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Doing Justice During Wartime

Why military tribunals make sense

By ABRAHAM D. SOFAER AND PAUL R. WILLIAMS

ON NOVEMBER 13, 2001, President Bush issued a Military Order authorizing the Department of Defense to create military commissions to try non-citizens who are members of al Qaeda or who have attempted or carried out acts of international terrorism. The promulgation of the order was met with overwhelming public support, but with a stream of criticism from civil libertarians and others concerned with the possible dilution of due process standards. The Military Order has also sparked a lively debate among lawyers and pundits in the op-ed columns of America's newspapers focusing on the legality of the commissions under international law and their actual utility in fighting terrorism.

What has unfortunately been missing from this debate is its proper politi-

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cal context. The question is not whether a military commission is a good or bad thing, but whether any adequate mechanism currently exists for prosecuting prisoners who end up in U.S. custody during the new terror war facing America and its allies. The narrow legalistic debate has failed so far to do justice to the magnitude and nature of the threat of terror war and the policy context for the decision to use military commissions. In this broader context, it becomes clear that current domestic and international mechanisms cannot respond effectively to the needs encountered in the current terror war, but that military commissions, properly used, can do so at least for now. In the longer run, the existing Yugoslav tribunal offers substantial promise as an international terrorism court for particular types of cases. But in the meantime, the need for an effective mechanism is acute, and the military commissions provide one.

Criminals *v.* enemies

THE CURRENT DEBATE over military commissions is so intense and widespread that it gives inordinate importance to the question of the forum in which terrorists should be tried. In reality, courts, in whatever form, have only a small role in the terror war currently underway. The campaign of terror war directed against the United States can be described as "unconventional warfare conducted by unprivileged combatants with the assistance of criminal co-conspirators designed primarily to terrorize and kill civilians." This campaign has been underway for nearly a decade and will likely continue well into the foreseeable future. The potential use of military tribunals was not intended and should not be seen as an effort to shortcut court procedures ordinarily applicable to individuals charged with crimes. Rather, it was intended as a major shift in policy away from the criminal law model as a means for deterring and preventing terrorism. Until September 11, 2001, when al Qaeda struck American targets, including the World Trade Center (in 1993), President Clinton promised to hunt down those responsible and "bring them to justice." Unfortunately, he meant this literally: He called in the FBI as lead agency, and turned to federal prosecutors as the means for fulfilling his pledge. Naturally, no issue of where to prosecute terrorists arose, because in those few instances when the U.S. was able to arrest a terrorist, criminal trials were the principal means intended to "bring them to justice."

President Bush put all that behind him after the attacks of September 11. He called the attacks "acts of war," and demanded that the Taliban surrender Osama bin Laden and other al Qaeda leaders on pain of being treated the same as they, as "enemies" of the United States. When the Taliban refused, hailing bin Laden as a Muslim "hero," Bush (with Congress's support) attacked Afghanistan with military force and turned to the Department of Defense to lead the campaign. The terror war, long pursued

by al Qaeda, was finally confronted as an issue of national security, rather than one of criminal law enforcement.

Taking his cue from this major shift in policy, Attorney General John Ashcroft, along with FBI Director Robert S. Mueller III, issued instructions to their personnel to implement a corresponding shift in focus, away from the investigation of terrorism as crimes and the preparation of criminal cases to the overriding objective of preventing terrorist attacks. (CIA Director George Tenet issued an analogous instruction.) Many of the anti-terrorist measures taken by the attorney general since then — some deservedly controversial — are part of this shift in policy designed to prevent terrorist acts through various forms of preemptive action.

It should be no surprise that, among the measures adopted that reflect the shift of policy from criminal law enforcement to military engagement, was the order instructing the Department of Defense, now the lead agency in the nation's effort, to set up military commissions to try terrorist fighters. Viewed as a national security problem, the al Qaeda network and the Taliban fighters constituted a force of some 40,000 to 50,000 men. A successful military engagement was certain to result in the capture and potential trial of hundreds, perhaps thousands, of individuals. The military commission was a mechanism far more suitable to meet this need than the full-blown trials used to prosecute conventional crimes in the federal courts.

Unlike the executive branch, the judicial system cannot rapidly retool or evolve to accommodate the new needs of terror war.

The U.S. military rapidly responded to the new policy by engaging in a comprehensive use of force intended to bring about a victory and to end America's vulnerability to al Qaeda. To accomplish this objective, the military developed new doctrines, deployed advanced technological resources, embraced the extensive use of special forces, and selectively relied on assistance offered by our allies without compromising American leadership in the campaign. The intelligence community is also undertaking a critical reassessment of its capabilities and intelligence assets and is retooling to better meet the threat posed by al Qaeda.

Unlike the executive branch departments, the judicial system cannot rapidly retool or evolve to accommodate the new needs of terror war. The American domestic criminal system was designed primarily to protect civil liberties while effectively prosecuting those responsible for murder and other domestic crimes. The system was never intended or designed to perform the judicial roles related to terror war or for that matter to prevent fundamentalist terrorism. The creation of military commissions is thus an effort by the Bush administration to provide a method for trying non-citizen terrorists that corresponds to the shift from fighting terrorism with conventional law

enforcement to serious foreign military engagement.

Just as a single cruise missile attack against near-empty training camps constituted ineffective, pinprick engagement, the use of the domestic criminal system to try all terrorist prisoners would amount to ineffective, pinprick justice. The domestic criminal justice system, by itself, is simply unable to serve as an effective tool in dealing with the judicial fallout of terror war. Even the most successful prosecutor of terrorists, U.S. Attorney Mary Jo White, has recognized that, with proper safeguards, military commissions "could be preferable to conventional trials in a time of war," as she told the *New York Times*.

The reasons for the preference for military commissions are numerous. First, and most important, the acts of terror committed by al Qaeda against civilians are not the types of crimes our domestic system was designed to prosecute; rather, as President Bush characterized them, they are war crimes. Sen. Joseph Lieberman, writing in the *Washington Post* January 1, put it this way: "The attacks of Sept. 11 were acts of war. Because they were carried out against defenseless civilians by terrorists posing as noncombatants using concealed weapons, the perpetrators were guilty of heinous war crimes, not simple domestic crimes."

The acts of terror are not the types of crimes our domestic system was designed to prosecute; they are war crimes.

Second, the domestic system has proven unable to deter and rarely able even to punish those responsible for terror crimes. In the cases of the Yemen hotel bombing, the attack on the Saudi National Guard, the 1996 Khobar Towers attack, the 1993 bombing of the World Trade Center, the 1998 bombings of U.S. embassies in Africa, and the U.S.S. *Cole* attack in 2000, the U.S. either has been unable to prosecute any responsible party or has prosecuted only a handful of low-level culprits and ideological supporters.

Third, to insist on the application of American constitutional due process standards to terrorist perpetrators of war crimes would limit the U.S. in exercising its national security powers. Evidence subject to exclusion from a trial would not be appropriate to consider, even though the evidence was reliable and established heinous and ongoing behavior. Guilt would have to be established on the basis of such admissible evidence, beyond a reasonable doubt. The need to establish such proof, we are told, led to a catastrophic decision by the Clinton administration. In 1996, Sudan offered to detain and transfer bin Laden to the United States. According to the *Washington Post*, then-National Security Advisor Sandy Berger declined the offer on the grounds that it would not be possible to try and convict him in an American criminal court. This, despite our having no moral doubt of his involvement in the Yemen hotel bombing, the attack on the National Guard, and the

Khobar Towers attack, and despite our awareness of his determination to engage in future attacks.

Fourth, extensive use of domestic courts may significantly undermine the United States' ability to protect its citizens and to prevent additional attacks. Judges and juries in such cases have historically been at risk from terrorist groups. Under current law, it is not possible to protect intelligence methods and information used against the defendants in court. While federal legislation limits the ability of defense counsel to examine intelligence agency files used to prepare a case, all information used in court, and all methods used to gather it, are open to the public. Even much of the unclassified information presented at trial may be of use to future terrorists — such as structural diagrams of the World Trade Center and expert testimony as to the size of an airplane necessary to bring down one of the towers.

The limitations of domestic courts in punishing and deterring those responsible for war crimes has apparently led United States officials to attempt to evade their own judicial system. For example, when Berger turned down Sudan's offer for bin Laden, he tried to persuade Saudi Arabia to take him and after a streamlined trial to have him hanged. According to a recent *New York Times* report, the Clinton administration sought to circumvent the rules of the American judicial system by persuading "friendly intelligence services to arrange the arrest and transfer of al Qaeda members without formal extradition or legal proceedings" to Egypt and other countries to stand trial.

International standards

FOR THE CASES where an American citizen or an individual under protection of the U.S. Constitution is suspected of participation in war crimes against the United States, Congress has the authority to create a special District Court that can be designed so as to protect the defendant's constitutional rights while mitigating some of the concerns expressed above. For suspected war criminals and terrorists not under the protection of the U.S. Constitution — which to date is every individual detained by the United States in Afghanistan save one — a military commission or some other judicial mechanism is the most appropriate means for determining their guilt or innocence.

The military commission is able to avoid the shortcomings of the conventional judicial system because it is specifically designed to respond to situations in which the United States finds itself, during or as a result of a military engagement, in physical custody of non-U.S. citizens believed to be members of terrorist networks who have committed terror acts against the United States. The military commission would also be useful in dealing with individuals associated with institutions or governments, such as leading members of the former Taliban government, who aided and abetted those com-

mitting or planning terrorist acts against the United States and its allies.

Military commissions are a flexible tool on which the United States can rely to ascertain with relative informality which defendants are in fact responsible for criminal acts and which are not. This flexibility is an important, practical necessity; for example, in addition to the nearly 500 suspects in American custody by January 2002, Afghan forces were holding nearly 3,000 non-Afghan prisoners who may have had some connection to al Qaeda or may have been trained in terrorism. The military commissions also offer an opportunity — not possible in the domestic context — to create mixed tribunals involving civilian or military judges from countries such as Afghanistan and Pakistan, which currently exercise custody over the detainees, or from countries such as Saudi Arabia and Kuwait, whose citizens are among the detainees.

International standards of justice are not identical to those found in the U.S. Constitution.

Contrary to some contentions, the military commissions can provide a full and fair trial while also protecting sensitive intelligence and other information crucial to further efforts to prevent and deter acts of terrorism and war crimes. The Department of Defense must (and we believe it will) ensure that the military commissions comply with the obligation in the Military Order to provide for a full and fair trial, and to ensure that the purpose of the commissions remains to ascertain the guilt or innocence of those accused of war crimes and terrorism. Given that all of the suspects to be tried by military commission will be foreign nationals, it is appropriate for the United States to look to international standards of justice in formulating procedures. Various sets of international standards exist, but the most practical are those used by the International Criminal Tribunal for Yugoslavia (ICTY). According to the statute and rules of evidence and procedure for the tribunal — formulated with the participation and approval of many nations and the entire U.N. Security Council — all defendants are entitled to an expeditious, fair, and public trial, the presumption of innocence, the right to defense counsel of their choosing or to have legal assistance provided, the right to examine evidence and witnesses, and the right not to be compelled to testify against oneself or to confess guilt.

International standards of justice, however, are not identical to those found in the U.S. Constitution or in the Federal Rules of Criminal Procedure. In fact, a number of constitutional protections applicable in U.S. criminal cases have been considered unnecessary or undesirable by the international community or have been significantly modified when applied in the international context for the purposes of ascertaining the guilt or innocence of those charged with war crimes. International standards do not bar hearsay, but rather permit the introduction of any relevant evidence which the court deems to have probative value, and there are no Fourth

Amendment-style search and seizure restrictions. Trial by jury is not required. Under certain circumstances, witnesses against the accused may testify anonymously (using voice and image-altering technology) or submit their testimony in writing — thus significantly limiting the defendant's ability to cross-examine witnesses effectively. The prosecution may appeal acquittals (during which time the defendants usually remain in custody) and may seek to retry acquitted defendants if new information becomes available which pertains to guilt — thus exposing such defendants to double jeopardy by U.S. standards. A defendant may even be subject to a form of mini-trial in absentia when the prosecutor, unable to secure his presence, presents the evidence against the defendant in a public hearing for the purpose of reconfirming the indictment.

International standards also provide for the strict protection of confidential and classified information as well as intelligence sources and methods. For instance, if the ICTY prosecutor is in possession of information obtained on a confidential basis, and which has been used solely for the purpose of generating new evidence, that initial information and its origin need not be disclosed by the prosecutor. If the government providing the information consents, the information may be used in the court — in a closed proceeding — but there is no requirement that the sources or methods be available for examination, or even disclosed to the defendant. The defendant is also not entitled to access to information in the possession of the prosecutor the disclosure of which may prejudice further investigations, may be contrary to the public interest, or may affect the security interests of any state. These protections go beyond those provided in U.S. domestic law, which limit the scope of material defendants may request from intelligence agencies but do not protect sources and methods. In addition, as all court proceedings are open to the public, any information used in court automatically becomes available in the public domain.

The draft rules under consideration by the Department of Defense are consistent with international standards.

At the Yugoslavia and Rwanda tribunals, a determination of guilt is made by a majority of the Trial Chamber, with the standard of proof being beyond a reasonable doubt. While these international courts may not impose the death penalty, over 130 states do — in particular for war crimes and terrorism — and the death penalty was imposed in a number of instances by the Nuremberg and Tokyo tribunals.

The draft rules under consideration by the Department of Defense are consistent with these international standards. The rules are reported to provide for appellate review, the presumption of innocence, the requirement of proof beyond a reasonable doubt to establish guilt, the admission of hearsay

evidence (but with the application of the reasonable-person standard), the limited use of in camera proceedings, and the requirement of a unanimous decision for a sentence of death.

Answering the critics

THE MANNER IN which the original Military Order was drafted caused some valid concern that the level of due process contemplated might not comply with international standards. In the further promulgation of rules of evidence and procedure for the military commissions, and in their use, the United States must be careful to ensure that their purpose remains solely to ascertain the guilt or innocence of the accused. In most regards, however, the due-process concerns raised by commentators are unsubstantiated.

The death penalty was imposed in a number of instances by the Nuremberg and Tokyo tribunals.

Another concern raised about the use of military commissions is that by not having a public trial, the United States forgoes an opportunity to try to undermine international support for terrorism. No evidence supports this claim. The United States has had a number of trials of low-level terrorists and trigger-pullers, and there is no indication whatsoever that those trials have reduced the level of support for terrorism. If anything, the trials have led to cries of outrage from the radical Islamic world and provided a platform for defiant speeches and posturing. It is highly unlikely that any individual sufficiently propagandized by religion and ideology to train in an al Qaeda terrorist camp is going to be influenced by Court TV coverage of judicial proceedings. More likely, the fully public hearings will provide a platform for the further recruitment of terrorists and for preaching the tenets of Islamic fundamentalism. This is why Zacarias Moussaoui, accused of participating in planning the September 11 attacks, sought to permit Court TV to cover his trial and why the U.S. government opposed his request.

A second concern is that using military commissions instead of conventional trials will undermine American values and the rule of law, and thus hand victory to the terrorists. This is fanciful and unfair. First, so long as the military commissions provide for a full and fair trial, they do not undermine American values or the rule of law. The Supreme Court has upheld such commissions in principle, and the level of protections provided will be much higher now than in the World War II case in which the court ruled. Second, it is silly to suggest that bin Laden is seeking to undermine the rule of law in the U.S., and would therefore gain from being tried by a military tribunal. Bin Laden is not waging a war against the United States because he objects

to our notions of democracy and civil liberties, but because he has determined that killing Americans is the best way to undermine American support for the Saudi regime. American support for that regime is based on our economic and geo-strategic interests — certainly not on our values. Similarly, the individual al Qaeda terrorists who actually carry out attacks are not interested in undermining American values, but in personal glory and a shortcut to martyrdom and the afterlife. In short, we lose nothing by using tribunals, and they gain nothing by our doing so.

A third concern is that the military commissions will become "kangaroo courts" or will be perceived as such by "the world." We simply cannot be moved by such claims, to the extent that they are made. The U.S. system of justice will require full and fair hearings, which will satisfy international standards. The kangaroo courts that al Qaeda prisoners are likely to see will be for those unlucky enough not to have the benefit of a U.S. trial, forced instead to confront the likely alternative of summary execution by the Northern Alliance or southern Pashtun tribes, or summary proceedings by Islamic courts in the region. Our allies will support us in this regard. Many European states, including France, Ireland, and Italy, have special proceedings, rules of evidence, and procedures for terrorism cases, and most of the Arab states, including Egypt and Jordan, use military tribunals extensively to try suspected terrorists. Some states, like Spain, may refuse to extradite suspected al Qaeda members to the United States to face a military commission even though, as some experts have noted, the suspects would likely receive a higher level of due process before an American military commission than in a Spanish criminal court. But in these instances, the United States can suggest other alternatives in order to gain custody of particularly important individuals.

Some will rely on the use of trials by military commission as grounds for attacking the United States.

No doubt, some will rely on the use of trials by military commission as grounds for attacking the United States, and presenting evidence in secret will fortify bin Laden's propaganda; furthermore, the execution of convicted terrorists after such trials will be used to attempt to create a new generation of martyrs. But it is capitulation to such irrational forces, not the use of military tribunals, that would truly jeopardize the rule of law. While Islamic fundamentalists will passionately claim that any trial of Taliban or al Qaeda members is a rigged process, moderate Arabs will weigh the fairness of such trials against their perceptions of justice and due process as framed by their own experiences in their home countries.

Some argue that by not providing terrorists seized in the ongoing terror war with American constitutional protections, the United States will no longer have credibility with the international community when it seeks to

criticize other states for failing to apply standards similar to those applied in the United States. In fact, the conduct of full and fair trials before a military commission consistent with internationally accepted standards (as opposed to merely American standards) is a lot more likely to persuade states already using military tribunals to upgrade their level of due process to international standards than is continued lecturing by American diplomats and NGOs about the need to copy the American model of due process.

Finally, some commentators have suggested that existing international mechanisms, or mechanisms that could be readily adopted, are the right place in which to prosecute suspected terrorists and war criminals, and thus that no need exists for military commissions. This is simply untrue.

The International Criminal Court, which has been mentioned as a possible venue, is not yet in existence.

The International Criminal Court, for example, which has been mentioned as a possible venue, is not yet in existence; when and if it does become a reality, it will have no power to apply its authority retroactively. Its jurisdiction, moreover, does not include terrorist crimes, because all suggestions that such crimes be covered were rejected at the Rome Conference. Even were it to come into force, it would take many years for the Assembly of States that will be its governing body to select a prosecutor and judges, let alone to prepare an indictment against key terrorist figures. In the case of the Yugoslavia tribunal, for instance, it took over a year and a half to select a prosecutor, and then seven years for the prosecutor to prepare an indictment of Slobodan Milosevic. The ICC in any event would pose a far greater threat to U.S. interests and the advancement of human rights than would the use of military tribunals. The Assembly of States, composed of no fewer than the 60 states that must ratify to bring the treaty and court into existence, will be empowered with a two-thirds vote to add international crimes (including eventually the crime of "aggression") and to hire and fire the prosecutor. Given the record of states in the General Assembly with regard to the values the U.S. espouses on human, political, and economic rights, one can only view with astonishment the willingness of states and scholars that share U.S. values to risk turning over such power to any 40 of the current 180 or so states that make up the General Assembly.

The Spanish prosecutor Baltasar Garzon, a former Socialist politician who pressed for the extradition of Chile's General Augusto Pinochet, is rumored as a potential prosecutor for the ICC. As the U.S. prepared to exercise its right of self-defense in Afghanistan with the unanimous (albeit implicit) approval of the Security Council, Garzon declared, "Lasting peace and freedom can be achieved only with legality, justice, respect for diversity, defense of human rights and measured and fair responses." The U.S. action,

he claimed, was illegal and unjust, explaining that "it should not be forgotten that there will come a time when justice is demanded of those responsible for these mistakes and the loss of a historic opportunity to make the world more just." The *Financial Times* further reported him warning, "The justice I am talking about is that which should be brought to bear not only on the Taliban for its brutal and oppressive regime but also on the leaders of western countries, who, irresponsibly and through the media, have generated panic among the Afghan people."

Calls have also been made for the creation of a special "International Terrorism Court" as a substitute for national courts, including military tribunals. Unfortunately, no draft plan for such a court exists, and its creation would likely take many years and be highly politicized. Such a tribunal might also suffer from many of the deficiencies that will afflict the ICC, depending on the manner in which its statute is drafted.

Building on the Yugoslavia tribunal

A MORE PRAGMATIC APPROACH to creating an international mechanism that could supplement the use of military tribunals, and one that could have the advantage of displacing the ICC, would be to add to the jurisdiction of the existing ICTY crimes associated with terror wars no matter where or by whom they are committed. This could be accomplished through a U.N. Security Council resolution citing the authority of Chapter VII of the U.N. Charter, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." The Security Council would have to markedly increase the ICTY's budget to provide for the hiring of a substantial number of personnel, in addition to modifying its organizational structure and mandating a number of overdue institutional reforms.

Transforming the ICTY to deal with certain terrorist crimes is preferable to creating a new international mechanism for a number of reasons. After nearly eight years of operation the ICTY has an established set of rules of procedure and evidence and has a rational jurisprudence. The tribunal is perceived as fair and capable, with a competent prosecutor and a solid complement of trial and appellate judges, including a number of Islamic judges. The tribunal was in fact originally created in response to atrocities and war crimes committed against Muslims because of their religious identity. The tribunal should thus have a heightened degree of credibility among those who might otherwise be skeptical of an international tribunal. Moreover, as an institution with ample independence, yet created and supported by the Security Council and subject to its continuing review, the transformed Yugoslavia tribunal would avoid many of the political and practical afflictions of the ICC. While a U.S. military commission could be used to try most suspected terrorists and war criminals, the expanded Yugo/terrorism tri-

bunal could be used to try top-level suspects and those who do not come into U.S. custody.

