, then, it could not bind us to service in any *particular* state (specifically, our state of citizenship). Suppose, for instance, that the duty to serve were conceived as part of a natural duty to support just governments. We would then be bound by it to serve in the military of *all* just governments—certainly not a duty we should recognize as genuine.

What needs to be explained is why a government's being *ours* grounds special ties to it, such as the requirements to pay taxes to it, obey its laws, and serve in its military. This an account in terms of natural duties cannot do.

(3) Requirements based in nonvoluntary relationships

If political obligations must arise out of some special tie between the citizen and his particular country, where this tie cannot be construed as voluntarily assumed by the citizen, then this third class of moral requirements is especially promising. An account in these terms captures the spirit of the most familiar answers to questions about political obligation. The reason we are obligated to serve the state, many argue, is that it has so effectively served us. It has provided numerous and substantial benefits at low cost, and it is the duty of those who have benefitted from the labor of others to reciprocate. Thus, in the earliest recorded account of political obligation (Plato's *Crito*), Socrates argues for political obligation both as reciprocation for benefits provided and as that which is due the state as "parent." Here the appeal is to two special relationships—benefactor-beneficiary and parent-child—both of which need not be entered voluntarily, and both of which are ordinarily taken to ground special obligations.

Few would deny that the state provides considerable, even essential, benefits to its citizens—benefits, furthermore, that citizens are incapable of providing for themselves. Does this mean that citizens owe a debt of reciprocation to the state, to be rendered in the form of taxes, obedience, and military service?

It does not. We need to remember what the content of an obligation of reciprocation is normally taken to be like. What we owe a benefactor is almost never determined with any precision by the context, but varies with our capabilities, the benefactor's needs, and the value of and sacrifice involved in providing the benefit. There is considerable latitude in discharging such an obligation, and the best guide is only a very vague sense of what constitutes a "fitting" return. What we certainly do *not* owe a benefactor is whatever he demands as repayment.

Thus, even if we are obligated to reciprocate for the benefits we receive from government, we are not obligated to reciprocate in all (or perhaps any) of the ways that the government demands. We are not required to serve in the military, to obey every law, or to pay precisely the amount of tax imposed on us simply because we are told to do so. The government, as benefactor, has no special claim to dictate the content of our obligation or pass final judgment on what constitutes a fitting return. The benefactor-beneficiary relationship cannot ground an obligation of military service.

Perhaps the filial obligations arising from the parent-child relationship provide a more helpful comparison. We can set aside the claim that children owe reciprocation for parental care, since the argument that obligation arises from benefaction is even less convincing in cases where the benefactors have them-

selves created the needs that their benefits satisfy. But parent-child and state-citizen relationships have been taken to be analogous in other ways.

Socrates maintains that the citizen ought to obey the state as a child obeys his parents, "to obey in silence if it orders you to endure flogging or imprisonment, or if it sends you to battle to be wounded or die." It does not seem, however, that children do in fact owe obligations of obedience to their parents. Young children do not, because young children do not have any moral obligations, to their parents or to anyone else. Where the capacities necessary for minimal levels of moral responsibility are absent, so are moral requirements. Mature children do not owe obedience, because they have the same rights and obligations as other adults. And children of middle years may act either rightly or wrongly in obeying or disobeying parental commands. The rightness or wrongness is a function of the acts performed, not of the parental command having been obeyed or disobeyed. So, by analogy, citizens also have no obligations of obedience to the state, though it may be independently right or wrong for them to do whatever it is that the state is commanding.

Filial and political relationships are also analogous in that both are routinely accompanied by strong emotional ties, of love and friendship in the one case, and loyalty and concern in the other. It is often argued that filial obligations arise from this personal intimacy—mutual caring creates the obligations, and where mutual caring ceases, the obligations cease as well. Perhaps political obligations are created and erased in the same way.