Bearing in mind that courts, in whatever form, play only a small role in the fight against terror, the recent authorization of the use of military commissions should be welcomed as a sign that the U.S. government will not continue the criminal-law response to terror war, which contributed to the vulnerability of the United States on September 11. Assuming that the rules of procedure and evidence for the commissions comply with international standards, the commissions will fill a crucial role, one that the domestic criminal justice system is incapable of meeting. In addition, the United States should initiate an effort in the Security Council to expand the existing Yugoslavia tribunal to enable it to prosecute certain particularly egregious terrorist crimes. This would have the dual benefit of creating a viable mechanism to aid in the war against terror, and supplanting the ICC, which is likely to restrict efforts of the United States and its current allies to protect themselves and their interests against future acts of terrorism amounting to acts of war. In this way, courts and the rule of law will serve to make the battle for freedom more rather than less effective.

Devil's Advocates

The danger of judging lawyers by their clients

By LEE A. CASEY AND
DAVID B. RIVKIN JR.

THERE IS AN ESPECIALLY chilling moment in *The Crucible*, Arthur Miller's play about the 1692 Salem witch trials, when the principal protagonist, farmer John Proctor, arrives in court to defend his wife against a charge of witchcraft. As the scene progresses, the refined and conscientious Judge Danforth looks Proctor in the eye and asks, "Have you ever seen the Devil?" At this point, we know that John Proctor will hang. Danforth's position is clear — anyone who would defend an accused witch, thereby threatening the court's godly work, must himself also be in league with Satan. Miller clearly captured something profound and primordial here — the assumption that anyone who defends an accused either must approve of the crime or be guilty himself. It remains a common view today, even if less often openly articulated than in the past.

Lawyers, however, have traditionally enjoyed a kind of immunity in this

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arena. Whether based on the belief that lawyers were above, or below, the fray, and if sometimes honored in the breach rather than in the observance, our society has permitted lawyers to ply their trade without ultimately being blamed or punished for the clients they have represented. This "immunity" is, in fact, essential to the operation of a neutral legal system, which assumes that there are two sides to any question, presupposes that all parties ought to receive a fair hearing of their case, and depends upon lawyers to articulate the relevant legal principles so that disinterested judges and juries can fairly resolve the issues presented.

Today, however, this immunity increasingly has been challenged in a number of real and immediate ways. Politicians, pundits, partisans, and activists of all stripes have attacked individual lawyers based upon the identity of their clients or because of the legal positions they have advanced on a client's behalf. The unspoken, or spoken, premise of these attacks is that a lawyer is, for all intents and purposes, responsible for a client's actions, or for the arguments advanced on a client's behalf. This phenomenon, which has been fueled by both left and right, poses a significant threat to the integrity of our judicial system and to the principles that support Western-style democracy itself.

Examples here are not hard to find. Washington "superlawyer" Robert Bennett won the praise of conservatives, and liberal scorn, for successfully representing former Reagan administration Secretary of Defense Caspar Weinberger during the Iran-Contra affair, ultimately obtaining a presidential pardon for his client in 1992. A few years later, he became a conservative bête noire, and a liberal hero, for his muscular defense of President Clinton against Paula Jones's sexual harassment accusations. Similarly, former Clinton White House Counsel Jack Quinn was heavily criticized for his successful efforts, during the Clinton administration's final days, to obtain a presidential pardon for fugitive financier Marc Rich. Indeed, feeling was running so high against Quinn that an article in *National Review* attacked conservative commentator and former Washington, D.C. United States Attorney Joseph DiGenova for his representation of Quinn, on account of Quinn's representation of Rich.

A spate of President Bush's lawyer nominees have been opposed because of clients they have represented while in private practice, or because of positions they have advanced on a client's behalf.[1] In this regard, during his confirmation hearings, Solicitor General Theodore B. Olson was closely ques-

[1]The practice of opposing the appointment of otherwise qualified individuals based on their personal views on political and public policy issues is both unfortunate and clearly emblematic of the partisan rancor in Washington. However, when applied to lawyers, based on the clients they have served, these practices are particularly distressing, since they involve inferring the lawyers' views from their professional work rather than obtaining direct knowledge of those views.

tioned by senators about arguments regarding such hot-button issues as affirmative action and women's rights, which he had made for clients while in private practice. President Bush's nomination of Harvey L. Pitt, another highly respected Washington lawyer, to be chairman of the Securities and Exchange Commission was opposed by conservative activists because he represented New Frontier Media, an internet distributor of "adult" (some would say pornographic) materials. The nomination of Eugene Scalia (son of Justice Antonin Scalia) to be the solicitor of the Department of Labor met with opposition from labor groups because he has represented companies, such as United Parcel Service and Anheuser-Busch, seeking to block adoption of certain ergonomics standards. The nomination of Jeffrey Holmstead as an assistant EPA administrator was opposed by a number of environmental groups, in part because he represented "polluters" in private practice.

A spate of President Bush's lawyer nominees have been opposed because of clients they represented while in private practice.

The most prevalent use of this tactic occurs with respect to federal judicial nominees. This is because: (1) the stakes in such nominations are particularly high, since federal judges serve for life; (2) a growing number of important public policy issues are brought before the courts for resolution; and (3) all such nominees are lawyers, most with long and distinguished experience in private practice. Thus, the nomination of John G. Roberts Jr. for a seat on the United States Court of Appeals for the District of Columbia Circuit has been challenged by pro-choice groups based on briefs he signed while serving as deputy solicitor general under President Bush senior. Similarly, the nomination of Columbus, Ohio lawyer Jeffrey Sutton to the U.S. Court of Appeals for the Sixth Circuit (covering Tennessee, Kentucky, Michigan, Ohio, and Indiana) has been opposed based on his representation of the state of Alabama in an effort to shield states from application of the Americans with Disabilities Act. There are likely to be many more such attacks as President Bush transmits additional nominations to the Senate.

Attacks on lawyers are, of course, nothing new. Ours is not an overwhelmingly popular profession, and those practitioners who imagine some past golden age, before the "litigation explosion," when the bar was universally respected as the champion of justice and guardian of the Republic are deluding themselves. Shakespeare summed up popular feeling, then and now, pretty well in *King Henry VI, Part 2*, when the leader of an English peasant revolt suggests: "The first thing we do, let's kill all the lawyers."

However, the more recent attacks on lawyers, and lawyer-nominees for office, have not been advanced by the pitchfork crowd, but by highly educated and sophisticated politicos, many of whom are also members of the

bar — people who are supposed to know better. For example, Harvey Pitt's appointment as SEC chairman was opposed by former presidential candidate Gary Bauer, currently head of the organization American Values and a 1973 graduate of the Georgetown University School of Law. In opposing Pitt, Bauer reasoned: "Surely there are people capable of doing an excellent job in the field of securities regulations who don't have the baggage of having a client whose activities are the exact opposite of the millions of traditional voters who elected George Bush president." Similarly, on the left, attacks on specific Bush nominees have been orchestrated by activist groups awash in lawyers. With regard to judicial appointments, Elliot Mincberg, a 1977 graduate of the Harvard Law School and legal director of People for the American Way, has stated, "I don't think that the fact that someone is an advocate insulates him from some responsibility for the content of what's being advocated."

These two examples (and there are many more) are representative of the two principal modes of attack on lawyers and lawyer-nominees for appointive office. The first is straightforward guilt by association: because the lawyer undertook to represent an entity involved in a sexually oriented business, he must himself be no better than a pornographer — and therefore would certainly be unfit for public office. The second mode of attack suggests that certain legal positions are, inherently, unacceptable for political reasons and that a lawyer who advances these arguments should be punished on that account. These modes of attack are equally insidious, and both are fundamentally at odds with the day-to-day realities of the legal profession and its governing principles.

Unpopular clients

ATTACKING A LAWYER based on the *identity* of his or her clients is simple guilt by association. It is a highly effective and highly destructive tactic because it taps into the primitive emotions so ably portrayed in *The Crucible*. Indeed, this is a pure form of "McCarthyism" — named for Wisconsin Sen. Joseph McCarthy, who refined it to a high art during his tenure at the Senate Permanent Subcommittee on Investigations (whose activities, along with those of the House Committee on Un-American Activities, are the allegorical subject of Miller's play). From the accusers' perspective, this tactic has two important benefits. First, it punishes the individual lawyer for his associations, for representing "bad" people. Second, it makes it more difficult for those people or causes to obtain effective legal representation in the future.

It is true, of course, that the legal profession has a long and honored tradition of representing unpopular clients and causes, often at considerable personal and professional sacrifice. For example, the leading patriot and future president John Adams undertook the highly unpopular representation

of the British soldiers involved in the 1770 "Boston Massacre." Feelings were running very high in colonial Boston, and Adams feared (not unreasonably given the temper of the time) for his safety and that of his family. Moreover, as David McCullough notes in his recent biography, *John Adams* (Simon & Schuster), "Criticism of almost any kind was nearly always painful for Adams, but public scorn was painful in the extreme." Nevertheless, Adams achieved acquittals for all but two defendants, who received comparatively minimal punishments. In his old age, Adams wrote that this was "one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country."

However, not all lawyers have this kind of fortitude. (Indeed, few people do, which is why such episodes are celebrated.) The reality is that, if lawyers can expect to be held accountable for the clients they represent, many simply will avoid controversial representations. In recognition of this truth, the rules of professional conduct governing the legal profession provide that: (1) lawyers have some basic obligation to undertake the representation of unpopular clients; and (2) a lawyer does not endorse a client's conduct, character, or views by taking the client's case. Although the rules of professional responsibility vary from state to state, they are in general agreement on these points. Specifically, as provided in the American Bar Association's Model Rules of Professional Conduct (which have been adopted in whole or in part by more than two-thirds of the states), "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities," and "[a]ll lawyers have a responsibility in providing pro bono publico service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients." These basic principles have, in fact, been a part of legal ethics since the profession began to establish general rules of conduct early in the last century and were incorporated into the American Bar Association's Canons of Professional Ethics as early as 1908. Canon 15, "How Far a Lawyer May Go in Supporting a Client's Cause," states: "No fear of judicial disfavor or public unpopularity should restrain [a lawyer] from the full discharge of his duty."

Rules of professional conduct provide that lawyers have some basic obligation to undertake the representation of unpopular clients.

Under these rules, a lawyer generally should refuse a client only if he or she finds the client, or cause, so personally repellent that it would affect his or her ability to perform in a competent and professional manner. Of course,

every lawyer can, and should, have some limits. However, members of the profession should reflect that, ultimately, the ability to make such choices is a luxury, since the one absolute in all of this is that the profession as a whole must provide legal counsel to all comers. A system where different lawyers make different choices and where those choices are not second-guessed — at least by fellow practitioners — ensures the maintenance of this overarching imperative and permits individual lawyers to decline clients they find personally unsavory.

Unpopular arguments

ATTACKING A LAWYER based on the arguments he or she has advanced on a client's behalf also runs counter to the rules of professional conduct. The premise here is that if a lawyer includes a particular argument in a legal brief, an oral presentation in court, or as part of an effort to explain publicly the client's position, he must agree with that position and, as a result, can be held accountable for it. However, each lawyer has an overarching ethical obligation to represent his or her clients "zealously" within the bounds of the law. This obligation includes advancing on the client's behalf every non-frivolous argument available unless the client specifically consents to forgo a particular argument. Moreover, a lawyer must abide by the client's decisions regarding the objectives of the representation (again, within the limits of the law).

Like the rules regarding the representation of unpopular individuals or causes, these requirements have long been a part of the ethical canons governing the legal profession. The ABA's 1908 canon of ethics provided that:

> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," . . . . No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

In addition to being inconsistent with the longstanding rules governing a lawyer's professional conduct, the assumption that a lawyer personally agrees with every argument he or she makes is simply at odds with the realities of legal practice. As every lawyer knows, there usually are many legal issues presented in any single case, whether it involves highly contentious matters like abortion, pornography, or affirmative action, or the most mundane questions of land conveyancing. A client may have very strong arguments on one or two points, but rarely does a client have a clearly prevailing position on every point. (Where this is the case, the matter is likely to be resolved before the lawyers are even called, and certainly before litigation

commences.) Invariably, there will be some arguments that, as a professional matter, the lawyer considers strong and others that, were the lawyer sitting as a judge, he or she would likely reject as weak. This is true regardless of whether the case has any larger political significance. In all cases, a lawyer is required to make every nonfrivolous argument available on a client's behalf, regardless of his or her own feelings about what, in some epistemological sense, the "right" answer should be.

Of course, lawyers are entirely free to counsel a client against asserting certain arguments or claims, and there are some who argue that lawyers should attempt to get their clients to "do the right thing" from a political or social perspective.[2] In this view lawyers should behave, in the words Russell G. Pearce, writing in the August 6, 2001 *Legal Times*, as a "governing class" with obligations to society which clearly trump those to a mere client.

The rules of professional ethics do permit a lawyer to urge upon a client one course of action over another, based on moral or prudential grounds in addition to simple legal calculation. As the ABA Model Rules note, in his or her role as an advisor, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." There are, however, two highly important qualifications. First, such advice must be given based upon what the lawyer believes to be the best interests of the client and cannot be driven by the lawyer's concern for the interests of some other entity, ideology, or cause, however exalted — including the lawyer's own political or moral views. (The model of lawyer as "ruling class," really more "enlightened despot," was deposed long ago, if it ever really reigned at all.)

Second, any such advice is strictly between the lawyer and the client. Whether and how such advice may have been given, and how the client responded to it, cannot later be revealed by the lawyer — even years after the fact.[3] Moreover, a lawyer cannot resign his or her representation merely because a client chooses not to accept or act on this advice, cannot later attack the client for a decision, and cannot even discuss how he or she "felt" about a client or the client's decisions.

In addition, a lawyer's obligation to represent a client's interests zealously also is limited by the overriding caveat that he or she cannot actually assist a

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[2] Indeed, the authors themselves experienced this, from colleagues, diplomats, and others, in full measure (both in Europe and America) during several years in which they represented the government of Croatia before the International Criminal Tribunal for Yugoslavia.

[3] The Supreme Court, in fact, recently ruled that the lawyer's obligation to keep attorney-client confidences private survives even the client's death. In that case, the Whitewater independent counsel had sought to compel disclosures from a lawyer whom former White House deputy counsel Vincent Foster had consulted before his death (*Swidler and Berlin* v. *United States*, 1998).

client in carrying out a criminal act. Lawyers who do undertake to foster the criminal plans or purposes of their clients enjoy no special immunity — either in law or theory — and are fully subject to prosecution like any other common criminal. Fortunately, however, the "mob lawyer" remains very much the exception rather than the rule. Such people are prosecuted and punished not because of who they represented, but because of the crimes they themselves committed.

The advocate's role

ACCEPTING THAT THESE are the rules, and they are, the question remains whether different standards should be applied to lawyers who willingly choose, on a regular basis, to represent a particular type of client, who specialize in certain highly controversial areas, or who accept contentious cases on a pro bono basis. An argument can be advanced that, at least in such cases, the identity of the client, and the arguments put forth on the client's behalf, can fairly be attributed to the lawyer because the lawyer has purposefully associated himself or herself with those clients and causes. In other words, if the lawyer did not agree with the client and the case, he would not have undertaken the representation. The temptation to ascribe a client's views to a lawyer is perhaps strongest in cases where the lawyer works full-time for a group dedicated to the pursuit of one or more related issues — such as civil rights groups, environmental protection groups, or "pro-life" or "pro-choice" groups. The agreement in point of view is no doubt true in many or perhaps most instances. But it should be remembered that there are many reasons, other than ideological commitment, why a lawyer may take on controversial clients or cases. These reasons vary, ranging from a general intellectual interest in the subject matter to pressure from an employer to simple contrarianism.

Nevertheless, the rules are, and should remain, the same. This is because they were not developed merely for the comfort of the legal profession, in order to enable practitioners to act as "hired guns" with a clean conscience and unblotted professional copybook. These rules were, in large part, adopted to ensure that every litigant can, as a matter of due process, obtain legal counsel. As explained in Canon 5, "The Defense of Prosecution of Those Accused of Crime," of the ABA's professional ethical rules:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

In addition to the due-process considerations, these rules also are compelled by the very nature of our adversarial system of justice. Following the English common law model, rather than the Roman law "inquisitorial" model still used today in continental Europe and much of the rest of the world, the actual workings of the American justice system depend largely upon the lawyers, rather than the judges. The judge's role in our system, whether a criminal or civil matter is involved, is to act as a strictly neutral arbiter. The judge cannot tell who should win based on the identity of the parties, and it is not the judge's role, as it is in some civil law systems, to perform his own investigation of the matter. Moreover, most judges have neither the time nor the resources to identify, research, and analyze all of the legal issues presented by a case.

Ultimately, judges must rely on the lawyers to present the facts and law of each case to them for decision, elucidating the relevant decisional principles.[4] The validity of this reliance is itself premised on the assumption that each of the lawyers involved will vigorously advocate the client's position, regardless of their own personal feelings about the correct outcome. A rule that permitted lawyers to be held accountable for the clients they represent, or the arguments they make, would fatally undermine this system. Judges could no longer act as neutral arbiters with any confidence that they were indeed doing justice. Unfortunately, at least for an important segment of those who have embraced these tactics, this may well be the whole idea.

The "crit" connection

THE RULES AND REASONS for not holding lawyers accountable for their clients described above are, in fact, very well known to the lawyers and activists who have utilized these tactics against lawyer nominees to federal office and, especially, for federal judgeships. For the less scrupulous, these tactics are merely a means of obtaining temporary political advantage — one way of defeating an objectionable nominee who is otherwise entirely qualified for the job in question. For others, mostly on the left of the political spectrum, there is much more at stake. At the very core of these attacks is a different conception of the legal profession, linked with a different vision of our judicial system.

Holding a lawyer accountable for his or her clients, and the arguments made on the clients' behalf, effectively denies the neutrality of the legal profession — the very essence of professionalism — and is one aspect of a

[4] The ability to relate the case-specific facts to the relevant and neutral decisional principles is of paramount importance in the common law system. In the long run, preoccupation with the results in individual cases, rather than the integrity of those principles, must certainly destroy the system itself.

broader movement, in progress now for many years, that denies the neutrality of the law itself. Although claims that the law, courts, or individual judges act politically surface from time to time (the most recent example being the dueling criticism of the dueling opinions of the Florida Supreme Court and the United States Supreme Court involving the last presidential election), a more systematic approach to the question can be traced to the 1970s and 1980s. During these years, scholars like Harvard professor Laurence Tribe openly began to advocate a policymaking role for the judiciary, with the Supreme Court in particular being viewed as a kind of enlightened despot — the "republic's schoolmaster," ensuring justice rather than dispensing justice under law. This idea reached its logical conclusion very early on in the "critical legal studies" (CLS) movement.

CLS involved a group of radical legal scholars, such as Roberto Unger, Duncan Kennedy, and Catharine MacKinnon, who argued, in one form or another, that law *is* politics. As Mark Tushnet, himself a founder of the movement and a leading "crit," wrote in the 1991 *Yale Law Journal*:

> When people associated with CLS assert that law is politics, I take them to mean that when one understands the moral, epistemological, and empirical assumptions embedded in any particular legal claim, one will see that those assumptions operate in the particular setting in which the legal claim is made to advance the interests of some identifiable political grouping.

As a practical matter, the ultimate denial of law's objectivity moved from the classroom and faculty lounge to the national stage in 1987, during the campaign against Judge Robert Bork's Supreme Court nomination. The stakes were high, and, by any objective measure Bork was one of the most qualified individuals ever nominated for a Supreme Court seat. Objectivity was, therefore, the first casualty of the Bork confirmation process. Although the assault came in the guise of "judicial philosophy," in itself a proper area of inquiry for the Senate, the real "charge" against Bork was that he simply decided cases the wrong way. Over and again Bork's opponents claimed that he was "anti-civil rights," or "anti-privacy," or "anti-individual," or "pro-business," merely because he had criticized the reasoning of important precedents dealing with such issues or because, while serving on the bench, he had ruled for one side more often than another. As a 1989 Justice Department report explained:

> [T]he reports [produced by Bork's opponents claiming to assess his judicial philosophy and record] premised their ultimate assessments of Judge Bork's record upon assumptions that are difficult to defend, except perhaps in raw political terms. Most significantly, they generally drew conclusions about Judge Bork's record without seriously attempting to challenge, or even to evaluate, the legal reasoning in the cases or the merits of the holdings from a legal perspective. . . . For example, the Public

> Citizen Report concluded that Judge Bork was "willing to cut back on basic safeguards for persons facing criminal charges" because in "the 24 criminal cases in which he [had] participated, Judge Bork [had] voted for the prosecution 23 times." . . . In essence, Public Citizen's complaint was not that Judge Bork had failed either to follow applicable precedent or to reason the cases through but simply that he had voted against the criminal defendant a certain percentage of the time.

Punishing lawyers, and particularly lawyer-nominees, based on the identities of their clients, or the arguments they have advanced, is merely another aspect of the "law is politics" approach that proved so successful against Judge Bork and that has since become something of an article of faith among the politically correct. In fact, the next use of this tactic against a judicial nominee took place only two years after Bork's nomination was defeated. In 1989, San Francisco lawyer Vaughn Walker's appointment to the local United States District Court was fiercely contested by a number of gay rights organizations, based on Walker's representation of the United States Olympic Committee in a trademark infringement action against the sponsors of the "Gay Olympics."[5] The tactic is especially suitable for use against nominees who have no long record of judicial opinions or personal writings to draw from, as is the case with a number of President George W. Bush's current nominees.

The almost casual use of this tactic today, by both left and right, lawyers and laymen, and against nominees for judicial and non-judicial offices, suggests that the "law is politics" thesis has gained much ground in the past decade. It certainly indicates a growing acceptance, among the politically active as well as the public at large, of this thesis — a highly troubling development since a neutral rule of law is the glue of any democratic body politic, and of ours in particular. The rejection of even the idea of neutral institutions and individuals was, in fact, a central premise embraced and implemented by the fascist and communist regimes of the last century, and was summed up by an avid early practitioner, Maximilian Robespierre: "I know only two parties, that of good citizens and that of bad." In the old Soviet Union, this principle was expressed by the term "*Kto Kovo*," "who triumphs over whom," which reduces all of life's complexities and nuances to a crude zero-sum paradigm.

This pedigree should be reason enough to eschew attacks on members of

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[5] Judge Walker was eventually confirmed for the United States District Court for the Northern District of California, sitting in San Francisco, after he was reappointed by President George H.W. Bush. Ironically, he has been attacked by conservatives for his vocal opposition to federal drug enforcement policies. This should serve as a reminder to all, right and left, who believe that they can predict how any nominee will perform on the bench.

the bar based on their clients or causes. Such tactics constitute a rejection of the principle of objectivity — that there can be right and wrong divorced from political labels or causes — and of the Western democratic tradition itself. Lawyers also, regardless of political beliefs or affiliations, should actively and collectively denounce such tactics — if not from a basic appreciation of the needs of our adversarial judicial system and its importance to our democracy and the rule of law, then out of a healthy dose of self-interest. Public opinion is a highly changeable affair. Although today the "politically incorrect" client may be a tobacco company, corporate "polluter," or gun manufacturer, tomorrow it might be banks, liquor manufacturers, or media companies that become the target of public opprobrium. There are few lawyers who are not vulnerable on this score. In a world of shifting black hats, you can never know when you will end up having fought on the wrong side.

From the perspective of the general public, all have an interest in a genuinely neutral judicial system, whatever may be its flaws. Objectively, there is no particular reason why a lawyer who has represented unsavory or unpopular clients cannot serve with distinction in high office. Before his election as president, Abraham Lincoln represented railroad interests which, at the time, enjoyed a reputation not unlike that of tobacco companies today. However tempting, and even satisfying, it may be to associate a lawyer with his or her clients and to make the lawyer "pay" for representing unpopular individuals or causes, it is in everyone's interest to rise above Judge Danforth's instincts.

Do Kids Need Government Censors?

By RHODA RABKIN

MOST AMERICAN PARENTS want to restrict children's access to entertainment glamorizing violence, sex, drug use, or vulgar language. Fashioning public policies toward that end is not, however, a simple task. Ideally, purveyors of "mature" entertainment (like retailers of other legal but morally dubious products enjoyed by many adults, such as alcoholic beverages, tobacco, and gambling) would voluntarily adhere to a code of advertising ethics. Self-regulation would obviate the need for burdensome government regulation. In practice, threats of legal restriction have always played an important role in persuading "morally hazardous" industries to observe codes of conduct and to avoid aggressive marketing to young people. Specifically, self-regulation on the part of makers of entertainment products (for example, movies and comic books) has allowed Americans to shield children and adolescents from "mature" content with minimal recourse to government censorship.

This tradition may, however, be about to change. In April 2001, Sen.

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Joseph Lieberman introduced the Media Marketing Accountability Act (MMAA) — a bill to prohibit the marketing of "adult-rated media," i.e., movies, music, and computer games containing violent or sexual material, to young people under the age of 17. The MMAA would empower the Federal Trade Commission to regulate the advertising of entertainment products to young people. The proposed legislation, if enacted, would inject a federal agency into decisions about the marketing of movies, music, and electronic games — and thereby potentially into decisions about what sorts of movies, music, and games are produced. Lieberman's hearings, well publicized at the time, provided a valuable forum for exposing entertainment industry practices to public scrutiny. Even so, the expansion of the federal government's regulatory powers in the area of entertainment and culture is undesirable compared to the traditional, and still workable, system of industry self-censorship.

Calling in the FTC

THE MOST RECENT ROUND of public controversy over mass entertainment began in the mid-1980s, when, at a Senate hearing, Elizabeth "Tipper" Gore (wife of the then-freshman senator) voiced alarm about sexually explicit and violent lyrics in popular teenage music. For this she was subsequently ridiculed by many self-styled civil libertarians and defenders of the music industry. Nonetheless, public concern over violence and vulgarity in entertainment revived mightily following the June 1999 shooting murders at Columbine High School in Littleton, Colorado — murders committed by teenaged boys steeped in various forms of violent entertainment. After that event, President Clinton asked the FTC to investigate the marketing of such entertainment to young people. In the fall of 2000, Sen. John McCain, chairman of the Senate Commerce Committee, presided over hearings on the resulting FTC report, "Marketing Violent Entertainment to Children." After extensive study of the marketing plans of the movie, music-recording, and electronic-game industries, the FTC concluded that media companies do aggressively market products with "mature" content to children, and that these practices "frustrate parents' attempt to protect children from inappropriate material."

The irresponsibility of the entertainment industry came up again as an issue during the 2000 presidential campaign of candidates Al Gore and Joseph Lieberman. At the time, many commentators dismissed their references to the issue as empty campaign rhetoric (the *Washington Post* reported that Gore had first telephoned industry executives to reassure them). But these skeptics proved wrong. In April 2001, Gore's former running mate introduced the MMAA. The bill (co-sponsored by Sen. Hillary Rodham Clinton) defined "targeted marketing" to minors of such material as "an unfair or deceptive" practice.

The text of Lieberman's bill cites the findings of the September 2000 FTC report. At that time, the FTC recommended that the entertainment industries: (1) establish or expand codes that prohibit target marketing to children and impose sanctions for noncompliance; (2) restrict the access of children to age-inappropriate entertainment at the retail level by requiring identification or parental permission; and (3) work to increase parental understanding of the ratings and labels. A second FTC report, made public in April 2001, found that matters had not much improved since the first report. Only the electronic game industry had agreed to adopt a recommended marketing code.

McCain's and later Lieberman's hearings generated negative publicity for the entertainment industry. The hearings also pressured industry representatives to publicly defend their marketing practices, and, in many cases, vow to improve them. Movie industry leaders, for example, promised to stop using children and underage teenagers to test-screen films with R-ratings and to stop showing trailers for R-rated films at movies rated for general audiences. Critics of the entertainment industry, however, were not satisfied with the promises made by entertainment executives. According to FTC testimony in July 2001, the movie and electronic game industries had improved their practices following the September 2000 report, but there was much room for further improvement. Most unsatisfactory of all, the music recording industry had made "no visible response" to criticism.

Public concern over violence in entertainment revived mightily following the shooting murders at Columbine High School.

Lieberman's proposed legislation would appear to inject real menace into public consideration of the issue. The bill empowers the FTC to formulate standards for entertainment advertising and to impose steep fines ($11,000 per day) for violations. Some entertainment executives claim to fear that Lieberman's legislation will empower the FTC to formulate a code of conduct and content guidelines for all entertainment media. In fact, one important consumer advocacy group, the National Institute on Media and the Family (NIMF), argues that the existing self-regulatory system, in which the movie, music, and electronic games industries each have their own separate voluntary system of ratings, should be replaced by a new uniform rating system, monitored by an independent oversight committee. It is also worth noting that the FTC itself, in its testimony before the House Commerce Subcommittee on Telecommunications in July 2001, did not seek regulatory authority over the marketing of entertainment products and in fact argued, in view of the First Amendment protections enjoyed by these products, that industry self-regulation was the best approach.

In a sense, however, these worries are unrealistic. In practice, federal regulatory content standards are unlikely — and the entertainment industry knows it.

The First Amendment

To be sure, legal restrictions on the access of young people to certain forms of entertainment are workable and do exist in many countries. In the United Kingdom, for example, the independent British Board of Film Classification makes judgments about the age-appropriateness of individual movies and sometimes demands cuts in problematic scenes in order to achieve a younger age-rating. Although the board's judgments are not legally binding, the power to license the exhibition of films does rest with local authorities, which generally follow the decisions of the national board. Overall, the British regulation of entertainment tends to be more rigorous than the American; for example, it is a legal offense for theater owners to admit the underaged to movies rated for older patrons (although small children are admitted to mild PG-rated fare if accompanied by parents). In 1984, Parliament passed a Video Recordings Act, which imposed criminal penalties for the circulation of videos without a rating certificate and for distribution of videos to anyone below the age indicated in the rating.

Historically, there were numerous attempts at the local level in the United States to enact something like the British approach to film ratings, but these uniformly failed in the face of opposition from the federal judiciary. For example, *Freedman* v. *Maryland* (1965) ruled that local film licensing boards are instruments of "prior restraint," and required them to obtain judicial findings of obscenity as a condition of denying exhibition licenses. In 1968, the Supreme Court invalidated a Dallas, Texas ordinance which prohibited anyone under 16 from viewing movies labeled "not suitable for young people" on the grounds that the law's standards were "too vague" (*Interstate Circuit* v. *Dallas*).

Obscenity laws have been of little use to American parents concerned about age-inappropriate entertainment, even though the Supreme Court has ruled (*Roth* v. *United States*, 1957) that obscenity is not entitled to constitutional protection — and even though some material which is not obscene for adults can still be considered obscene as to minors (*Ginsberg* v. *New York*, 1968). In the first place, legal obscenity has to do with references to sex and excretion; it does not even pertain to much of the content that contemporary parents find objectionable, such as violence, drug use, and occultism. Second, as a practical matter, it is very difficult to prove that any film, recording, or other product meets the legal test for obscenity, since the material must be not only "patently offensive," but "utterly without redeeming social value." And unless proven legally obscene, "speech" about sex

(including dramatic portrayals and music lyrics) enjoys First Amendment protection. Nor have the outcomes of recent local obscenity prosecutions been encouraging; juries tend to defer to "expert" witnesses who find artistic merit in Robert Mapplethorpe photographs and 2 Live Crew lyrics. For all these reasons, most parents will continue to consider much entertainment to be highly unsuitable for their children even though that entertainment cannot technically be defined as "obscene" under current law.

Why voluntary aged-based ratings?

Even in the 1930s, when America was a much more conservative country (at least in terms of popular culture) than it is today, public outrage over the emphasis on sex and crime in the movies led not to censorship by the federal government but to a system wherein Hollywood regulated itself. The movie moguls created their own Production Code Administration (PCA) in 1930, supervised first by William Hays and later, in 1934, with more seriousness, by Joseph Breen.

The so-called Hays Code presumed that movies were far more influential than books and that standards of cinematic morality consequently needed to be much stricter than those governing novels and other literature. The code forbade any mention at all of certain controversial topics, such as "illegal drug traffic," "sex perversion," "white slavery," and "miscegenation." The code did allow for the depiction of some crime and some immorality (such as adultery), but stipulated that no presentation should encourage sympathy for illegal or immoral acts.

The American film industry has a long history of self-censorship for the simple reason that offending audiences has never been in its self-interest. Business concern for the bottom line, not moral sensitivity, dictated the willingness of the film industry to regulate itself. For example, during the 1920s and 1930s, Hollywood seldom produced mass market movies with dignified portrayals of black Americans. Scenes of racial mixing on terms of social equality were avoided because they were known to offend white Southern audiences. By the 1940s, however, tentative efforts at more dignified portrayals could be seen, and soon the industry was censoring itself to avoid offending black Americans. The NAACP's threat of a boycott caused Walt Disney to withdraw *Song of the South* (1946), a partly animated musical based on the Uncle Remus stories. The NAACP found the film's depiction of happy slaves demeaning. For a long time, this feature was available only on a Japanese laserdisc, and even today one can obtain a video version only from Britain or Germany.

The Hays Code assumed that adults and children would and should share the same entertainment at the movie theater. But the code applied only to American-made films, and in the 1950s and 60s, Hollywood found itself losing box office share to "sophisticated" European imports. In 1968, the

movie industry abandoned its code of conduct approach and replaced it with a system of age-based ratings devised by Jack Valenti, then (as now) president of the Motion Picture Association of America.

The history of the comic book industry also illustrates the effectiveness of industry self-regulation in shielding the young from "mature" content. Public concern about crime and horror comics in the 1950s led to congressional hearings sponsored by Sen. Estes Kefauver, Democrat of Tennessee. The hearings did not come close to proving that lurid comics caused juvenile delinquency, but in the face of negative publicity an embarrassed comic book industry opted for self-regulation. The system was voluntary, but the fact that most retailers chose not to display or sell comics without the industry seal of approval meant that objectionable comics soon languished, unable to reach their intended market.

Television greatly reduced the popularity of comic books among children, but the comic book medium did not die. Instead, a new reading audience for "adult" comics came into being. In the 1970s and 80s, as graphic violence became more acceptable in movies and television, the industry rewrote its code to be more permissive. In September 2001, the largest comic book company, Marvel, released several new lines (*Fury*, *Alias*, and *U.S. War Machine*) completely without code approval. The new titles, which allowed for profanity, sexual situations, and violence, were big sellers. But they are not sold at newsstands, airports, or convenience stores; they are distributed through specialized comic book stores which tend to be patronized by older purchasers (average age: 25).

An age-based classification system has also been employed since 1994 by the video and computer games industry, which has an Entertainment Software Rating Board (ESRB). The board classifies products as EC (everyone including young children), E (everyone), T (teen), M (mature — may not be suitable for persons under 17), and AO (adults only).

The music recording industry as such does not employ an age-based ratings system, but an increasing number of recording artists do (at their own discretion) attach a parental advisory label to their products. Some music performers, in an effort to reach the broadest possible market, now even release their albums in two versions, one "explicit" and the other "clean"!

Why age-based ratings at all?

AGE-BASED RATINGS provide a useful tool for parents who want to monitor entertainment. Children are far more impressionable than adults and far less able to distinguish fantasy (or satire) from reality. At the same time, adults can and should contemplate themes which children find disturbing (and even the Bible contains some narratives that are not appropriate for young children). Moreover, age-based ratings, as opposed to outright bans of "strong" material, allow our society to avoid

the problem raised in *Butler* v. *Michigan* (1957), a Supreme Court decision which overturned a state obscenity law on the grounds that it would "reduce the adult population . . . to reading only what is fit for children."

In Britain and Canada, as mentioned, age-classification systems are enforced by law. This is an effective technique where admission to movie theaters is concerned, and has the added benefit that extensive regulation of advertising to young people becomes unnecessary. One has to doubt, however, the effectiveness of legally enforced age restrictions with respect to such media products as games, videos, and music recordings used at home. Unless parents are especially vigilant, it is likely that young people will encounter these products at the homes of older friends, and it is also easy for an underage consumer to arrange purchase of the product through an older friend.

In any case, the British and Canadian approach is unlikely to pass constitutional muster in the United States, and it is not clear that legal prohibition is superior in all respects to the traditional American system of industry self-regulation. In principle, parents know better than anyone else the level of maturity of their children and are therefore best equipped to judge the appropriateness of books, television shows, music, movies, and games. By way of example, even an acknowledged "children's classic" such as *Huckleberry Finn* (which has frequently been the object of efforts at banning) should not be turned loose on the young without careful adult guidance. An older child can understand the ironic artistic purpose behind the eponymous narrator's constant use of a now-taboo racial epithet; a younger or less mature child might be enticed (innocently or otherwise) to mimic the speech of Twain's characters.

Even in the pornography business, marketers have found it useful to distinguish between the hard-core and soft-core stuff.

As practiced in America, voluntary age-based ratings systems are not censorship; they are more akin to the consumer information labeling that we now take for granted on food products and clothing. Even in the pornographic video business, marketers have found it useful to distinguish between the hard-core and soft-core stuff. FTC regulation was not necessary; the pornography marketers themselves discovered the utility of classifying their products and so advising their customers.

Although age-based ratings are not censorship, they can, with the cooperation of entertainment producers, retailers, and parents, effectively restrict the dissemination of offensive materials to young people. Thus far, of the three main segments of the entertainment media business, the game industry has been the most cooperative in this respect, and the music industry the least.

There are several plausible explanations for why the game industry has in

recent years behaved more responsibly than other branches of the entertainment industry. Perhaps most important is that most games are quite expensive, around $40 or more, so that parental involvement in purchasing is highly likely. A second factor might be that the Columbine murders focused public attention on the possible negative effects of violent games, thereby putting a spotlight on the industry.

The "oppositional" music industry

Of all branches of entertainment, the music recording industry has been least responsive to parental concerns and most resistant to self-regulation. The best explanation is that "oppositional" teenage music, although far from the whole of youth-oriented recordings, accounts for a significant proportion of sales. Many music performers who cater to the adolescent audience view themselves as anti-establishment rebels, and this self-image is inseparable from their marketing strategies. Irreverence and defiance seem grown up and sophisticated to many teenagers.

What comic books were to young people in the 1930s and 40s, popular music is to today's generation of adolescents. Although many adults focus on television as a baleful influence on the younger generation, this is just a sign of how out of touch with teenagers they are. Survey evidence indicates that, in terms of both hours logged and overall meaningfulness, music listening has an importance in the lives of many adolescents far beyond what most parents understand. Parents can easily monitor what their children watch on television, but most adults find it impossible to listen to teenage "noise" on the radio or CD, let alone distinguish among the many varieties, such as album rock, alternative, grunge, world beat, progressive rock, salsa, house, technopop, etc. Yet involvement in a particular sub-genre of music is often an important aspect of adolescent social identity. Conversance with popular culture seems to enhance a teenager's social contacts and status, and contrariwise, the young person who remains aloof from pop music is likely to be excluded from many teen peer groups.

One should not assume that music with lyrics featuring profanity, violence, casual sex, drug use, and so on is itself the cause of negative behaviors. Adolescence is a time of life when young people must adjust to startling discoveries about sex, violence, and other potentially troubling aspects of the real world. Just as many adults enjoy watching movies about gangsters, with no inclination toward becoming gangsters themselves, many teenagers find in their music a safe way to satisfy curiosity about the darker aspects of life. The key to understanding this segment of the entertainment industry is that "mature" content actually signifies the opposite, a puerile interest in everything so taboo that parents will not discuss it with their children. The good news is that the teenager who does not die first (or become pregnant or addicted to drugs) almost always grows out of it. On the other hand,

undoubtedly some troubled teenagers focus on music with morbid, aggressive, profane, or vulgar lyrics because it seems to legitimize their impulses — in which case the music may indeed reinforce their predispositions. Many different forms of music are popular with teenagers, so preoccupation with "oppositional" music should draw parental attention — which does not mean that underlying problems are addressed by simply prohibiting a form of music.

Movies were controversial from their inception. Comic books were born innocent, but aroused parental concern when they began to exploit themes of violence and sex. Scantily-clad women and heads dripping blood came as a shock to adults who had thought comics were about funny talking animals. Similarly, coarse, violent, misogynistic lyrics (to say nothing of offensive references to race, religion, and sexual orientation) prevalent in some youth-oriented music came as a shock to many parents raised on the "outrageous" music of their day, 1950s rock-and-roll.

Survey evidence indicates that music listening has an importance in the lives of adolescents far beyond what most parents understand.

Back in 1985, when Tipper Gore, together with several other Washington wives of politicians, founded the Parents Music Resource Center (PMRC), their new organization successfully drew public attention to the problematic content of rock lyrics, particularly those of heavy metal groups with names like Twisted Sister, Black Sabbath, Judas Priest, etc. In the view of the PMRC, it was a straightforward issue of consumers' rights that parents know about references to sex, drugs, alcohol, suicide, violence, and the occult in their children's music. The PMRC proposed that music companies affix warning labels to their products to alert parents about questionable content (for example, V for violence, X for sexually explicit lyrics, O for occult).

Defenders of the music industry predictably accused the PMRC of advocating censorship. This was unfair — no censorship is involved when retailers determine that they do not wish to be in the business of selling products that are morally offensive either to themselves or to their customers. But music industry executives were right to foresee that, once recorded music was rated, at least some major retail marketers (such as Wal-Mart) would refuse to carry products with "explicit" content.

The charge of censorship was unfair, but the music industry was right that there were real problems with the PMRC approach, which viewed any reference to a topic, regardless of how the topic was treated, as cause for a warning label. Thus, an anti-drug song would call for a warning sticker the same as a song that promoted drug use. This was one of the problems with the Hays Code and the comics code as well. For years, movie executives shied

away from *The Man with the Golden Arm*, until Otto Preminger made this powerful anti-drug drama and successfully released it without PCA approval. In 1970, after receiving a letter from the Department of Health, Education, and Welfare, Marvel Comics incorporated an anti-drug story into its popular Spider-Man series, but had to release the titles without code office approval.

Another difficulty that arises with attempts at age-classification of music lyrics is the problem of double meanings, which have a long tradition in songwriting. John Denver testified to good effect at the 1985 hearings that his song "Rocky Mountain High" about the beauty of nature had been unfairly banned by some radio stations out of misplaced zeal against drug references. But those responsible for age-ratings will have to face such issues as what Marilyn Manson means when he sings about someone who "powders his nose." Most parents will not have a problem with children hearing Bessie Smith sing: "Nobody in town can bake a sweet jelly-roll like mine" — but of course she meant something by that, too. The enterprise of routing out double entendres can quickly turn ridiculous, seeming to prove the truth of Lenny Bruce's observation: "There are no dirty words; there are just dirty minds."