This view, however, seems to be mistaken. Moral obligations do not come in and out of existence with changes in our emotional state, and, furthermore, it is precisely in the absence of emotional reasons for certain kinds of behavior that the point of ascribing moral obligations comes most clearly into focus. While children love their parents and citizens remain loyal to their country, loving and loyal behavior will be natural and unconstrained. But the love and loyalty do not make such behavior into a matter of obligation. The parent-child analogy fails as well, then, to establish an obligation of military service.

The Justifiability of Conscription

It seems, then, that there is no moral obligation to serve. The central assumption of the standard arguments for conscription is a false one. Before concluding, however, it is useful to examine the connection between political obligation and conscription more closely. It is frequently assumed that if there is an obligation to serve, conscription is thereby justified. Likewise, it is assumed that if there is no obligation to serve, conscription is thereby impermissible. Neither is the case.

If there is an obligation to serve, is conscription justified?

Philosophers commonly claim that the existence of an obligation entails that coercion is justified in its enforcement. As stated, however, this view is too



Photo by Dana Pallotto

simple. It is not true that whenever someone has an obligation someone (or everyone) else is morally justified in forcing performance. Just as it can be morally wrong, all things considered, to discharge an obligation, so it can be morally wrong to force another to discharge his obligation. For example, it would be wrong of me to ignore the drowning man in order to discharge my obligation to meet you for lunch, and it would be wrong of you to force me to discharge this obligation.

Thus, even if citizens did have a moral obligation to serve in the military, the state should not enforce this obligation under many conceivable circumstances. Some of these circumstances are in fact recognized in current practice as limits to the state's justified enforcement of the citizen's obligation to serve: strong competing obligations, such as the obligation to support dependent family members, and the obligations of religion and moral conscience are recognized as having overriding importance, making state enforcement of the obligation to serve indefensible. Many other circumstances in which state enforcement of the obligation to military service is illegitimate are not recognized in actual practice. These are cases in which the conscript is to be used for morally unacceptable purposes, such as to wage an unjust war. Where it is wrong to serve, it cannot be right to force service.

If there is no obligation to serve, is conscription impermissible?

It is not, for just as obligations sometimes ought not to be discharged, so rights may sometimes legitimately be infringed. I do not act wrongly in taking your rope without permission (and so violating your property rights) in order to throw it to a drowning man.

Even if citizens have no obligation to serve, certain kinds of social or military emergencies may still make

conscription (military or otherwise) morally justifiable; even if citizens have a moral right not to be conscripted, they may be justifiably conscripted. But because conscription violates many people's rights, and violates them extensively (causing prolonged loss of liberty and opportunity and risk of death), justifying emergencies must be very real and very serious indeed. And in order to be justified, the benefits of

conscription must not only outweigh its costs, but conscription must be far enough better than the next best alternative policy in reaping these benefits that its higher probability for success outweighs the infringed rights that it involves. So even if conscription might otherwise be defensible, it would almost certainly be unjustifiable in virtue of the moral superiority of alternative non-coercive policies.

Children and the Constitution

In considering the conflicting claims of children, their parents, and the state, the Supreme Court has ruled that:

- parents have the authority to commit their children to mental institutions without any formal hearing
- parents do not have the authority to limit their children's legal access to contraception devices and abortion services
- some form of due process procedure is owed to students in cases of suspension
- no form of due process procedure is owed to students in cases of corporal punishment
- parents' religious interests override the state's interest in requiring compulsory education through high school
- parents' religious interests are overridden by the state's interest in regulating and limiting child labor.

According to David A. J. Richards, Professor of Law at New York University, this hodgepodge of inconsistent decisions signals the lack of any explicit underlying principle justifying the Court's conclusions. In "The Individual, the Family, and the Constitution," (*NYU Law Review*, April 1980), he takes on this task: "To assess what is valuable and what is mistaken in this incoherent body of case law we must do what the Supreme Court has failed to do. We must philosophically conceive and explicate the conflicting rights of children, parents, and society as a matter of general moral and constitutional principle."