With rap music and hip-hop, the question of morality in music became entwined in questions about racism and double standards.

In response to the 1985 Commerce Committee hearings, and because of a wave of local prosecutions (utilizing charges of obscenity) against retailers, in 1990, the Recording Industry Association of America (RIAA) announced that it had designed a "Parental Advisory/Explicit Lyrics" label, with a distinctive logo. But whereas the movie industry's trade association, the MPAA, rates individual movies, the RIAA created no guidelines or recommendations and left the use of the labels to the discretion of the individual recording companies. "This consistent reference to parents is offensive. We are all parents," said RIAA president Hilary Rosen. "I don't want to tell parents whether Chuck Berry is singing about his ding-a-ling."

The PMRC was disturbed by the lyrics of heavy-metal rock groups, but many parents would soon be concerned by the violence and sexual vulgarity in a new form of teen-age music: hip-hop, or as it is sometimes (though not accurately) called, rap music. And with this new form of music, the question of morality in music became entwined in questions about racism and double standards.

Sen. Lieberman did not invite Russell Simmons, a longtime hip-hop entrepreneur and chairman of the Hip-Hop Summit Action Network, to testify at his hearings. But Simmons attended anyway and managed to speak. Simmons complained that Lieberman had unfairly targeted hip-hop as

objectionable. In the *New York Times*, he wrote: "hip-hop is an important art form, really the first new genre of music to emerge since rock and roll. . . . To deny its power and artistic merit in an attempt to silence it is downright dangerous." Criticism of violent, profane, and vulgar music lyrics, Simmons implied, betrays unconscious racism because black performers are the main creators of "gangsta rap" and hip-hop.

Simmons was wrong to equate Lieberman's proposed legislation with censorship; the Media Marketing Accountability Act does not ban any form of entertainment — it calls for age rating and restricts advertising to minors. But Simmons still had a point worth considering. Many parents upset by hip-hop would not be similarly disturbed by traditional songs, such as "Whiskey in the Jar" (an Irish song which celebrates drinking) or "Tom Dooley" (a Civil War-era song that became a popular hit for the Kingston Trio in the early 1960s), which recounts a murder. One of my own favorite pieces of recorded music, which I have listened to in the company of my children, is "Mattie Groves," performed by the Beers Family. The ballad is a tale of adultery and murder in medieval Scotland — but it conveys the dreadfulness of sin and violence, and I consider it a highly moral work. Of course, some parents would be equally disturbed by these songs (just as some are offended by the "occult" in a children's classic such as *The Wizard of Oz*). Many parents believe that evil has enormous inherent attractiveness, so that any depiction of wicked conduct is morally dangerous. But should the law require the makers of all such recordings and videos to affix a warning sticker and submit their advertising plans to federal supervision? In answering "no," I am of course invoking aesthetic discriminations that might elude committees and with which surely an "objective" legal-regulatory system is ill-equipped to grapple.

There is some basis for optimism that the value of voluntary labeling has become apparent even to the music industry.

There is some basis for optimism that the value of voluntary labeling has become apparent even to the music industry. A hip-hop "summit" held in July 2001 brought recording company executives together with established black organizations, such as the NAACP. The three-day conference (at which Minister Louis Farrakhan spoke and urged the musicians to display more "responsibility") led to considerable reflection within the hip-hop community. Industry representatives at the summit agreed on a uniform standard for the "Parental Advisory" label, which should be one size, plainly displayed, and not removable, on the cover art of the recordings and visible on all advertising as well. The RIAA continues to insist, however (as noted critically in the FTC's December 2001 report), on its right to aggressively market labeled music to young people.

Teenage taste in popular music tends to be fickle. It happens that at this time one of the most popular music styles, hip-hop, is dominated by African-American performers. But parental concern about inappropriate lyrics extends far beyond hip-hop; in fact it began with heavy-metal music, which was (and is) performed and consumed almost exclusively by white males. In any case, not all hip-hop music contains lyrics disturbing to parents, nor is it consumed exclusively by African-Americans. The issue of race is essentially a distraction; no race has a monopoly on supplying — or consuming — unwholesome entertainment of the kind that concerns many parents.

The tobacco model

As it turns out, the music industry was right to argue that any concession to parental interest in labeling would stimulate additional demands for regulation of entertainment. One of the most well-respected citizen groups concerned with media, the National Institute on Media and the Family (NIMF), has paid considerable attention to media ratings, and is dissatisfied with the current system. The NIMF, along with other children's health advocates, has argued for an independent ratings oversight committee and a unified media ratings system to cover movies, television programs, music, and games.

Some politicians and children's "advocates" seem entranced by the prospect of identifying the entertainment industry in the public mind as the successor to Big Tobacco as a threat to the health of young people. In the late 1990s, Sen. Sam Brownback, Kansas Republican, helped persuade the American Medical Association to assert a causal connection between violent entertainment and individual acts of aggressiveness and violence. In fact, an impressive list of highly respectable organizations, such as the National Institute of Mental Health, the National Academy of Sciences, the American Psychological Association, and the American Academy of Pediatrics, are on record agreeing that exposure to media violence presents a risk of harmful effects on children. These claims in turn help support litigation that seeks tort damages from the producers of violent entertainment. For example, families of victims of the Paducah, Kentucky school shooting filed lawsuits against entertainment companies on the grounds that their products created a mindset that led to murder. Thus far, lawsuits of this nature have been dismissed in court, but, then, so were tobacco suits — until they weren't.

Perhaps because stridently "moral" discourse seems less acceptable in America today than it once was, many essentially moral concerns tend to be packaged and presented in terms of concern for danger to "children's health." And there is no shortage of experts whose research alleges that violence (and sometimes sex) in entertainment presents proven health hazards analogous to cigarette smoking. According to one Harvard researcher, Dr. Michael Rich, "The findings of hundreds of studies, analyzed as a whole,

showed that the strength of the relationship between television exposure and aggressive behavior is greater than that of calcium intake and bone mass, lead ingestion and lower IQ, condom nonuse and sexually acquired HIV, or environmental tobacco smoke and lung cancer, all associations that clinicians accept and on which preventive medicine is based."

Of course, some experts have come to the opposite conclusion about the effects of media on behavior. The September 2000 FTC report acknowledged that there are abundant studies on both sides of the issue. But politicians are apt to cite experts with whom they already agree. For example, according to Charlie Condon, South Carolina's attorney general, "what we have here is a virtual replay — only much worse — of the damage the tobacco industry did to our children. But instead of Joe Camel, Hollywood is using Eminem, South Park, Doom and people such as film director Quentin Tarantino to seduce children and subvert parents." The solution, according to Condon, is that "we state attorneys general must hit Hollywood where it hurts — in the court and in the pocketbook."

"Marketing to children" is not a clear, unambiguous concept. More than two-thirds of the audience for MTV consists of viewers aged 18 or older.

It is possible that, even if passed, the Media Marketing Accountability Act would be found unconstitutional in the first federal court to hear a challenge to it. In one recent case, *Lorillard* v. *Reilly* (2001), which involved efforts by Massachusetts to restrict the advertising of tobacco products, the Supreme Court stated that retailers and manufacturers have a strong First Amendment interest in "conveying truthful information about their products to adults."

Supreme Court decisions in recent years have tended to expand protection for commercial speech, even when the advertising in question is for products recognized as presenting moral hazards. But the purveyors of such products sometimes — as a matter of good public relations — prefer to withhold advertising. For example, R.J. Reynolds in a 1998 court settlement with 46 states agreed to end its Joe Camel cigarette advertising. The alcoholic beverage industry also follows voluntary industry advertising codes, although, in view of the extent of the teenage drinking problem, some consumer watchdog groups believe that stricter curbs on industry advertising are needed.

Unfortunately, "marketing to children" is not a clear, unambiguous concept. Many adults watch children's programming, such as "The Wonderful World of Disney," and more than two-thirds of the audience for MTV consists of viewers aged 18 or older. The FTC objected to the industry practice of showing movie trailers for R-rated movies before G- and PG-rated movies. But as Valenti testified, "the R-rating does not mean 'Adult-Rated'

— that is the province of the NC-17 rating. Children are admitted to R-rated movies if accompanied by a parent or adult guardian. The rating system believes that only parents can make final decisions about what they want their children to see or not to see." A Pennsylvania statute banning the practice of showing previews for R-rated features at G- and PG-rated movies was ruled unconstitutional by a federal court. Some industry executives responded to complaints about movie trailers for R-rated movies by asking where the regulation of advertising would stop — should R-rated movies be removed from newspaper ads? But Jack Valenti eventually responded to congressional criticism by promulgating new MPAA guidelines, including: "Each company will request theater owners not to show trailers advertising films rated R for violence in connection with the exhibition of its G-rated films. In addition, each company will not attach trailers for films rated R for violence on G-rated movies on videocassettes or DVDs containing G-rated movies." This suggests that parent groups have enough clout to persuade the entertainment industry that it should "voluntarily" refrain from advertising R-rated movies in certain venues.

A statute banning the practice of showing previews for R-rated features at G- and PG-rated movies was struck down by a federal court.

The MPAA ratings board has assigned age-based ratings to almost 17,000 films. According to Valenti, "While there is criticism about the 'accuracy' of the ratings of individual films, never once have there been accusations faulting the integrity of the system." This claim is mildly amusing, since the membership of the ratings board is an industry secret, and individuals sign secrecy agreements before serving. Even so, a recent *Washington Post* story featured an interview with a former member of the board who, violating his secrecy agreement, complained of an idiosyncratic, inconsistent, and autocratic rating assignment process.

Valenti, representing the movie industry at the Senate hearings on the Media Marketing Accountability Act, argued convincingly that the proposed legislation would likely jeopardize the voluntary ratings system on which the FTC regulatory regime is supposed to be based. As Valenti noted, "the bill immunizes those producers who do not rate their films." "Why," he asked, "would sane producers continue to submit their films for voluntary ratings when they could be subjected to fines of $11,000 per day per violation?" A good question. What seems likely is that Lieberman's approach requires the creation of a different, compulsory ratings system staffed not by unaccountable, anonymous industry insiders but by "members of the entertainment industry, child development and public health professionals, social scientists and parents," as one witness recommended.

If children's "health" is the primary concern, there is no reason to expect such an independent board to stop with rating entertainment for violent content when there are so many other "threats" to the health of young people and so many pressure groups concerned with such health. What would certainly follow would be calls for adding a ratings category to restrict the depiction of tobacco and alcohol products. There would also be pressure to address other social problems as well, such as eating disorders among teenage girls allegedly promoted by unrealistically slender actresses. Health-oriented raters might consider "safe sex" scenes with condoms more youth-appropriate than sexual depictions without them. Racial, religious, and sexual stereotyping also present a threat to the health of children, to be dealt with accordingly.

In Britain and Canada, where age rating has legal force, all kinds of issues, such as cruelty to animals, racial slurs, and even "presentation of controversial lifestyles," can be grounds for restriction. But at least in those countries, local authorities have the final say, an important check on the system lacking in Lieberman's plan to give the FTC regulatory authority.

The bull in the (video) shop

REPRESENTATIVES OF THE entertainment industry have deployed two serious arguments against the MMAA: first, that violence in entertainment does not cause young people to behave violently; and second, that the proposed legislation excessively empowers government to control speech and art through control over the marketing of entertainment.

Entertainment executives are right that media messages have a complex, indirect relationship to behavior. Consequently, our society wisely vests control over the entertainment choices of young people in their parents using common sense, not in a clumsy, heavy-handed government bureaucracy relying on the latest, and soon to be controverted, social science research. A sense of proportion is needed if we are to reinforce parental authority without attempting to supplant it. Self-regulation is a system in which all citizens assume civic responsibility. The MMAA, by contrast, assumes that young people are helpless victims of the advertising and media to which they are exposed. Much of the rhetoric supporting the legislation is uncomfortably reminiscent of the campaigns directed at tobacco products, junk foods, and guns. One collateral result is likely to be encouragement for lawyers to sue entertainment companies.

What cannot be achieved by the heavy hand of the law can be achieved by industry self-regulation — but this requires the cooperation of the regulated. Lieberman's bill does not seem well thought out. It would punish companies that rate their material, but no law can compel the companies to rate their material satisfactorily in the first place. What is involved here obviously

calls for much more complex judgments than, for example, listing the alcohol content of a beverage or the nicotine content of a cigarette. If the music or movie industry resists rating because it leads to punitive fines, the next step would have to be rating by quasi-official "independent" boards whose judgments would then be utilized by FTC regulators. Self-censorship would give way to federal regulation. Congress will have performed its usual sorry trick — enact a vague regulatory regime and then settle back as lobbying interest groups funnel money to Washington politicians in hope of gaining favorable treatment.

In the past, families, schools, and churches were the primary institutions socializing American youth; today it seems that they share this function with media industries, advertisers, and celebrities. It is easy to understand the appeal of Lieberman's approach to parents frustrated by the prevalence of violence, sex, profanity, allusions to drugs, etc. in movies, music, and games. Only extreme civil libertarians would argue that parents should not be socially supported in their efforts to monitor and influence the entertainment choices of their children. The MMAA empowers the FTC only to regulate advertising to young people, so the legislation would not truly establish a system of federal censorship over entertainment. But it would bring us much closer to such a system than we have ever come in our history. Averting this outcome is in everyone's interest, but the entertainment industries themselves have the greatest responsibility to do so — through voluntary observance of codes of conduct acceptable to American parents. If debate on the MMAA (despite the proposed legislation's many flaws) helps encourage this observance, it will have served a useful purpose.

China's America Problem

By YING MA

IN THE AFTERMATH of the terrorist attacks on the United States on September 11, numerous Chinese web users gloated in chat rooms over America's national tragedy. Declaring that the attacks were payback for America's imperialistic foreign policy, they rejoiced at the sight of the "world's policeman" being dealt a colossal blow. To be sure, these Chinese were not the only ones who displayed little sympathy for America's grief. Most notably, Palestinians in the West Bank celebrated by passing out candy to children and dancing in the streets.

Yet gloating from the Chinese remains deeply disturbing, as these are the very people on whose behalf U.S. policymakers have claimed to seek freedom and democracy in the past 12 years. That the gloating comes from the Chinese internet generation is even more unsettling, for this small but rapidly growing population has been widely hailed by the Chinese and U.S. governments as the bright future of a more modern, more open, and more liber-

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al twenty-first century China. At this time of persistent national soul-searching about the nature and merits of U.S. foreign policy, a close examination of the grave disconnect between Washington and the people of China is sorely needed.

A more (and less) Americanized China

Ever since the government of China opened fire on peaceful demonstrators demanding democracy at Beijing's Tiananmen Square on June 4, 1989, American criticism of an authoritarian Chinese regime that has been reluctant to democratize has been a constant. Policymakers left and right have claimed that by fighting for liberty and democracy in China, not only are they upholding values and principles upon which this country was founded, but they are also fighting for the Chinese people who cannot and perhaps dare not speak up against their own government. As Rep. Henry Hyde, Chairman of the House International Relations Committee, said, "We shall remain with [the Chinese people] until they are free, however long the struggle."

As it turns out, the Chinese people, in no uncertain terms, have repeatedly said, "No, thank you." In just the past couple of years, a number of spontaneous outbreaks of anti-Americanism in China have given voice to this sentiment. In May 1999, when NATO bombed the Belgrade Chinese embassy in what Americans called an accident, massive anti-American riots erupted throughout China. The destruction of American property, physical and verbal intimidation of Americans, and protests led by the chant of "Down with the USA" paralyzed major Chinese cities for days. This past April, when an American EP-3 surveillance plane and a Chinese fighter plane collided during what Americans referred to as routine intelligence gathering near the south China coast, Chinese on the street and in internet chat rooms threatened to "teach the United States a lesson" in "World War III." The gloating on the internet post-September 11 emerged as the latest manifestation of pent-up Chinese frustration with the United States.

It is difficult for Americans to understand Chinese hostility toward them. After all, it was less than 13 years ago that students and workers piled into Beijing's Tiananmen Square demanding a free and liberal society modeled after the United States. Since then, economic liberalization has brought about an ever more American look and feel to China. In a country where everyone used to wear drab Mao suits colored in only gray, blue, and black, the Chinese now sport Nike shoes, NBA T-shirts, and Levi's jeans. McDonald's, KFC, and Pizza Hut decorate corners of Chinese cities, and products manufactured by Kodak, Coca-Cola, and Procter & Gamble are used in urban households throughout China. Many Chinese also have become increasingly "Americanized" themselves: working in American-based multinationals, seeking and receiving American venture capital fund-

ing for businesses, studying abroad in the United States, watching American movies, reading American news sources online, and admiring American popular culture icons from Madonna to Michael Jordan.

At the same time, Chinese increasingly view America today as a bully who habitually badgers their pride, belittles their accomplishments, transgresses their national sovereignty, and attempts to thwart the rise of their country's international influence. Perceived American self-righteousness, arrogance, "obsession" with liberty and democracy, and most of all, missionary zeal to change China's communist regime have served to fan sentiments that range from indignation to rage.

Many in Washington have accused the Chinese government of stirring up anti-American sentiment in China in an effort to deflect foreign criticism. Though Chinese perceptions of America no doubt are influenced by the Chinese state media, which regulate and manipulate every medium from television to radio, from print to internet, these perceptions are hardly an invention of the government. They also have roots in the real world, as the product of protracted Sino-American disputes, rising Chinese nationalism, and changing realities in Chinese society since 1989.

U.S. policy, Chinese discontents

ANTI-AMERICAN SENTIMENTS on the popular level in China since 1989 have been shaped by endless, contentious conflicts on the government-to-government level. Disputes in multiple policy areas, ranging from trade to human rights, from weapons proliferation to Taiwan, have convinced many Chinese that the United States is intent on coercing China's internal developments or weakening its international influence. Resentment emerged most notably at the beginning of President Bill Clinton's first term, when he conditioned the granting of China's most-favored-nation (MFN, now known as normal trade relations) status in 1994 to demonstrable improvements in the country's human rights situation. Having accused President George H.W. Bush of "coddling dictators from Baghdad to Beijing" in the 1992 election, President Clinton came to office determined to change China's human rights practices by leveraging America's tremendous trade and market influence.

Beijing flatly refused to yield to President Clinton's pressure, responding that it would not tolerate "the United States openly intervening in China's affairs and bossing it around." In the end, the Clinton administration gave in: MFN was granted and its linkage to human rights eliminated. However, America's willingness to dictate political reforms in China by holding its economic progress hostage was a source of resentment not only to the Chinese leadership, but also to the Chinese people, who felt their own prospects threatened. To them, this form of American arrogance and coercion would manifest itself many times over in the 1990s.

Though President Clinton changed his tone and policy on China from a confrontational to a conciliatory one in 1994, many in Washington continued to take a harder line. Vehement criticism of China (and of Clinton's about-face) continued from the political left to right. Notable Sino-American conflicts in the past decade have included: the annual congressional struggle (until 2000) to deny China permanent normal trading status (PNTR) on the basis of human rights objections; the 1994 U.S. inspection of the Chinese ship *Yinhe* over Chinese objections for hidden chemical weapons (none were found); the U.S. attempt to block China's bid for hosting the 2000 Olympics; the granting of a visa by the Department of State to Taiwanese President Lee Teng-hui to visit the United States in 1995; U.S. accusations of Chinese attempts to make illicit campaign contributions during the 1996 elections; NATO's bombing of the Chinese embassy in Belgrade in 1999; findings by the congressionally appointed Cox Committee of Chinese nuclear espionage in 2000; and the EP-3 incident in 2001.

Washington's gestures toward Taiwan have appeared to the Chinese as an effort to weaken their nation.

Influenced by government propaganda, Chinese goodwill toward the United States took a beating with each new Sino-American conflict. "Criticisms [of China] got blown out of proportion by some on Capitol Hill," said Professor Jia Qingguo, associate dean and professor of Beijing University's School of International Studies. "To most Chinese, it is very hard to see good intentions in such exercises."

Washington's gestures toward Taiwan, in particular, have appeared to the Chinese as an effort to weaken their nation. Fundamental to the modern Chinese worldview and identity is the belief that Taiwan, which split from the mainland as a result of an unfinished civil war, should be returned to China rather than exist as a separate, independent entity, as many Taiwanese natives hope. Even exiled Chinese democracy activist Wei Jingsheng, who spent years in jail for criticizing the Chinese government, stated at a press conference upon his arrival in the United States, "Taiwan is a territory that belongs to China." This nationalistic desire for territorial reunification, according to Minxin Pei of the Carnegie Endowment for International Peace, is simply "poorly understood" here in the United States. What Washington views as an important strategic and moral effort to defend democratic Taiwan from provocative military posturing by the communist regime has been interpreted by many Chinese as an effort to deny them the eventual unity of the motherland. As a result, U.S. weapons sales to Taiwan and the U.S. commitment (at some times more ambiguous than at others) to come to Taiwan's defense if attacked by China have been characterized, as one retired professor at the Chinese Academy of Sciences put it, as a "humiliation that [China] cannot swallow."

If U.S. gestures toward Taiwan have been interpreted as ill-intentioned, the embassy bombing in 1999 and the EP-3 incident in 2001 have been viewed as deliberate attempts to humiliate China. Ordinary Chinese today still refuse to believe the American explanation that the bombing was purely an accident or that the reconnaissance plane was traveling in international space. Instead, they continue to call both incidents "stupid acts of American aggression."

President George W. Bush's October 2001 visit to China occasioned a hiatus in Sino-American squabbles. But even President Bush's declaration in Shanghai that China was not an enemy of the United States and that the two countries were fighting terrorism "side by side" could not overturn negative impressions resulting from years of emotionally wrenching bilateral conflicts. As Chinese President Jiang Zemin beamed at the upswing in Sino-American relations, Chinese internet chat rooms were filled with skeptical comments about the intention of Bush's friendly words and sarcasm about America's willingness to say anything to pursue selfish interests — which in this case meant securing Chinese support for the war on terror.

Propaganda and its collaborators

SINO-AMERICAN SQUABBLES could not have created intensely negative Chinese perceptions of the United States without the aid of Chinese government propaganda. For the most part, Chinese society today is still dominated by state-controlled media. Print and broadcast media must adhere to government regulations that forbid certain commentary or reporting, such as anything supporting Taiwan's independence, Tibetan autonomy, democratization, or overthrow of the Communist Party. For instance, the lively *Southern Weekend,* a newspaper published out of the city of Guangzhou, has been shut down by the authorities on numerous occasions for its relentless critique of government corruption and failed or abusive policies toward Chinese citizens.

Even the new and burgeoning internet media, widely expected to bring the free flow of information into China, adhere to government censorship guidelines on political topics. The most popular internet websites in China today, including the three Nasdaq-listed portals Sina, Sohu, and Netease, dutifully self-censor content that might be deemed offensive by the Chinese government.

Because of the influence of the state media, popular Chinese objections to the United States tend to sound oddly uninformed and jingoistic. For instance, to counter American criticisms of China's human rights practices, the Chinese media regularly feature reports accusing the United States of abusing its own minorities, namely, African Americans. Almost every Chinese discussing human rights issues with Americans will in knee-jerk fashion challenge U.S. credibility by alleging that the U.S. government sys-

tematically puts blacks in ghettos and prisons. For that reason, a businessman in China's southern Guangdong Province referred to the American government as "racist" and morally bankrupt.

To counter U.S. objections to China's abject treatment of minorities in Tibet or regular threats of invasion toward Taiwan, the Chinese state media have portrayed America's relations with other countries as inherently aggressive and bent on undermining other nations' sovereignty. American criticisms of China's human rights practices are described as a U.S. effort to interfere with China's "internal affairs" and impose its own reality on the Chinese people. The U.S. role in the war in Bosnia was described as an example of unilateralist action that needlessly killed innocent civilians. No mention was made of Slobodan Milosevic's campaigns of ethnic cleansing or military aggression. As a result, many Chinese people have come to believe that American rhetoric and actions abroad are indicative of U.S. arrogance in the post-Cold War world in its self-appointed role of "policeman of the world."

The negative Chinese view of America's global role was apparent in the reaction to the terrorist attack on the United States. As most Chinese grieved with Americans — the reputable Hong Kong-based newspaper *Ming Pao* reported that 98 percent of the Chinese people sympathized with Americans — the same Chinese also believed that American foreign policy brought this event on its own people. According to the government-backed *Wen Hui Po* in Hong Kong, over 70 percent of Chinese in major cities agreed that American civilians became the sacrificial lamb of both foreign terrorism and the American government's arrogance.

The power of the state media has led some foreign observers to believe that anti-American sentiment can be turned on and turned off by the Chinese government at will. As far back as when President Richard Nixon "opened" China in 1972, the Chinese media demonstrated their power by changing Chinese perceptions of the United States overnight, from viewing the United States as a decadent, imperialistic country to a potential new friend. When President Clinton visited China in 1998, the Chinese state media with no small amount of help from Clinton skillfully inspired overwhelming goodwill from its populace for a man who once was denounced for "bossing China around." James R. Lilley, former ambassador to China and senior fellow at the American Enterprise Institute, asserts that anti-Americanism in China has been and will be around for a long time, but "it can be bottled up" by the government.

While the Chinese government is largely responsible for fanning anti-American perceptions among its people, it has received much help from the Chinese people themselves, who willingly subscribe to the government line even when offered alternatives. Negative perceptions of the United States are widely held not just by Chinese who depend on the Chinese government for news, but even by the more "Americanized" Chinese who have been exposed to American corporate training, media sources, education, and

other aspects of the American way of life. In spite of having seen American influences up close and personal, many of China's English-speaking, ambitious, sophisticated, young urban professionals, entrepreneurs, and college students nevertheless find the U.S. government and U.S. rhetoric repulsive.

Chinese students in the United States mouth their government's rhetoric even when they are not exposed to its media. China's exiled dissidents in the United States are often confronted with hostility from such students, who question the dissidents' patriotism and attack their character, all because they have challenged the authority of the Chinese communist regime. Xiao Qiang, the Executive Director of the New York-based Human Rights in China, reports that his efforts to hold China accountable for its repression have been branded at various times by overseas Chinese students as "harmful" to the Chinese people and "disloyal" to the Chinese nation.

Similarly, people in China exposed to alternative news sources critical of the Chinese government do not always welcome such alternatives. A broadcaster for Voice of America (VOA), which transmits news and commentary into China from the United States, reports that VOA in recent years has received numerous responses from audience members in China accusing the network of "anti-China" bias. CNN, which is familiar to an increasing number of Chinese business professionals, was labeled a "vehicle of American propaganda" by a public relations manager in southern China. Negative perceptions of the United States, it seems, are formed as much by the Chinese themselves as by the state media.

In addition, anti-American sentiments are not always inspired by Chinese state propaganda. In the aftermath of the terrorist attacks, Chinese state media went out of their way to tone down the usual propaganda against American imperialism and arrogance. President Jiang publicly expressed condolences to the United States and pledged China's solidarity in combating terrorism. Nevertheless, a significant number of Chinese citizens insisted that the United States deserved the terrorist attacks. As Richard Betts and Thomas Christensen argue in the *National Interest*, anti-Americanism is not always engineered by the state. In "China: Getting the Questions Right," (Winter 2000/2001), they note that Chinese policy experts believe the protests outside the American embassy in Beijing during May of 1999 were actually "managed, controlled and ultimately suppressed by the Party."

Intoxication with greatness

CHINESE NATIONALISM HAS helped to fan much of the hostility toward the United States. Since 1989, American rhetoric and actions have not only displeased the Chinese government but also clashed with the Chinese view of the world and their country, a view characterized by a nationalistic yearning for China's past and future greatness. The Chinese are and have always been exceptionally proud of their rich culture,

ancient heritage, colorful history, and countless contributions to civilization. Yet for much of China's modern history, the Middle Kingdom was not so proud — invaded, carved up, and humiliated by foreign powers one after another from Asia and Europe. Even after the foreigners departed and Chairman Mao Zedong declared at the founding of the modern Chinese state in 1949 that "the Chinese people have stood up," China remained mired in failed policies, backwardness, starvation, and poverty for decades.

The reforms pioneered by the late Deng Xiaoping began in 1978 and brought about an impressive economic miracle producing double-digit annual GDP growth for much of the 1980s and early 1990s and an average of 7 percent to 8 percent growth. As success promised to lift the Middle Kingdom out of its modern misery, Chinese nationalism soared along its side, characterized by an intense desire to show the world that China, this time, is truly going to stand up. As skyscrapers rose in Shanghai and Beijing, as multinationals rushed to enter the vast Chinese market, as bars, restaurants, and nightclubs sprang up, as giant shopping malls emerged, Chinese from the mainland to Hong Kong to the United States became intoxicated with the idea that China would march toward greatness again.

Negative perceptions of the United States are even widely held by more Americanized Chinese.

Such intoxication, however, is especially sensitive to potential slights from more powerful foreign powers, for they remind the Chinese of humiliations in the recent past and glory not fully achieved in the present. The United States, which seems to have leveled accusations against China regarding almost everything under the sun, has become precisely *the* foreign power that the Chinese find insufferable. "As a nation invaded, bullied, isolated and coerced by stronger countries during the past 100 or more years, China is finally trying to pick up its long lost dignity both in the economic and political realm," a former translator and editor from Beijing told me. "But the U.S. government, knowing or caring little about the feelings of the Chinese people, regards China as a potential enemy and tries to coerce its development."

To be sure, resentment of the United States is not an unshakable feeling of seething hatred. It is quite different from the combination of hatred, contempt, and mistrust most Chinese harbor toward the Japanese for massive atrocities committed during World War II. Rather, China's wounded pride tends to manifest itself in what Professor Andrew Nathan of Columbia University's East Asian Institute calls "an injured, you-don't-understand-us" type of complaint. "Most Americans have no idea what the real situation is like in China," a former Chinese ambassador once protested, "If you want to criticize us, why don't you come and spend some time in China before you do so?" Younger and less political Chinese often agree. Tracy Li, for-

merly a sales executive at a popular Chinese internet company, pointed out to me, "It is true that there are still problems in China regarding democracy and human rights. However, given the size of the country and historic circumstances, great progress has been made and is being made. China deserves appreciation for this effort . . . but all we hear in the U.S. is criticism."

When acknowledgement of China's progress was little forthcoming from the United States, American criticisms of the Chinese government, even those that were supposedly made on behalf of the Chinese people, appeared to nationalistic Chinese as anti-China. On the one hand, the Chinese suffer from wounded feelings created by the failure of the United States to apply to itself the lofty human right standards it has set around the globe. In the aftermath of NATO's bombing of the Chinese embassy in Belgrade that killed three Chinese citizens, a senior at Beijing University angrily protested, "American values are for Americans only. Apparently, you have no regard for the lives of Chinese people." In the aftermath of the terrorist attacks, one web user wrote, "We grieve for the loss of life because every life is sacred. . . . But you Americans have always thought that your lives were worth more than the lives of anyone else. . . . Let this be a lesson."

On the other hand, many Chinese have come to view U.S. criticism as a cynical ploy to thwart China's impending greatness. The Chinese have not failed to point out that American criticisms of China's far more deplorable human rights conditions in the 1970s and 1980s were almost nonexistent when the United States was playing the China card against the former Soviet Union. Chinese resentment was perhaps best expressed by the 1994 Chinese bestseller, *China Can Say No*. Written by two participants in the 1989 student democratic movement, what the book says "No" to is American hegemony, arrogance, and "bullying" tactics to change China. Co-author Song Qiang explained: "Don't think the Chinese youth appreciate the sanctions by the United States against China. You cannot divide the individual from the state. When you hurt the Chinese government, you hurt the Chinese people." Or as a Hong Kong representative to the National People's Congress (the Chinese legislature) phrased it somewhat differently at the height of the EP-3 incident, "If you are Chinese, you should always side with China, not with the foreigners who try to bully China."

Government legitimacy

RISING CHINESE NATIONALISM and negative perceptions of the United States emerged along with a growing sense of legitimacy for the Chinese government. While this sense has been fanned by the government to boost legitimacy at a time when its official communist ideology is increasingly corroded by market capitalism, it is also a result of concrete reforms and improvements made in Chinese society during the past

two decades. Unimaginable though it may be to Americans, many Chinese, particularly those who have benefited from the reforms of the past 20 years, say that they are happy with and even proud of the Chinese government. As Tracy Li said, "I feel the leaders in China try hard to solve those problems to help people live a better life. Many Chinese appreciate that, and we don't care if America does not."

Many in the United States have assumed that the Chinese government has managed to suppress political reforms while focusing only on economic reforms, but Minxin Pei of the Carnegie Endowment for International Peace calls this a "prevailing myth." The political changes that were implemented were not democratizing, but they have been essential to the introduction of a modern economy and a more responsible government. They include, among other things, the development of a legal system, introduction of a civil service system, enhancement of the power of the National People's Congress, implementation of a mandatory retirement system for government officials, and the adoption of limited village elections. On July 1, 2001, Jiang Zemin announced his intention to expand Communist Party membership to private businessmen and professionals (i.e., the capitalists), something that would have been unimaginable even a few years ago.

The changes since 1989 have created a society much different from the isolated and totalitarian one under Chairman Mao. Chinese citizens who do not openly challenge the state's authority or legitimacy enjoy expanding personal freedoms to travel, to study or work abroad, to pursue a profession of their choice, and even to criticize the government in a non-organized manner. In this working society, ordinary, law-abiding citizens are not usually subject to the torture, detainment, and abuse regularly faced by political dissidents. Many patriotic and younger Chinese, in fact, have a very romanticized view of their country and their government, so much so that many feel an obligation to "do something" for China. A CEO and founder of a fledgling broadband communications firm in Beijing has worked 16-hour days for the past few years with the hope of making $10 million in the next 10 years. If he succeeds, he plans to contribute the bulk of his money to the government to further economic development and progress. A senior sales executive who works for a popular Chinese website sees his work as a contribution to China. He proudly declared, "I am helping to build the internet for my country." The combination of pride, romanticism, and hope that this new generation of Chinese feel about their country has led them to come to the Chinese government's defense when the United States calls attention to its repressive characteristics.

This is not to say that the Chinese are not critical of their own government. From doctors trying to alleviate the AIDS crisis to businessmen frustrated by the bureaucracy and corruption infused at every level of the government, from unemployed workers laid off by dismantled state-owned enterprises to intellectuals lamenting moral decadence in Chinese society, the Chinese themselves are intensely critical of their government's inefficiency,

bureaucracy, lack of responsiveness, and frequent policy failures. Yet many Chinese nevertheless find U.S. criticisms unhelpful.

"Much like people in other countries," Professor Jia Qingguo explained, "Chinese in general do not like other people to criticize their own country." It may be true that they are themselves critical of the government, Jia continued, "but they also look to it to protect their interests and hold it responsible for their well being." The CEO of the broadband communications firm concurred, "We will be responsible for criticizing and reforming our own government. But we don't want America to stick its nose in our business." Li Xu, an overseas Chinese student at Columbia University who claims to be very unhappy with the Chinese government, is actually more frustrated with the United States. "America is conceited, self-centered, and ignorant," she said, "It feels good about itself and doesn't care about other countries' understanding."

Liberty *v.* food: Chinese priorities

If the Chinese recoil at the manner in which the United States criticizes China's problems, many also disagree with the solution that Americans offer, namely, quick democratization. During the past 12 years, the Chinese government has successfully pitted economic liberalization against political liberalization, arguing that a country as poor, as big, and as backward as China is simply not ready for democratization. Liberty has been pitted against food, and the continuation of the current regime's repression has been justified in the name of social stability. The political struggles, class warfare, wanton persecutions, and economic paralysis of the Cultural Revolution (1966-76) remain fresh in the collective Chinese memory, reinforcing a reluctance to risk reverting to political and social chaos. In an interview with the *New York Times* in August 2001, President Jiang Zemin said, "I can tell you with certainty: Should China apply the parliamentary democracy of the Western world, the only result will be that 1.2 billion Chinese people will not have enough food to eat. The result will be great chaos."

Many Chinese, including those who have seen or experienced democracy in America firsthand, have adopted the government's argument that extensive political liberalization cannot take place alongside economic liberalization. They believe that Americans simply fail to understand the magnitude of poverty and backwardness that plagues China today.

In addition, the economic success of the past two decades has convinced some Chinese that stability, even at the cost of political repression, is so far a necessary price to pay. Jason, an American-educated MBA student, justified the abuses of members of the banned Falun Gong sect: "These people are creating trouble for society. . . . I would rather have the Communist Party than Falun Gong rule my country." A former reporter in Hong Kong who

said that she hated the government for firing upon democracy protesters at Tiananmen 12 years ago now feels differently: "What did you expect the government to do? Just hand over power to a bunch of kids and let the country descend into chaos?" Numerous others point to democratization in Russia, which has correlated with widespread poverty and hunger, and that in South Africa, which has correlated with lawlessness, to argue that the same might happen to China should it decide to democratize today.

Much like President Jiang, numerous Chinese argue that political liberalization is a secondary priority to economic liberalization. A Shanghai lawyer who used to practice law in New York City agreed that feeding 1.3 billion people is the priority for China. U.S. pressure to change China with different priorities has left him feeling "resentment, hatred, contempt and sadness." Jason agrees that the Chinese leadership should adopt a model of reform much like that in Singapore and Malaysia, which grants economic freedom but limited political rights.

As China prioritizes and maintains stability, the crackdown on political and religious dissent continues. American concerns about human and political rights are finding an unreceptive audience in a new Chinese generation pursuing promising careers, sipping Starbucks coffee, and singing at Karaoke bars.

Implications for the United States

THE USE OF PROPAGANDA in China should not surprise Americans. Yet the resentment of the Chinese people, especially those who appear to be most like Americans, provides reason for reexamination. Can the United States help further the process of political reform without alienating the Chinese people? Though Sino-American relations post-September 11 have been infused with an added sense of mutual cooperation, bilateral relationships between any two countries will inevitably have their ups and downs, and stable relations with the Chinese government cannot be relied upon entirely to change popular Chinese perceptions of the United States.

To win the hearts and minds of the people, some, such as Minxin Pei, have suggested that the United States should "use fewer threats" and engage in more constructive criticisms based on mutual respect. Many Chinese agree: They do not mind U.S. criticism but resent "actual steps to weaken China." A manager working for a major international media conglomerate in China said, "I am okay with criticism on anything if it was meant well." Tracy Li, the former internet sales executive, said, "Criticism is okay, but there should be a limit. We don't point to the United States and say you should do this or do that, or that you should free this or that criminal." Along the same lines, the former translator and editor suggested, "I think that some friendly and respectful gestures will help China change, such as

granting entry to the WTO or approving China's bid for the 2008 Olympics. To welcome China into the world family and help it observe international practices will be more effective than harsh words or steel bombs."

It is true that U.S. criticisms of China have been both less than accurate and overly inflammatory for domestic political purposes. Many in Washington have not changed the rhetoric they deploy to describe China — a communist dictatorship or a "tyrannical" state — to reflect the sweeping liberalization measures in Chinese society and the Chinese economy since 1989. As a result, American sincerity was questioned and credibility diminished even in the eyes of those who should have been our natural allies: the Chinese who are critical of their own government.

One should recognize, though, that trying to portray China in a more accurate light can only go so far to improve Chinese perceptions about the United States. America may agree with China today on the issue of fighting terrorism, but U.S. and Chinese national interests on various issues affecting fundamental interests in trade, security, and Taiwan no doubt will conflict at other times. The U.S. government cannot and should not abandon its international agenda simply for the sake of becoming more popular with the Chinese people. The mere articulation of U.S. policy positions by standard diplomatic means will inevitably give the Chinese government and inclined Chinese nationalists further excuses to brand U.S. positions as anti-China. Currently, the U.S. proposal to build a national missile defense (NMD) system faces strong resistance from China, which flatly rejects the American assertion that NMD is targeted at rogue states such as North Korea and Iraq. Instead, the Chinese view Americans as bent on curbing China's rising military strength. Similarly, the United States cannot simply turn away every time Beijing threatens to invade democratic Taiwan. Yet any action that indicates American friendship for Taiwan will be seen by Chinese nationalists as an effort to "undermine Chinese sovereignty" and to thwart eventual reunification. In short, acknowledging the progress made in China today — though necessary — will not shield the United States from accusations from the Chinese government or the Chinese people.

American concerns about human and political rights are finding an unreceptive audience in a new Chinese generation sipping Starbucks coffee.

Aside from hard-core strategic interests, the United States also has a fundamental difference with China over how citizens ought to be treated. Much like interests in trade, security, and Taiwan, U.S. principles on human and political rights cannot and should not be abandoned. That the United States has not always lived up to moral principles in its foreign policy does not

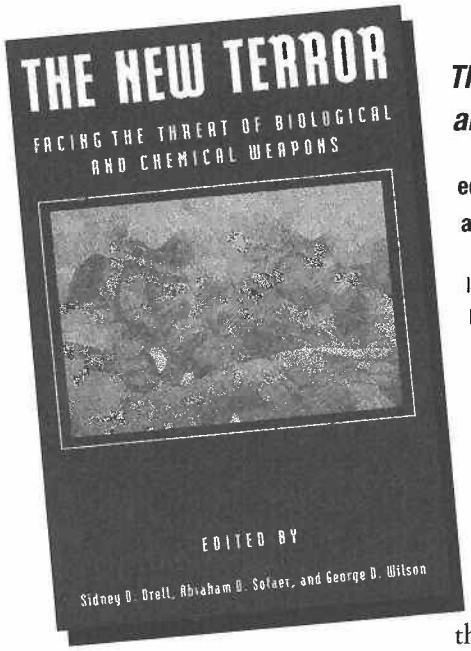
take away from the need to try to affirm and uphold these principles. Without extensive political liberalization, China's modern national greatness will remain a tool of the state media and a dream for Chinese nationalists. U.S. criticisms of China, though not always accurate or consistent, are not fabricated out of thin air but are the result of American disgust with the Chinese government's brutality and authoritarianism. As one marketing professional in Beijing acknowledged, many U.S. criticisms of China are "basically true."

The United States may need to acknowledge that it has precious little leverage in changing Chinese minds against the powerful forces of Chinese propaganda and Chinese nationalism. However, in the foreseeable future, U.S. influence will remain crucial to a China searching for options for political reform. As the clamor for visas to the United States continues across China, one can see that America continues to capture the imagination of Chinese people searching for a better life. Many Chinese may be angry with the U.S. government, but they remain open to American culture and values. Many who are less vocal, including those who believed that the United States intentionally bombed their embassy or knocked their pilot out of the sky, still admire America's political values and institutions. As the Beijing marketing professional said, "One thing that sets the U.S. apart from most other countries is its willingness to take responsibility and stand up for the right principles. . . . I like Americans mainly because of their stance on freedom, reason, and respect to humanity."