The moral and constitutional principle needed, Richards proposes, is the principle that every person has a right to equal respect and concern in the pursuit of autonomy. That is to say, every person has an equal right to develop his capacity for determining his own goals and life purposes, for deciding independently the content of his own desires, needs, choices, projects, and aspirations. One practical implication of this deeper principle is a principle of equal opportunity in the broad class of external circumstances that bear

upon personal development. These include opportunities for emotional nurture within the family and educational opportunities for training in basic skills and cultivation of self-critical faculties.

This principle provides both the justification and the limitation of what Richards calls "liberal paternalism" in child rearing. Parents and educators are required to exert a certain amount of control over young children, and, to a much lesser degree, adolescents. The aim of this power is to guide the child into mature, independent rationality, to protect the child's interests so that she becomes able to choose and defend her own interests in adulthood. While parents do of course rightly impart their own values and concerns to their children, liberal paternalism requires that "they must do so in ways that acknowledge and foster the child's critical rationality in making decisions on her or his own." To achieve this end, "appropriate nurturing and education should be supplied, notwithstanding the child's resistance, that will lead to rational autonomy."

This, then, is the principle by which the Court's decisions should be evaluated: autonomy and equal opportunity preserved through liberal paternalism. If the Court had explicitly relied on this principle in its deliberations, Richards suggests, it might well have reached some rather different rulings.

Compulsory Education and School Discipline

Since Locke and Rousseau, education has been at the heart of the liberal tradition, education designed to foster the child's emerging intellectual independence and to fit him for defining the meaning of his own existence. From this perspective, Richards finds the Court's educational record a disappointing one: "The Supreme Court's decisions regarding both the requirements of compulsory education and rules governing speech and discipline in educational institutions fail to meet the demands of liberal paternalism. The Court has been overly lax in enforcing compulsory education laws that are critical to the develop-

ment of capacities of autonomy and has failed to take a consistent view of school discipline that coincides with the legitimate purposes of education in effectuating capacities for autonomy."

In *Wisconsin v. Yoder*, the Court ruled that Wisconsin's compulsory education law violated the prerogative of Amish parents to decide on religious grounds whether their children should attend school. The Amish families resisted exposing their children to values and attitudes outside the confines of their religious community, arguing that such exposure was incompatible with full community assimilation. The Court endorsed their argument. Richards does not. "No parent has the right to immunize the child from a diverse and stimulating education which will enable the child to develop rational independence [and] some perspective on their lives and those of their parents." Amish children must be able to accept or reject membership in the community for their own reasons, and not have it thrust upon them for lack of perceived alternatives. The Court's decision, furthermore, is flatly incompatible with *Prince v. Massachusetts*, which upheld the application of child labor laws to the sale of religious literature under parental supervision. If labor regulations override parents' religious interests, so should cultivation of independence of mind.

The Court has considered several cases involving school discipline and arrived at contradictory opinions on the extent of student rights and school authority. In *Tinker v. Des Moines Independent Community School District*, it affirmed the right of students to wear black armbands in protest of the Vietnam War. Richards applauds this ruling: "Allowing adolescents to take and defend controversial moral positions . . . cannot be regarded as anything but the kind of moral education in independence, conscience, and sensitivity to rights that is . . . the aim of education under liberal paternalism." Likewise, he sides with the Court in *Goss v. Lopez* for requiring that students about to be suspended receive an explanation of the reasons for their suspension and an opportunity to present their side of the matter. Even such minimal due process shows respect for the rationality of students and provides an example of "how authority can be exercised reasonably." But in *Ingraham v. Wright*, the Court refused to require the same observance of due process as a condition of inflicting corporal punishment, seemingly a much more severe violation of the dignity of the person. On the principle of respect for autonomy, this is simply perverse, for the argument for due process as an instrument of liberal education is as compelling here as in *Goss v. Lopez*.