Similarly, a Chinese internet professional who travels frequently to the United States remarked, "The U.S. is different from China. In China, the people are merely grasshoppers that can be stepped on by the government. Over there, you sense that Americans really feel that they are the masters of their own country." Surely, Americans would that one day, the Chinese people could become masters of their own country as well, and for that reason, the United States cannot abandon the Chinese in their struggle against repression.

China's future ultimately depends on her people, and an examination of anti-Americanism in China provides a sobering reminder of the limits of U.S. influence on Chinese views. Nevertheless, Americans should continue to let the Chinese people know, whether they believe us or not, that we are on their side in the fight for freedom and dignity.

CONFRONTING THE NEW TERROR



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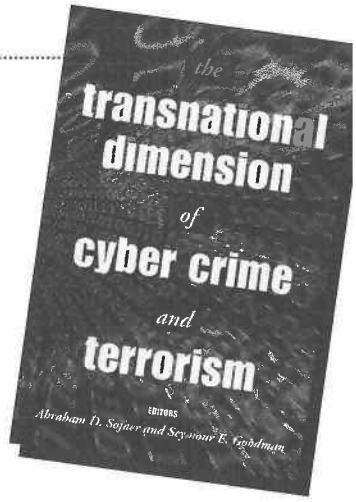

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Cloning Red Herrings

Why concerns about human-animal experiments are overblown

By DAVID LONGTIN AND DUANE C. KRAEMER

IN FEBRUARY OR MARCH 2002, the U.S. Senate will consider several competing bills that address human cloning, stem cell research, and other issues dealing with reproductive biotechnology. Kansas Republican Sam Brownback has offered some of the most restrictive legislation. He favors a proposal to outlaw the production of cloned human embryos for any purpose. He would ban all attempts to engineer human genes in ways that could be passed on from one generation to the next, partly because he does not want scientists to transfer animal DNA into the human genetic code. He also would forbid researchers from creating human-animal hybrids or chimeras — a term used in mythology to describe a monster made of parts from several animals, but in biological terms, an organism with at least two genetically distinct types of cells. In making these proposals, Brownback has joined a growing number of people on both ends of the political spectrum who voice concerns that bioengineers eventually will pro-

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duce creatures that blur the line between humans and other species.

In a recent article, syndicated columnist Charles Krauthammer argues that many of his fellow conservatives do not recognize the awful power of reproductive technology and how badly it needs to be reined in by the government. He writes: "In 1998 it was reported that a human nucleus had been implanted in a cow egg cell, producing . . . a possible hybrid human-cow creature. It was destroyed in its early embryonic stage, but not before giving us a glimpse of horrors that lie within the reach of the new reproductive biotechnology." Krauthammer suggests that Congress should fund embryonic stem cell research but outlaw the production of cloned human embryos for any purpose. Through such measures, he believes, federal authorities will gain a large degree of control over how such research is conducted, as scientists scramble for government grants.

Francis Fukuyama, a professor of international political economy at the Johns Hopkins School of Advanced International Studies, takes Krauthammer's argument a step further. In a recent op-ed piece in the *Wall Street Journal*, he too mentions the same "hybridization" experiment to justify federal support of embryonic stem cell research. He writes:

> A couple of years ago, a small biotech company named Advanced Cell Technologies [sic] reported that it had successfully implanted human DNA into a cow's egg, and that that egg had successfully undergone a number of cell divisions into a viable blastocyst[1] before it was destroyed. It might come as a surprise to many that biotechnology is in a position to produce creatures that are part human and part animal, and that the law is indifferent as to whether it does so.

Fukuyama believes that Congress should require all scientists who work with embryonic stem cells to obey a set of guidelines recently proposed by the National Institutes of Health, even if those researchers do not receive any government grants. These guidelines, published in the *Federal Register* on August 25, 2000, would allow federally funded scientists to conduct research on stem cells obtained from embryos that had been produced by in vitro fertilization clinics and were slated for destruction. New criteria issued by the Bush administration would require government-backed laboratories to work with 72 existing stem cell lines, but would not change how those cells could be used. Since both sets of rules would bar federally funded scientists from producing cloned human embryos for any reason, they automatically would prevent biologists from doing the kind of research that Advanced Cell Technology conducted. The guidelines also would ban the

[1] A human embryo reaches the blastocyst stage five or six days after fertilization, just before it implants in the womb. A blastocyst is a sphere made up of about 150 cells. It has a protective outer casing of cells that will help to form the placenta, a fluid-filled cavity, and an inner mass of cells that will become the infant that we would recognize.

creation of human-animal chimeras, but they would do nothing to restrict the insertion of human DNA into other species. Nor do they prohibit the transfer of human fetal stem cells into the fetuses of other animals, as Fukuyama mistakenly claims in the *Wall Street Journal.*

In their descriptions of the cow-egg experiment, Krauthammer and Fukuyama also omit crucial details. In this procedure, scientists first removed the nucleus of a cow egg, taking with it nearly all of the egg's genes but leaving behind the egg's mitochondria. Mitochondria, which possess tiny amounts of their own DNA, are bacteria-like structures that reside in every living cell in the fluid outside the nucleus. Mitochondria allow cells to convert carbohydrates and fats into a usable form of energy. After removing the nucleus, the scientists injected a human skin cell into the gutted cattle egg, thereby refurbishing it with an entire set of human genes. Finally, the researchers used a small electrical pulse to activate the egg, which caused it to start dividing as if it had been fertilized with sperm. During its short existence, the resulting embryo seemed to develop as fully human, despite its minute bovine heritage.

Scientists long ago developed other technologies that would stand a far better chance of producing creatures with a genuine mix of human and animal traits.

In June 1999, Neal First at the University of Wisconsin and Tanja Dominko at the Oregon Primate Center published the results of a similar experiment in the journal *Biology of Reproduction.* In this study, they transferred rat, pig, sheep, and monkey nuclei into gutted cow eggs. These rat, pig, sheep, and monkey embryos reached a key stage in their early development — the formation of blastocyst-like structures — within periods of time that were appropriate for their respective species, though not for cattle. This gives us a preliminary indication that the residual bovine DNA had no effect on the young embryos and that animals cloned in this way would not exhibit any hybrid characteristics.

In any case, scientists long ago developed other technologies that would stand a far better chance of producing creatures with a genuine mix of human and animal traits — if that is what scientists were really bent on doing.

In 1999, the U.S. Patent and Trademark Office shot down a most unusual request from Stuart Newman and Jeremy Rifkin, two prominent anti-biotechnology activists. Newman, a member of the Council for Responsible Genetics, and Rifkin, president of the Foundation on Economic Trends, had sought a patent on techniques that could be used to create human-animal hybrids and chimeras. Although patent protection is normally intended to foster the exchange of new and useful information, Newman and Rifkin had the opposite intent. They wanted to head off research that they opposed.

Scientists already have inserted small bits of human DNA into pigs, sheep, and other animals, causing their cells to yield medically useful by-products, such as monoclonal antibodies, that can neutralize various infections, tumors, and toxins in human patients. Some monoclonal-antibody drugs are already on the market, such as Daclizumab, which prevents acute rejection of transplanted kidneys. Dozens more are in human clinical trials, and several of them may be approved in 2002 by the Food and Drug Administration. But Newman and Rifkin worry that biologists eventually could transfer even more human genetic material into other species than they previously have. There was nothing original in their proposal, which is one big reason that it failed. The Patent Office also was not prepared to recognize that creatures with substantially human characteristics should be patentable. Newman and Rifkin want to rekindle a debate about how many human genes an animal could receive before we would have to grant it citizenship. But we are a long way from having the capability to transfer such huge quantities of DNA between species. Worrying now about the ethical implications of such technology seems far-fetched.

In the late 1980s, however, Congress considered passing a law that would have addressed this very issue. The attempt failed, partly because legislators had trouble defining what traits would make an animal "human." We have little reason to believe that they would be any more successful today. In 1999, the scientific journal *Nature* quoted Rifkin as saying, "No parliament in the world is going to be keen to debate how much human genetic information [in a hybrid creature] makes up a human being. But we want to force them to do it." Although cross-species research does raise some interesting ethical issues, Rifkin exaggerates the risks and then offers an easy answer. He wants to ban most, if not all, transfers of human genetic material into other animals, despite any medical benefits that may result. Listening to critics like Rifkin, you would think that reproductive biologists are completely unregulated and out of control. Yet these anti-biotech activists ignore many historical, technical, and bureaucratic factors that work against their dire predictions.

The forbidden experiments

MANY BIOTECH OPPONENTS simply refuse to acknowledge that the scientific community has little tolerance for offbeat, ethically challenged cross-species experiments and that its aversion has only grown stronger in the past few decades. Experts have known for years that humans and apes share a large measure of reproductive compatibility, a fact which weakens the view that researchers are on some mad dash to mix our species with other animals. J. Michael Bedford reported in the May 28, 1981 issue of *Nature* that human sperm can penetrate the protective outer membranes of healthy gibbon eggs. This kind of sperm-egg interaction,

which does not occur readily even between mammals as similar as mice and rats, usually indicates that two species are at least close enough to form hybrid embryos. Despite the many provocative questions raised by Bedford's decades-old experiment, no one has ever tested the developmental potential of an ape egg penetrated by human sperm.

Scientists also have long had the ability to produce animal chimeras. In this procedure, biologists can combine the cells of early embryos from two different subspecies or even separate species of mammals. Although the cells from the two embryos remain genetically distinct from each other, they associate randomly to form a single complete individual. In 1961, a Polish embryologist named Kristof Tarkowski first used this technique to produce mice with mixed albino and black fur coats by fusing embryos together in a test tube. Seven years later, British biologist Richard Gardner developed an even more efficient way to make chimeras by injecting cells from one mouse embryo directly into another.

The scientific community has little tolerance for offbeat, ethically challenged cross-species experiments.

From the start, scientists theorized that these procedures might allow them to combine embryos from distantly related species, although they were slow to explore this possibility. In 1980, Canadian embryologist Janet Rossant produced the first cross-species chimeras when she injected embryo cells from Asian wild mice into those of European house mice. These two mouse species occasionally can produce viable hybrids together, but only with great difficulty. Then in 1984, according to a 1986 article in the *Oxford Reviews of Reproductive Biology*, Danish veterinarian Steen Willadsen produced strange creatures composed of tissues from both sheep and cattle, using the same technique that Tarkowski had invented 23 years before.

Scientists have conducted this type of research primarily in an attempt to save endangered species. To speed up the breeding of rare zoo animals, reproductive biologists sometimes transfer the embryos of these endangered species into surrogate mothers from other closely related but more plentiful domestic species. This technique already has been performed successfully on endangered mammals such as wild cattle, zebras, and exotic cats by transferring their embryos into domestic cows, horses, and house cats, respectively. In many other cases, however, cross-species embryo transfers do not work so well, possibly because the foreign embryo does not implant properly in the host female's womb or because the surrogate's immune system rejects the alien fetus growing inside her.

Because chimeras were composed of embryo cells from two distinct species, they showed scientists how to overcome these reproductive barriers. Several days after fertilization, a young embryo has two basic parts: an inner mass of cells that will become the animal we would recognize, and an outer

casing of cells that helps to form the placenta. It is the outer casing that determines whether the embryo will implant properly in the womb and keeps the mother's immune system from rejecting the fetus. Biologists discovered that they could inject the inner cell mass of an Asian mouse embryo into the gutted outer casing of a European mouse embryo. After they transferred the reconstructed blastocyst into a European mouse female, she gave birth to a pure Asian mouse pup. This technique, a spin-off of the experiments with chimeras, eventually may allow scientists to transfer the embryos of endangered species into other distantly related mammals. But by the early 1990s, researchers stopped producing cross-species chimeras, having learned all they could from these strange creatures.

In his 1998 book *The Biotech Century*, Rifkin suggests that biotech companies one day might revive this old technique to produce human-chimpanzee chimeras and then use these hapless creatures as organ "donors." Aside from the all-too-obvious ethical difficulties that such a venture would pose, there are a host of technical problems that Rifkin ignores. Because most of the organs harvested from such chimeras would contain an unpredictable mix of human and ape tissues, they would not be much more compatible with the human body than organs taken from pure chimpanzees. The mass production of such chimeras also would be highly inefficient and prohibitively expensive. Biotech companies would find it easier to insert small bits of human DNA into chimpanzee embryos, producing apes whose tissues would be more compatible with the human immune system. Unlike the chimeras, these genetically engineered chimpanzees would be indistinguishable from other members of their species. They also would have the ability to pass their human DNA on to future generations of apes through traditional breeding, something that chimeras could never do. At the moment, however, it seems improbable that biotech companies will pursue either of the scenarios that we have just mentioned.

A slippery slope?

WHILE NO ONE will ever produce a human-ape chimera, some bioethicists are concerned that researchers might cross the human-animal divide in other less dramatic ways. Thomas Murray, director of the Center for Biomedical Ethics at Case Western Reserve University, argues that cross-species research is "a classic slippery slope." He told a *Washington Post* reporter in 1998, "If we put one human gene in an animal, or two or three, some people may get nervous but you're clearly not making a person yet. But when you talk about a hefty percentage of cells being human . . . this really is problematic. Then you have to ask these very hard questions about what it means to be human." Indeed, to a casual observer, it might appear as if scientists already have performed experiments that raise such questions.

Cloning Red Herrings

Biologists recently demonstrated that human neural stem cells can integrate themselves into the brain of a monkey fetus and contribute to its development. This research, published in the September 7, 2001 issue of the journal *Science*, was performed by Vaclav Ourednik at Harvard Medical School, W. Michael Zawada at the University of Colorado, and their colleagues. In accordance with strict federal guidelines, these scientists obtained human neural stem cells from a 15-week-old fetus after the mother had sought an elective abortion. They then injected the human cells into the brains of three bonnet monkeys that were still in the womb. Normally, when human tissues are grafted into adult animals, their bodies quickly reject the transplanted material unless they receive potent immunosuppressive drugs. In this experiment, however, the fetal monkeys' immune systems were too young to recognize the human cells as foreign and instead became acclimated to their presence. When the researchers aborted the primate fetuses a month later, they found that the human stem cells had helped not just to construct the monkeys' brains but also to form a pool of stem cells from which new brain cells could possibly be derived throughout adulthood. Because the transplanted cells appeared to function normally in the monkeys' brains, this experiment bolsters the idea that neural stem cells someday could prove useful in correcting various human brain diseases such as Parkinson's, Huntington's, and Alzheimer's.

Receiving their cues from the surrounding tissues, foreign cells take on a form and function appropriate for their adopted species.

Before stem cells can be used in human patients, however, they will have to be tested in monkeys suffering from equivalent neurological afflictions. Primates offer the best animal model in this case because their brains are structurally most similar to ours. Scientists must make sure that human neural stem cells, once introduced into a person's body, will not become cancerous. They also must develop better ways to keep a patient's immune system from rejecting the transplanted cells, a problem that stands out most clearly when human stem cells are transferred into other species. Last, researchers need a primate model to determine whether enough stem cells can be delivered into a patient's brain to make a therapeutic difference.

If Ourednik and his colleagues had decided not to abort the monkey fetuses used in their experiment, the newborns would have looked like monkeys, but their brains would have possessed a large percentage of human cells. Would these creatures have started to think like people? The best evidence says no. When neural tissue from aborted mouse fetuses is grafted into the visual cortexes of kittens, or when human neural stem cells are

transferred into the brains of mice, the foreign cells essentially go native. Receiving their cues from the surrounding tissues, they take on a form and function appropriate for their adopted species. The animals that receive these types of cross-species transplants also show no signs of unusual behavior, unlike the full-fledged chimeras that we described earlier.

Current technology, therefore, appears to leave bioengineers with a rather stark choice. If they were to inject cells from an early human embryo into an equally young chimpanzee embryo, they would produce a creature with an unpredictable mix of human and ape characteristics. As we mentioned before, this is an experiment that no one will ever do. Alternatively, scientists could inject cells from an early human embryo into an older chimpanzee fetus. In this context, the human cells would be redirected by the surrounding tissues, producing an animal that would probably look and think like an ordinary ape. Between these two extremes, there seems to be no unhappy medium.

Current ethical safeguards

Fukuyama argues in the *Wall Street Journal* that, while bioengineers have the ability to produce creatures that would be part human and part animal, the law is powerless to stop them. He writes:

> Such rules as exist . . . have focused on federally funded research. This was fine in an age when the NIH funded the vast majority of biotech research. But today, there is a huge private biotech industry and hundreds of millions of loose research dollars seeking all sorts of morally questionable objectives.

But Fukuyama oversimplifies the issue. Most scientists seem to agree that federally funded research receives a higher level of scrutiny now than it did 20 years ago. In 1977, for example, when Bedford injected human sperm into the fallopian tube of a healthy adult gibbon, he did so under an NIH grant. We doubt that such a bold experiment would attract government money today.

Moreover, even though federal law does not spell out precisely which types of cross-species experiments private laboratories may or may not conduct, existing government regulations would make it difficult for any scientist to produce creatures with substantially human characteristics. In 1985, Congress amended the Animal Welfare Act, requiring all research facilities that work with higher mammals to establish Institutional Animal Care and Use Committees (IACUCs), whether or not those facilities receive federal money. Any IACUCs established on behalf of a private company must register with the Animal and Plant Health Inspection Service (APHIS) at the U.S. Department of Agriculture (USDA) and meet certain minimal criteria to stay

in operation. These oversight bodies function somewhat like trial juries, reviewing all experiments that are to be performed at their institutions. According to the law, IACUCs are supposed to "represent society's concerns regarding the welfare of animal subjects" used in research. While their main task is to alleviate the animals' physical suffering, many of these committees routinely take other ethical issues into account. Whenever an experiment is likely to cause the animals involved unnecessary pain or distress, the law requires scientists to consider more humane alternatives. On this basis alone, IACUC members would have good reason to challenge the creation of a human-ape chimera.

Each IACUC must have at least three members: a chairperson, a veterinarian, and an outside individual who is not affiliated with the facility beyond his or her service on the committee. Although both the chairman and the veterinarian are employed by the institution itself, they may not have any direct involvement in the research projects that they are evaluating. They also must have other jobs at the facility and may not receive any compensation above their regular salaries. Presumably, they would have a vested interest in preventing their companies from performing ethically challenged experiments that might scare away investors and invite congressional scrutiny. The unaffiliated member must not be closely related to anyone on staff at the institution and may not receive payment other than a modest travel stipend. A local clergyman or a professor of bioethics typically fills this volunteer position.

Existing government regulations would make it difficult for any scientist to produce creatures with substantially human characteristics.

The secretary of agriculture can levy stiff fines against private laboratories that ignore the judgments of their IACUCs: $2,750 per day for every violation of the Animal Welfare Act that she uncovers. By necessity, any attempt to produce a human-ape chimera would take at least nine months and would use a large number of animals as egg donors and surrogate mothers. If a biotech company were to perform such an experiment without the approval of its IACUC, the secretary theoretically could impose several million dollars in penalties on that facility and perhaps even put it out of business.

To be sure, the IACUC system is not perfect. Scott Plous at Wesleyan University and Harold Herzog at Western Carolina University reported in the July 27, 2001 issue of *Science* that these oversight boards often differ in their criticisms of the experiments they are reviewing. Plous and Herzog asked 50 IACUCs from U.S. universities and colleges to send in three research protocols each that they had recently examined. All of the protocols involved studies of animal behavior. After any information identifying the

scientists and their institutions was removed, each of the protocols was assigned randomly to another committee for review. Plous and Herzog found that the first and second IACUCs differed 79 percent of the time on which research to approve or on what modifications were needed to make the experiment acceptable. Of the 118 cases in which the two committees disagreed in their protocol reviews, the second committee was more negative than the first committee 101 times. Most of the unfavorable responses (84 of 118) resulted from calls for more information, which suggests that these IACUCs may have been a little disoriented when trying to second-guess research proposals from unfamiliar institutions. Nevertheless, Plous and Herzog raise some troubling questions. Like trial juries, IACUCs frequently reach different conclusions from the same evidence. But we still believe that the creation of a human-ape chimera would be so far beyond society's ethical limits and so devoid of genuine scientific merit that no oversight board would ever approve such an experiment.

Possible regulatory improvements

THE USDA IS studying ways that it might update its regulations to cope more effectively with the ethical issues raised by new reproductive technologies. In December 2001, APHIS hired a full-time veterinarian — a specialist in laboratory animal medicine — to head this effort. Congress also could amend the Animal Welfare Act for the same reason. This law has only a few criminal penalties. One such provision states that if an IACUC member knowingly discloses trade secrets to a rival company, that person may face a maximum of three years in jail and a $10,000 fine. We believe that a similar punishment should be imposed directly on any scientists who transfer human DNA into other animals without the approval of their oversight committees, in addition to the civil penalties that may be assessed against their companies today.

At present, federally funded laboratories must register their IACUCs with the Department of Health and Human Services (HHS), which imposes much stricter membership requirements on these committees than does the USDA. Instead of having a minimum of three participants, IACUCs that operate under HHS guidelines must have at least five members, including a veterinarian, an outside individual not affiliated with the institution, a scientist experienced in animal research, and another person whose primary concerns are in a nonscientific area.

We believe that corporate IACUCs should stay under USDA jurisdiction. But at the same time, Congress could stipulate that whenever private companies conduct experiments involving the transfer of human DNA into other species, their IACUCs also would have to meet the HHS membership criteria. To a large extent, such a measure would be symbolic, because many corporate IACUCs already have more than enough personnel to meet this stan-

dard. Yet it would send a message that these oversight boards must exercise special care when dealing with animals that possess human genes, without forcing legislators to spell out precisely how these committees should do their jobs.

The existing regulatory system is highly adaptable and has worked fairly well since 1985. With minor adjustments, it should continue to function for years to come. Scientists have not shown any interest in creating human-ape chimeras nor in producing human infants with animal DNA inserted into their genes. At best, therefore, proposals to ban such research are merely gratuitous. Jeremy Rifkin's call for an urgent debate about how much human DNA we should allow biologists to transfer into other animals is also premature. Our knowledge of genetics is still too primitive to write such laws intelligently. Moreover, we do not yet have the ability to move huge quantities of DNA between species. For the moment, it would be better to let Animal Care and Use Committees make such decisions on a case-by-case basis as this nascent technology develops.

In 1870, Jules Verne wrote his classic novel *Twenty Thousand Leagues Under the Sea*, in which he vaguely predicts the advent of nuclear-powered submarines. If, upon reading that book, parliaments around the world had set out to make laws governing the ethical use of military submarines for all time, we would see their efforts today as quaint, futile, and perhaps even dangerous. For the foreseeable future, current U.S. laws would allow scientists to pursue promising avenues of biomedical research, while ensuring that society's ethical concerns about cross-species experimentation are respected. After making a few improvements in the IACUC system, Congress should consider leaving well enough alone.

The GOP's California Blues

By BILL WHALEN

NINETEEN EIGHTY-EIGHT is the answer to two California trivia questions: It's the last time the Dodgers won in the post-season and also the last time a Republican won either a presidential or Senate election in the Golden State. The baseball metaphor is appropriate: If the big leagues ran the state parties, the California GOP, with few wins, a fractious roster, and a market that seemingly cares little for the Republicans' product, would seem an inviting target for either relocation or consolidation.

It's the new reality of the land that gave birth to the Reagan Revolution. Republican folklore has long honored California as a kingmaker and a wellspring of Republican ambition. In eight of the 10 presidential elections from 1948 to 1984, at least one California Republican — Earl Warren, Richard Nixon, Ronald Reagan — was on the Republican ticket. California's Orange County, home of John Wayne Airport, remains the spiritual homeland of paleoconservatives, a place where you can occasionally still find an "AuH_2O" bumper sticker. But California is fast becoming a graveyard for Republican fortunes.

Dating back to 1996, California has gone Democratic in each and every presidential, gubernatorial, and U.S. Senate election — while Texas has done

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precisely the opposite. One of those Republicans in whom Texans placed their trust, George W. Bush, sank approximately $15 million into his California operation during the course of the 2000 election yet managed to lose the state by more votes than Bob Dole did four years earlier. In that same election, California Republicans dropped four congressional seats, four assembly seats, and a state senate seat. Republicans are now outnumbered 32-20 in California's U.S. House delegation. Democrats enjoy nearly two-thirds majorities in both houses of the state legislature.

And there's more. Only one of California's six state constitutional offices is held by a Republican — secretary of state — and it's not much of a partisan office at that; California's secretary of state traditionally champions "good government" issues like voter turnout and registration. Look on the state party's website and you'll see pictures of the president, the vice president, Colin Powell, and Donald Rumsfeld. But not one Californian, not even Condoleeza Rice, President Bush's national security advisor.

Dating back to 1996, California has gone Democratic in each and every presidential, gubernatorial, and Senate election.

The fading of California Republicanism might spell disaster for the party nationally. Conventional wisdom holds that American political trends flow like the jet stream — west to east. In theory, that means voting trends that emerge in California eventually find their way to Washington. Exhibit A in this argument is Proposition 13, the California tax revolt of 1978. Two years after that vote, Reagan was swept into the White House running on a similar theme of lower taxes and frustration with government. Since Proposition 13, the press has actually oversold California's importance by assuming that almost every initiative that stirs up controversy in California has national implications. That's not always the case, yet California still deserves a fair bit of the attention of national trend-spotters.

On the other hand, should Republicans reemerge as a major force there, California would virtually clinch electoral success for the party. If, in the 2004 election, President Bush were to win his native Texas (now 34 electoral votes) and his brother Jeb's Florida (27 more), California's 55 electoral votes alone would push the president more than 40 percent of the way toward reelection — with only three states. A Democratic challenger would need to win nearly two-thirds of the remaining electoral votes, 270 of 422, to win the election. That's nearly impossible, given Republican advantages across the "blue state" Deep South and Great Plains. California is a necessity for Democrats. If Bush somehow could carry the state, California becomes Republican insurance.

But in the meantime, the 2002 election represents an uphill climb for

Republicans both as a party out of power and as a party in decline. Republicans seek to replace a Democratic governor — not an easy chore, considering it has been exactly 60 years since a first-term California governor was ousted. Should the Republicans fail in this effort, it will beg the question of which came first: Did the Republican Party leave California, or did California leave the GOP?

The rise and fall

When Pete Wilson took office in January 1991 as California's thirty-sixth governor, Republicans were riding high. Wilson had fended off a challenge from Dianne Feinstein, who had re-crafted herself as a pro-death penalty, tough-as-nails moderate — a preview of the Clinton 1992 campaign (Clinton and Feinstein even shared Dee Dee Myers as a press secretary). Wilson, who had earned a reputation as a California centrist (tough on crime, pro-choice, military hawk), planned an ambitious series of health services he termed "preventive government" — investments in prenatal care, early mental health counseling, and so on — the idea being that kids raised healthier and more content would not turn to harmful choices like gang violence and teen pregnancy.

Unfortunately, Wilson's agenda ran afoul of California's worst economic crisis since the Great Depression — the end of the Cold War and the collapse of Southern California's defense contracting sector. The state would reach double-digit unemployment as its recession lingered for three years. Within weeks of taking office, the new governor faced a $14.3 billion deficit in a $43 billion budget. Wilson solved the state's fiscal crisis by cutting a deal with the Democratic legislature — making up for the deficit through one part spending cuts, one part tax increases. What ensued was the first of several fissures in the state GOP; the party's hard right never forgave Wilson for the tax hike.

If the economic crisis foiled Wilson's version of "compassionate conservatism," it also set the tone for California politics in the first half of the 1990s. In hard economic times, the state's legislative agenda was decidedly "Republican"; criminal justice and business climate reforms made the headlines in Sacramento. By 1994, an economic recovery set the tone for a banner Republican year. Wilson, presumed to be political road kill when his approval rating shrank to 15 percent in 1992, defeated Kathleen Brown (Jerry's sister) by 15 points on election day. While the national party won back the Congress, California Republicans won four of six state constitutional offices and control of the state assembly. And Michael Huffington came within an eyelash of ousting Feinstein, now a U.S. senator.

Ironically, the Republicans' policy successes ultimately did them in. In the second half of the 1990s, California went from fiftieth to first in the nation in job creation. The state realized a new economy driven by tech, trade, and

tourism — and a new era of wealth the likes of which California hadn't seen since the Gold Rush of the 1840s. As hard times disappeared, so too did a voting majority who felt the state was on a "wrong track." The GOP lost its audience for "tough talk" on crime and spending. Californians shifted their attention to "softer issues" like education and the environment, and in doing so moved the state's political "center" from the right to the middle, if not the left of center.

In a sense, what occurred in California is little different from the challenge the national Republican Party faced in the 2000 election, when the Bush campaign correctly recognized the need to balance something old (tax cuts) with something new ("compassionate" conservatism) to appeal to an electorate adapting to the post-Cold War era. Only, California Republicans failed to adjust to the changing times. And to compound matters, Republicans found themselves trying to compete in a state that further skewed to the left. Few states if any remained as loyal to Bill Clinton throughout the impeachment ordeal. And while the state's population grew, it did so in a manner that worked against Republicans. California's elderly and more Republican population decreased; the state's fastest-growing sector — Hispanics — registered heavily as new Democrats.

As hard times disappeared, the GOP lost its audience for "tough talk" on crime and spending.

The media, of course, would seize on that latter trend. While media outlets have devoted much attention to the news that California has become a majority-minority state, with Hispanics so visibly on the rise, not as much attention has been given to the fact that California's *voting* population is becoming more Democratic. By the 2000 election, Democrats held a 1.7 million advantage among registered voters, 45 percent to 35 percent.

At the same time, California Republicans continue to cope with the fallout from 1994's Proposition 187 (illegal immigration) and 1996's Proposition 209 (racial quotas). Prop 187, the so-called Save Our State Initiative, sought to cut off health and social services benefits for illegal immigrants, most notably their children's access to public schools. Though approved by voters, the law was immediately blocked in federal court and never enforced. Prop 209, the California Civil Rights Initiative, outlawed the factoring of race and gender — i.e., minority "set-aside" programs — in either government contracting or public university admissions. Unlike Prop 187, Prop 209 did withstand a court challenge and is currently state law. Democrats have used the two initiatives to brand the California GOP — and Republicans in general — as racially and culturally insensitive. Some Republican moderates now choose either to duck or to denounce the measures; some conservatives want to run them again.

The problem with being a party of regrets is, of course, that it makes for

lousy politics. And Republicans are especially lousy apologists. In California, it's easy to look back on the past decade and see strategic flaws. For example, in an ideal world, California would have had several years to debate illegal immigration, rather than the issue taking on such strong political overtones when it emerged in the form of a ballot initiative. Similarly, Proposition 209's appearance on the November 1996 ballot was more fodder for Democrats as the initiative came on the heels of Prop 187 and coincided with Gov. Wilson's presidential ambitions. (In Wilson's defense, neither initiative was meant as a political crutch: Wilson saw Prop 187 as a states' rights argument — federal reimbursement of a federal responsibility; Wilson considered Prop 209 a means to address reverse discrimination in the form of racial quotas.) Further alienating minorities — Hispanics in particular — was 1998's Proposition 227. That measure, sponsored by the political maverick Ron Unz and opposed by all statewide politicians with the exception of Gov. Wilson (even though it would pass with 60 percent of the vote), required all public instruction in California schools to be conducted in English, with English immersion programs not to exceed one year for children not fluent in English.

But if common sense seems to dictate that California Republicans should denounce the aforementioned ballot measures as mistakes, common sense would be wrong. Ask any California pollster and he will tell you that if Propositions 187, 209, or 227 were on the ballot in November 2002, each would win by the same healthy margin as previously (187 perhaps more so, given America's newfound interest in alien documentation and border security).

Why, then, has support of these ballot measures spawned long-term problems for Californians? In simplest terms, it's an image problem. A strong intellectual case can be made in defense of Props 187, 209, and 227 — bilingual education is fatally flawed; affirmative action, though well-intended, has led to quotas and reverse discrimination; states like California were unfairly paying for the federal government's failure to address illegal immigration. Yet each of the ballot propositions sent a message of anger, frustration and — as easily spun by Democrats and a sympathetic press corps — Anglos beating up on minorities. At a time when the economy was on the mend and the state was regaining its sense of optimism, it became all too easy for Democrats to portray Republicans as spiteful, non-empathetic, and stuck in the past.

A cultural rift

DURING THE 1980s, Californians talked openly of dividing in two — into northern and southern states — because of differences over water supplies and tax burdens. A similar division exists within the California GOP. Northern California Republicans — in

particular, the ones in San Francisco and Silicon Valley — tend to be moneyed, moderate, pro-choice, and environmentalist. Southern Californians — the "true believers" of Orange County, San Diego, and the Inland Empire region — are more conservative and grassroots-oriented; they are pro-life and pro-Second Amendment. One's an NPR crowd; the other listens to Rush Limbaugh.

While the two factions share the same party, there's not much shared love. And, unfortunately, it shows. In the 1994 Republican primary, 34 percent of Republicans voted against Wilson in favor of Ron Unz, a conservative Silicon Valley tech executive and, four years later, the author of Prop 227. The primary vote was, in effect, a conservative protest vote against Wilson for raising taxes. But moderates got their revenge in 1998 when the conservative Dan Lungren lost to the current governor, Gray Davis, by nearly 20 percent.

Interestingly, one of the more bitter intraparty fights occurred on the hallowed ground that is Orange County. There, a moderate group called the New Majority Committee took on the county party apparatus — the county central committee and its conservative chairman, Tom Fuentes. The New Majority Committee described its members as "fiscally conservative and socially moderate." What they constitute are 100 or so very wealthy Republican entrepreneurs, including some billionaires, intent upon financing the political fortunes of more centrist, pragmatic candidates. As their mission statement explains, "Polls and voting analyses show that many view the party as intolerant and exclusive, which is resulting in large defections among Republican women, minorities and moderate voters."

Although the group failed to oust Fuentes, they were correct in drawing attention to the Republican disconnect with certain voting groups — women in particular. In 1994, though running against a female candidate, Pete Wilson won a majority of women voters. Four years later, a million fewer women voted for Dan Lungren. For all the attention given the GOP's Latino problems, this "million-woman march" is primarily responsible for the California GOP's inability to capture statewide races.

Reaching out to these disaffected groups has been the particular mission of one man: Gerry Parsky. Undersecretary of the Treasury in the first Bush administration and a Wilson appointee to the University of California Board of Regents, Parsky is now George W. Bush's chief political emissary in California. Parsky is an investment banker by trade and brings the same business mentality to his politics: He's most interested in bottom-line results. So Parsky hasn't been loath to ruffle conservative feathers in California. It was Parsky who assembled a cosmetically diverse delegation of Californians for the 2000 Republican National Convention and inflamed conservatives by including Toni Casey, an abortion rights activist and former Democrat.

And it was Parsky, with the full blessing of the White House, who brokered a series of reforms that transformed the California Republican Party into a more corporate structure run by a more moderate coalition. Parsky

serves as the chairman of the California GOP's Budget and Expenditures Committee. Consequently, he — and, by extension, the Bush White House — will hold unusual sway over which candidates get top priority in the coming election. That could mean an emphasis on "unconventional" Republican candidates. As Parsky told reporters at last fall's state party convention, "We were a minority party in this state. We were [viewed as] anti-immigration, anti-woman, anti-Hispanic, anti-education. Those days are over — because we keep losing."

But Parsky is meeting stiff resistance from the party's conservatives. This is the party, after all, in which conservatives liken non-conservatives to an often-fatal disease: a flyer passed out at the party's winter convention in 2001 warned, "Moderates are truly the cancer in the body of the Republican Party."

Moderates, for their part, can sound just as bellicose. In December, for example, gubernatorial candidate Richard Riordan attended a northern California fundraiser sponsored by pro-choice activists. One of the event's organizers, Jillian Manus-Salzman, told reporters, "I'm so sick of [conservatives] stealing our party, and our candidates. . . . We're going to create our own march, our own soldiers."

Three directions

THE REPUBLICANS' COURSE in California will be set after the party chooses a gubernatorial nominee in the March 2002 primary. The three candidates are California Secretary of State Bill Jones, former Los Angeles Mayor Richard J. Riordan, and investment banker William Simon Jr.

All three are male and white. Beyond that, the similarities end, for the three candidates represent the three directions in which California Republicans run for statewide office. Jones, a farmer from California's Central Valley, is banking on grassroots support and his credentials as a veteran officeholder. Simon is running as a darling of the *National Review* crowd — a champion of the same "empowerment" agenda espoused by Jack Kemp, Steve Forbes, and Brett Schundler. Riordan, a venture capitalist and philanthropist before he ran the City of Los Angeles, is a political moderate and abortion rights advocate, and is banking on his crossover appeal and high name recognition in Southern California.

All three come at a risk in a race against incumbent governor Gray Davis. Jones has low name recognition across the state and limited access to campaign donations, since the big donors who support President Bush won't forgive Jones for switching his endorsement from Bush to John McCain following the 2000 New Hampshire primary. Simon, meanwhile, is a political newcomer who has never been in a high-stakes race. As for Riordan, his past record of donating to Democrats (Davis, Feinstein, Rep. Maxine

Waters) infuriates some Republicans who might turn their backs on him in the general election.

These differences also underscore the challenge facing the Republicans in their uphill battle to carry the state. In order to win statewide, the GOP can talk conservative, but ultimately it has to play to the middle — making up for that 10 percent disadvantage in voter registration by winning over fence-sitting independents. The key to Gray Davis's unexpected success in 1998 was his ability to position himself as the centrist in that year's gubernatorial race. From there, he was able to portray Lungren as an extremist. Davis did this quite cleverly, using a series of five gubernatorial debates to paint Lungren into a too-conservative corner. In one debate, Davis pointed out Lungren's differences with Wilson on abortion and gun control. In another, Davis noted that Lungren, as a congressman, voted against the 1986 Safe Drinking Water Act that President Reagan eventually signed, thus suggesting Lungren was to the right of the Gipper. Lungren didn't help matters with miscues of his own: a television spot that talked about his pro-life stance and another ad (called "Character Counts") that criticized Davis for not coming out early and loud when the Lewinsky scandal broke.

The key to Gray Davis's unexpected success in 1998 was his ability to position himself as the centrist in the gubernatorial race.

If Republicans are going to have any success in 2002, they are going to have to decide where California's viable center lies. Is it pro-life and decidedly conservative, as are Jones and Simon? Is it pro-choice and non-conformist, as is Riordan?

This was long the secret of Pete Wilson's success. His campaigns were, essentially, a smorgasbord for California voters. Wilson could at the same time project himself as a moderate and as a conservative, and in so doing build a winning majority of Republicans, crossover Democrats, independents, and — most important of all — women. For example, as governor in July 1992, Wilson launched a health program called ENABL (Education Now and Babies Later) aimed at curbing teen pregnancy. It was the kind of program Democrats love: lots of school activities and a healthy public relations budget (the program turned out to be something of a bust — the state deduced that the more teens were lectured on sex, the more interested they became). Yet at the same time, Wilson was pressing the Clinton administration for some of the nation's most draconian welfare reforms and encouraged counties to aggressively crack down on fraud by fingerprinting welfare recipients. Similarly, Wilson thrilled law-and-order types in 1994 by signing the nation's first "Three Strikes" law, yet also delighted liberal health activists when he signed the nation's first ban on smoking in bars.

Of course, neither Wilson nor any other California politician has ever had

to contend with a challenge the likes of September 11. It's a wild card in a state where it's rather easy to count the cards. But assume that it will remain at the forefront of this election cycle. Californians' lifestyles have been affected, and this is a state that places a premium on quality of life — from the weather to access to beaches and mountains. Moreover, each of the three planes that crashed on September 11 was headed for California — a point of pathos that Gov. Davis mentioned in his 2002 State of the State Address (a 35-minute speech, seven and a half of which were devoted to the events of September 11) and that the California media and candidates won't soon forget.

If outcomes in California aren't predictable, figuring a winning GOP formula is. To earn a majority of the vote on Election Day in California, Republicans need to win 39.5 percent of the vote in Los Angeles County, 57.9 percent in San Diego County, 50.9 percent in Sacramento County, and 23.1 percent in San Francisco.

Crunching the numbers is the easy part. Figuring out what's on the public's mind is harder. At present, security and the economy have replaced education as the public's top concerns. Interestingly, today's California GOP doesn't lack for potential issues to exploit. The state suffers from a massive $12.5 billion deficit, and businesses are reluctant to take root in California due to a combination of high taxes, a poor infrastructure, and spotty public schools. It's difficult to see how California's quality of life has improved in the past three years, even though the state budget has grown by nearly 40 percent. Electricity deregulation and the power crisis of 2000-2001, the dominant topic over the past year in California, have taken a back seat due in part to September 11 and in part to the fact that cataclysmic blackouts never materialized (thanks mainly to a moderate winter and a cool summer in Northern California).

Getting these issues to resonate will be a challenge given the great distraction of the war on terrorism. But Republicans have at least one thing going for them: Surveys show Californians giving lower marks to only one politician since September 11, and it just happens to be the incumbent governor, Gray Davis.

Star power?

Still, California's two Republican factions remain at an impasse. And no proven, unifying candidate exists to bridge the divide. Consider the fate of the Class of 1994, swept into office in that year's Republican Revolution. Wilson was forced out, due to term limits, after his second term as governor. He couldn't run again even if the party drafted him. Lungren, the attorney general, lost to Davis in the 1998 governor's race. Matt Fong, the state treasurer, lost to Barbara Boxer in a 1998 U.S. Senate race. Chuck Quackenbush, the state insurance commissioner,

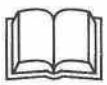
resigned from office amidst scandal. Only Bill Jones, the little-known secretary of state, remains to run for governor. The old cliché about University of Texas football, "we don't rebuild, we reload," doesn't apply to the California GOP. For the foreseeable future, California Republicans will find themselves, every two years, running a candidate not already prominent in state politics — unless, that is the unpredictable occurs. Barbara Boxer is expected to seek a third Senate term in 2004. Two big names will surely surface as challengers: Rep. David Dreier and Rep. Christopher Cox. And both will probably decline, as they always seem to do.

But two other possibilities have so far attracted little attention: Rep. Mary Bono and the actor Arnold Schwarzenegger. Neither has been a candidate for statewide office. Schwarzenegger has flirted with the idea since the early 1990s; Bono is from the Republican stronghold of Palm Springs, not the most contentious of districts. They have other similarities: Bono and Schwarzenegger are telegenic. They hold similar views on abortion, gun control, and the environment. Each has a famous last name. It's called star power, and California is a state that worships celebrity status.

The possibility of a celebrity candidate may not sit well with Republican traditionalists, who like to recount the stories of how a young Dick Nixon climbed his way up the political ladder and how Ronald Reagan led California's conservative movement from the fringes to the center of power in Sacramento. But wait a minute: Wasn't that Reagan fellow himself a showman? Vanity about grassroots politics aside, maybe it's time California Republicans looked for a new way to win — a "star" who can bypass the message and image problems.