Access to Contraception and Abortion

Some of the Court's most controversial rulings have extended constitutional rights of privacy to adolescents, permitting them access to birth control and abortion without the prior consent of their parents. In *Planned Parenthood v. Danforth*, the Court struck down a Missouri statute that required parental

consent for a child to have a legal abortion. In *Bellotti v. Baird*, it declared unconstitutional a Massachusetts statute requiring notification to parents in every case of a non-therapeutic abortion. In *Carey v. Population Services International*, it overturned a New York statute prohibiting the sale of contraceptives to minors under sixteen.

On Richards's analysis, these decisions are in keeping with the autonomy principle. Paternalistic control is already questionably justified for adolescents, whose rational capacities may be considerably developed, and liberal paternalism insists that control may be exerted only in the service of protecting the child's ability to determine her own future values and interests, not to impose any particular morality. Claims Richards: "The right to use contraceptives and to have an abortion are associated with the protection and enhancement of personal autonomy in making strategic life decisions . . . involving the central issues of sex, love, and procreation . . . Adolescents, using contraceptives, can explore their sexuality and its role in relationships without fear of procreation for which they, of all age groups, may not be ready."

Institutionalization of Minors

The Court's decisions on contraception and abortion for minors set new limits to paternal authority in order to protect the interests of children. In striking contrast is *Parham v. J.R.*, in which the Court ruled that minors may be institutionalized by their parents subject only to a corroborative judgment of mental illness by the hospital superintendent. No formal hearing is required. While specific rights to privacy and to the autonomous development of moral values are not at stake in *Parham*, the child's rights to equal respect and concern and to what autonomous rationality he is capable of developing certainly are. Richards argues: "It is unconscionable that a Court committed to equal concern and respect for the individuality of children should publicly legitimate their total institution without evolving some appropriate burden of justification, reflective of the rights of children."

The Court faces a formidable task in adjudicating among the rights of children, parents, and the state. It has been more successful, Richards suggests, in defending the interests of children where these are in direct conflict with the interests of their parents and much less successful where the state has combined with parents to exceed the limits of liberal paternalism. It will have to do better in these other areas if the theory of human rights implicit in the Constitution is to apply to this most vulnerable class of Americans: our children.

We gratefully acknowledge the permission of the *New York University Law Review* to extensively quote from Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U.L. Rev. 1 (1980).

Announcing a Summer Workshop

The fourth annual Workshop on Ethics and Public Policy will be held June 21-27, 1981, in Brunswick, Maine, on the campus of Bowdoin College. The workshop is sponsored by the Center for Philosophy and Public Policy, in collaboration with the Institute of Society, Ethics, and the Life Sciences (the Hastings Center).

The purpose of the workshop is to bring together individuals from different backgrounds with a common interest in public policy. The program is built around an examination of specific policy problems from a normative and philosophical point of view, with both academics and policymakers contributing to a better understanding of the concepts and values inherent in these problems.

This year's program consists of three sections: (1) an analysis of three current policy issues: military service, legal and illegal immigration, and risk and consent; (2) a discussion of what applied ethics is and what it is capable of achieving; (3) a look at public policy within the theoretical framework of liberalism and conservatism.

The session on military service focuses on the fair distribution of the burden of military service. Is the All-Volunteer Force viable or should we return to a conscripted military force? Should women be included in any possible future draft? The session on immigration policy includes the question of how many aliens should be allowed to seek temporary work in the United States and how they should be treated while working within our borders. It will also include some questions about the obligations of the members of a community to individuals outside the community: may Haitians be admitted to stay in this country with fewer rights than traditional refugees? The session on risk and consent examines such questions as how different risks can be compared and estimated, how subjection to risk should be compensated, the economic value of human life, and the role of individual consent in decisions made by centralized authorities that affect the personal safety of many individuals.

The program includes speakers from government agencies, research institutes, and faculty members with experience in ethics and public policy. Readings will be distributed in advance, and there will be extended small-group discussions and panel discussions. The sessions are designed to be especially useful to persons from both academic and policymaking institutions.

For further information and program agenda, contact Elizabeth Cahoon at the Center for Philosophy and Public Policy, (301) 454-6604. An advance registration form appears on the facing page.

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