It may sound like a desperate step, the California GOP "going Hollywood." But what are the alternatives? Perhaps Davis will, in fact, become the second governor in 60 years to lose reelection. Perhaps President Bush will maintain his lofty approval ratings, making his second term all but a fait accompli and enabling the California GOP to ride his coattails.

In an April 2001 address to the American Society of Newspaper Editors, the president mentioned a headline he'd like to see: "Two million overlooked ballots suggest Bush won California." The president can laugh; he won his election. But in the coming year, will the joke be on California Republicans?



BOOKS

Charmed By Tyranny

By STEVEN MENASHI

MARK LILLA. *The Reckless Mind: Intellectuals in Politics*. NEW YORK REVIEW OF BOOKS. 230 PAGES. $24.95

UPON HIS liberation from Auschwitz and Dachau after World War II, the Polish writer Tadeusz Borowski set about recording the realities of life in the concentration camp, producing such important works as *This Way to the Gas, Ladies and Gentlemen, and Other Stories* and *We Were in Auschwitz*. His literary ambitions led him back to Poland, where pursuing a literary career meant submission to official communist orthodoxy. Because of his great talent, the party embraced the young writer, who soon became a famous and prolific journalist. But Borowski's journalistic work increasingly lacked the artistry of his earlier prose. He produced flat propaganda articles for the Communist Party until, at the age of 29, Borowski killed himself in his home. "His mind, like that of so many Eastern intellectuals," the poet Czeslaw Milosz wrote of Borowski, "was impelled toward self-annihilation."

Borowski is one of four intellectuals profiled by Milosz in his 1953 work, *The Captive Mind*, which chronicles the debilitating impact of the official Stalinist doctrines of dialectical materialism and socialist realism on the minds of his countrymen. Mark Lilla offers his latest book, *The Reckless Mind: Intellectuals in Politics*, as "a modest companion" to Milosz's work. But *The Reckless Mind* turns out to be not so modest at all, for Lilla takes as his subject a question even more vexing than Milosz's. We may understand why intellectuals living under tyranny, jaded by the degradations of war and intimidated by a totalitarian state, would submit to regnant orthodoxy. But what accounts for tyranny's apologists in free societies? Why would an intellectual, unthreatened by censorship or official coercion, seek to justify repressive, dictatorial regimes "or, as was more common," Lilla writes, "to deny any essential difference between tyranny and the free societies of the West?" Lilla seeks to answer the question, as Milosz did, through a series of profiles of modern intellectuals.

It's unclear whether Milosz himself would embrace as clear a distinction as Lilla describes. In the midst of the Cold War, he wrote, "The world of today is torn asunder by a great dispute; and not only a dispute, but a ruthless battle for world domination. Many people still refuse to believe that there are only

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two sides, that the only choice lies between absolute conformity to the one system or absolute conformity to the other. Call such people impractical, if you will; but it would be wrong to treat their hopes as matter for contempt." Surely, Milosz's sympathy was with them.

For the philosophically minded, a liberal democracy can in fact be a cruel and desolate place. Democracy not only fails to appreciate, but positively resents, the philosopher's claim to superior insight. Liberalism reduces political life from broad philosophic debate to the private competition of individual interests. And even this lackluster politics is confined to a "public sphere," shielding all other fields of human endeavor from philosophical critique. The entire practice of philosophy, the attempt to answer political questions apart from a popular vote, becomes an anachronism. Indeed, the greatest affront to philosophy is liberal democracy's indifference to ultimate questions of right and wrong.

To be sure, those regimes that profess to answer questions of right and wrong, that claim to know the truth about human morality, have proved the most vicious engines of human suffering in history. Liberal democracies, surely, best promote comity and well-being among their citizens and in the world. But camaraderie has never been the primary concern of philosophers. "Though we love both the truth and our friends, piety requires us to honor the truth first," as Aristotle put it some time ago. Philosophers living under tyranny may sometimes be subject to abuse, but at least they are relevant.

In each of his case studies, Lilla evokes the passion for truth — or, at least, for ideas — that animated each thinker. "Thinking has come to life again" was how Hannah Arendt described her generation's reaction to the advent of Martin Heidegger, her teacher and lover. For years, a group of gifted intellectuals would gather at the feet of Alexandre Kojève, the great interpreter of Hegel, as he would expound, line-by-line, *The Phenomenology of Spirit*. Each encounter with Kojève, recalled the French philosopher Georges Bataille, would leave the listener "broken, crushed, killed ten times over: suffocated and nailed down." The same intellectual excitement prompted philosophers from across Europe and America, even after Carl Schmitt had been exposed as a Nazi, to visit Schmitt's home in Plettenberg, Germany, to discuss politics. "Schmitt is the only man in Germany worth talking to," Kojève remarked after making such a pilgrimage.

Set against the relatively modest liberal politics and bourgeois complacency of interwar Europe, the passionate philosophical thinking appeared all the more vital. "The Europe of the nineteenth century no longer lived with faith in a genuine mission; it simply disseminated its wares and its scientific-technological civilization in every direction," explained Karl Löwith, another of Heidegger's students. The traditional religious consensus in Europe had broken down; science had displaced theology as the way to understand the world, but science could not render conclusions as to the meaning of existence. "The aim is lacking," as Nietszche said, "'why?' finds no answer." Following Nietszche, Heidegger railed against the utter

"nihilism" of his age.

At the same time, Heidegger exemplified the skepticism of his times. Freed from superhuman moral rules, Heidegger undertook a radical philosophical questioning that dismantled the universalist pretensions of Western philosophy. For him, the transcendent values of the Western tradition lacked any basis in reality; all such ideas were merely the products of a specific historical period. People may forget the temporality of their consciousness, according to Heidegger, but they thereby lead an inauthentic existence; they lose themselves in "busyness," "idle talk," and a stultifying, inhuman social conformity. An authentic human existence requires man to confront his mortality and, with a new "resolve," assert himself into his time.

In January 1933, history provided the opportunity for decisive resolve, and Heidegger heeded the call. He joined the Nazi Party in May, becoming national socialist rector of Freiburg University. Many of his most talented students, the German-Jewish thinkers Hannah Arendt, Herbert Marcuse, Karl Löwith, and Hans Jonas, were forced into exile. For his part, Heidegger ended his relationships with Jewish colleagues — including his mentor Edmund Husserl — and set about "revolutionizing" the university in the service of national socialism.

In August 1933, Heidegger urged Carl Schmitt to rally to the Nazi cause. "The gathering of the spiritual forces, which should bring about what is to come, is becoming more urgent everyday," he insisted. Schmitt not only shared Heidegger's intellectual renown, but also his philosophical concerns. Schmitt, too, saw in the rise of liberal democracy a certain nihilism that neutralized all forms of political obligation, preferring commerce and security to political conflict and war. Europe, according to Schmitt, in its search for "an absolutely and definitively neutral ground," had perhaps preserved human life, but surrendered its meaning. Liberal neutrality aimed at perpetual peace, but a world without the possibility of war is a world in which people are no longer willing to die for a higher cause. It is a world of "idle talk" and entertainment, but no seriousness. Thus, Schmitt sought to rescue the political — the confrontation with an enemy — from the frivolity of liberalism, which consigned politics to an ever-smaller domain of social life. In 1933, he too saw human vitality in the promise of the "total state, which is not disinterested regarding any domain and potentially encompasses every domain."

Liberal democracies promote comity and well-being among their citizens and in the world. But camaraderie has never been the primary concern of philosophers.

Schmitt and Heidegger's turn to Nazism grew from the same passion that drove them to the philosophic life. But the turn itself was manifestly unphilosophic, for it lacked all norma-

tive content. Heidegger concluded, in fact, that political philosophy was impossible. The only "values" to which man had access were the transient ideals of his time. And yet, accepting the nineteenth century's judgment concerning the West's moral inheritance — that of nihilism — such a passionate thinker could not but celebrate vital human resolve in the face of the spiritual void. Thus Heidegger, the foremost critic of Western metaphysics, was guilty of complete formalism: resolute political action *as such* became the highest virtue for man. "One must get involved," as Heidegger would explain his political activity to his friend Karl Jaspers.

Lilla records Jaspers's bewilderment at his friend's embrace of Nazism: "What he thought they shared in the early years of their friendship was the conviction that philosophy was a means of wresting one's existence from the grip of the commonplace and assuming responsibility for it." But for Heidegger, such an elevated philosophy was not possible. His was a philosophy that explained existence in terms of everyday history; he could not help but embrace the spirit of his time. And Heidegger's existential philosophy left him unable to distinguish between reasonable involvements and dangerous ones. Any such judgment presupposed an ability to transcend man's worldly context, to reach some heavenly point of view from which objective reason was possible; but such a point of view is inaccessible to man by his nature. Without reason, all that's left is some sort of vague spiritual commitment, which perhaps explains Heidegger's famous comment in the 1960s that "Only a god can save us now." It makes sense that a thinker who insisted on the radical historical conditioning of human thought would adopt the dominant convictions of his time for moral guidance, that Heidegger would expect "from National Socialism a spiritual renewal of life in its entirety," as he wrote to his student Marcuse. But historicism also had Heidegger give up on philosophy altogether: "Let not doctrines and 'Ideas' be the rules of your Being," he wrote in 1933. "The Führer alone is the present and future German reality and its law."

The "decisionism" of Heidegger and Schmitt resembled not so much a philosophical conclusion as a theological commitment, grounded in faith rather than reason. For Schmitt, the conflicts between friend and enemy "are of a spiritual sort, as is all man's existence." Politics and theology serve the same function for Schmitt; all modern political ideas, in fact, "are secularized theological concepts." The confrontation with the enemy, according to Schmitt, occurs on strictly "existential-ontological" grounds, because man becomes authentic only through a confrontation with an enemy — regardless of who the enemy is. The meaning and seriousness of human life emerged from struggle as such. That Schmitt would aid the German-Jewish philosopher Leo Strauss early in his career, and carry on productive intellectual relationships with the philosopher Raymond Aron and the Jewish theologian Jacob Taubes after the war, seems to indicate that his stance as enemy of the Jews — in fact, his venal and pathological anti-Semitism — was for him less an expression of moral outrage than the identity handed him by fate. Schmitt, too, could not but accept the verdict of history.

Another of Schmitt's unlikely admirers was the German-Jewish literary critic Walter Benjamin, who also despaired of the triumph of technology over human vitality. But though Benjamin's central interests were theological — Benjamin advanced a fragmented, apocalyptic conception of history, taken from Jewish messianism, against the rationalist faith in "historical progress" — Schmitt's equation of politics and theology led Benjamin to imbue the historical materialism of Marxist doctrine with theological significance. "I do not concede that there is a difference between [religious and political] forms of observance in terms of their quintessential being," he wrote to Gershom Scholem. "The task is not to decide once and for all, but to decide at every moment. But to *decide*." For Benjamin, the turn to Marxist politics was an act of decisionism. He saw in the dialectical conception of history something resembling the breakages in history he found in apocalyptic messianism but not in the rationalist conception of continuous historical progress. Marxism, for him, was the theological quest for messianic redemption in other, more practical terms. His faith in that divine mission kept him unwilling to criticize Stalinism in the 1920s, until his faith was finally shattered by Stalin's pact with Hitler.

In Lilla's account, Benjamin typifies "the modern incarnation of the type of thinker who cannot be understood apart from traditional religious distinctions," but who nevertheless attempts to realize his other-worldly theological goals in the crude domain of real-world politics. But in trying to affect a synthesis of two diametrically opposed systems of thought, Benjamin became incomprehensible from the standpoint of either. To the materialist Theodor Adorno, Benjamin remained "under the spell of bourgeois psychology." To the Jewish historian Gershom Scholem, Benjamin had fallen victim to a heretical temptation, "the confusion of religion and politics."

The French philosopher Alexandre Kojève underwent a similar journey from theology to historical materialism. In his early years he studied Christian mysticism and Eastern religion, which he sought to combine with Western philosophy. Kojève eventually found his mystical yearnings satisfied in the philosophy of G.W.F. Hegel.

Hegel had adopted the Christian story of man's fall from paradise and the possibility of recovering it — that is, of establishing a harmonious political order, one that resolves the contradictions of human relations — in history. The Christian Incarnation is transformed by Hegel into the "end of history," the point at which the vanguard of history realizes the ideal political system, and then sets about spreading it across the globe. For Hegel, history ended at the Battle of Jena in 1806, with Napoleon's defeat of the Prussian aristocracy, the last challenger of liberalism. All that followed was simply the extension of the revealed truth of the French revolutionary system. "The Chinese revolution," Kojève once explained, "is nothing but the introduction of the Napoleonic Code into China." Thus, philosophy had nothing more to offer — not because philosophy was impotent, but because it had been completed: Final wisdom had been achieved.

Kojève stopped writing books on

philosophy and became a bureaucrat in the French government, preparing for the final advent of the "universal and homogeneous state" that Hegel had envisioned. The world government, for Kojève, could equally be realized through American liberalism or Russian communism, both of which were rational systems based on the Hegelian principle of mutual recognition. Kojève clearly preferred the communist alternative. But he maintained strict neutrality during the Cold War, which was, for him, a trivial event in human history; it was merely a question of how the final solution would be implemented. If Kojève could remain indifferent to the moral status of the Soviet system as versus the United States, it was because of his fidelity to an understanding of the universe in which History, in the manner of divine revelation, had already pronounced its ultimate verdict. Philosophers could not change the course of History, only prepare for its realization.

KOJÈVE'S FRIEND, the philosopher Leo Strauss, found Kojève's messianism profoundly inhuman — and told him so. "The state in which man is said to be rationally satisfied," argued Strauss, "is the state in which man withers away, or in which man loses his humanity." If philosophy is the quest for understanding, the end of philosophy represents a state in which man no longer seeks understanding, but merely exists. But Kojève countered that Strauss was possessed by an ancient prejudice: that there is, in fact, some eternal truth about human relations that is accessible to man through philosophy. Modern philosophers, however, realized that no such eternal ideas exist; all ideas arise out of the historical process. "Philosophers and tyrants therefore need each other to complete the work of history: tyrants need to be told what potential lies dormant in the present; philosophers need those bold enough to bring that potential out," Lilla writes, explaining Kojève's position.

Today, Strauss is known primarily as an opponent of historicism under the banner of "classical political rationalism," a Socratic conception of philosophy in which contemplation of nature can yield true answers to political questions. The mere possibility of discovering a true natural right serves as a clear counterweight to the temptation, engendered by historicism and exemplified by Heidegger, to identify the moral with the conventional, the opinions particular to a given society or time.

But there emerges in Lilla's account a Strauss for whom "Philosophy as such is nothing but genuine awareness of the problems, i.e., of the fundamental and comprehensive problems." For Strauss, philosophy must always remain aware of the dangers of tyranny. As Lilla writes, "It must understand enough about politics to defend its own autonomy, without falling into the error of thinking that philosophy can shape the political world according to its own lights. The tension between philosophy and politics, even politics in its worst tyrannical forms, can be managed but never abolished, and therefore must remain a primary concern of all philosophers." The problem with Kojève's system was that it engendered a sort of mental laziness in which he lost sight of a fundamental problem, the problem of tyranny. "Kojève's or

Hegel's synthesis of classical and Biblical morality effects the miracle of producing an amazingly lax morality out of two moralities both of which made very strict demands on self-restraint," Strauss wrote in response to his friend's criticisms.

At the close of his book, Lilla argues, with Plato, that the same psychological force that drives men to tyranny also leads them to philosophy: love. In the *Republic*, Plato's Socrates explains that the philosopher is driven by love, the love of wisdom, but maintains control of his passions. Those who lack self-control, who are governed by their passions, become tyrants. The twentieth century provided the consummate backdrop for these passions to emerge in sharp relief. Europe's intellectuals, passionate for the life of the mind, thrust themselves — recklessly and impulsively — into public life, to remake it in their own image.

As it happens, during his lifetime Strauss produced studies of only three living thinkers: Heidegger, Schmitt, and Kojève — three theorists who had put their formidable talents in the service of tyrants, the first two to Hitler and the last to Stalin. In contrast to their zealotry, Strauss appears (contrary to his popular reputation) resolutely anti-dogmatic. "Philosophy is essentially not possession of the truth, but quest for the truth," according to Strauss; he exhorts impulsive thinkers not to philosophical certainty, but to the philosopher's moderate self-control. Against the religious dogmatism of these intellectuals, he juxtaposed the uncertain wisdom of Socrates: The true philosopher knows that he knows nothing.

To understand the irresponsible political activity of modern intellectuals, Lilla writes, one must "confront the deeper *internal* forces at work in the philotyrannical mind." His analysis goes a long way toward understanding the intellectual servants of the master ideologies of the twentieth century. The ultimate lesson, however, is that the problem of philotyranny is always with us, for tyranny does not reside in our familiar ideologies, but in the composition of the human soul.

Strauss exhorts impulsive thinkers not to certainty, but to the philosopher's moderate self-control. Against the religious dogmatism of these intellectuals, he juxtaposed the uncertain wisdom of Socrates: The true philosopher knows that he knows nothing.

OUR CURRENT intellectual culture, surely, exhibits the passionate allure of ideas. Today's thinkers aim above all at final answers, and so trendy ideologies and "isms" dominate the landscape of contemporary thought. But intellectuals content to rest on the shallow but

dependable ground of multiculturalism, nationalism, relativism, or some other key to eternal happiness and justice — who work only to incite moral fervor in the public mind — are more interested in preaching than understanding. Such thinkers, as Lilla writes of the European intellectuals, "consider themselves to be independent minds, when the truth is that they are a herd driven by their inner demons and thirsty for the approval of a fickle public."

Intellectuals who disseminate political ideas as religious answers, in a sort of modern prophecy, incite passion rather than thought. It's not philosophy; it is hubris.

Getting Along

By Elizabeth Arens

John Gray. *Two Faces of Liberalism.* New Press. 162 pages. $25.00

"This is a Religious War" was the title of Andrew Sullivan's cover story in the October 7 *New York Times Magazine.* Remarkably, in the climate that prevailed in the weeks following September 11, this was an assertion of considerable boldness. Reluctance to encourage discrimination against Muslims or to alienate our Islamic "allies" led most public figures to follow the broad abstractions of President Bush: This was a war between a good, moral people and pure, unqualified evil. Sullivan was one of a handful of writers who dared to grapple with the religious dimension of the attackers' destructive rage. "Osama himself could not have been clearer about the religious underpinnings of his campaign," he wrote, and bin Laden's words "had salience among the people he wished to inspire and provoke." This violent strain of Islam is not limited to bin Laden and a few followers, nor is it a wholly modern phenomenon: "It would be naïve to ignore in Islam a deep thread of intolerance toward unbelievers, especially if those unbelievers are believed to be a threat to the Islamic world."

But this intolerance is hardly unique to Islam, Sullivan wrote. At the heart of the conflict, he argued, was the problem of fundamentalism generally, which everywhere is at "war against faiths of all kinds that are at peace with freedom and modernity." Fundamentalism includes in milder form some strains of religious belief in the United States. It also shows up in secular form, for example, in the public ideologies of Nazi Germany and Soviet Russia. Its defining characteristics are "the fusion of politics and ultimate meaning," and "the subjugation of reason and judgement and even conscience to the dictates of dogma."

The key feature of American society, by contrast, is the separation of politics from questions of ultimate meaning, Sullivan wrote. Americans have created a political system that stands apart from religious questions and that permits all citizens to worship as they

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please. In our current war against terrorism, therefore, what we defend is "the principle of the separation of politics and religion," and "the universal principles of our Constitution — and the possibility of free religious faith it guarantees." According to Sullivan, the conflict is between fundamentalism and a politics of ultimate truth on the one hand, and toleration and pluralism on the other.

SULLIVAN'S ARTICLE offers an intelligent account of the inner logic of fundamentalism and its allure in societies wracked by the pressures of modernization. It fails, however, to accurately represent the character of our own society. *Two Faces of Liberalism*, the recent work by British philosopher John Gray, can aid us in understanding why. It is a slender volume that tackles a broad subject matter with bold claims and vigorous writing. Gray, professor of European thought at the London School of Economics, has traveled considerable distance over his career. He has shifted from a Thatcherite libertarian to a Third Way environmentalist, and from a fairly orthodox liberal to a harsh critic of liberalism. In recent years, he has argued with increasing conviction that what he refers to as "the Enlightenment project" is a failure. Flawed in theory, liberalism's pursuit in practice has led to unhappiness and social strain in the societies in which it predominates, and increasing poverty and instability across the globe. Now, however, Gray claims to have identified an element of the liberal tradition that is worth rescuing from the wreckage.

In *Two Faces of Liberalism*, he assumes the responsibility of bringing this older, more shadowed "second face" of liberalism into the light. Liberalism's first face, which Gray identifies with John Locke and, in this century, with John Rawls, is the project of designing a single, ideal, universally legitimate regime. The second face — which he calls *modus vivendi* or neo-Hobbesianism — is an effort to create institutions that will permit different ways of life to coexist peacefully. The philosophical basis that Gray offers for this approach is the doctrine of value-pluralism, the idea that there are many different human goods, some of which cannot be compared in value. These goods are embodied in ways of life which are not only different, but often incompatible. Some exclude each other logically, others tend to drive each other out in practice. "No life can reconcile fully the rival values that the human good contains," Gray writes; furthermore, "the span of good lives of which humans are capable cannot be contained in any one community or tradition." This being the case, what is needed are "common institutions in which the claims of rival values can be reconciled." While the existence of different and incommensurable ways of life has been the truth of the human experience throughout history, Gray argues that the need for *modus vivendi* grows increasingly urgent as, through greater mobility and global economic integration, ways of life are more and more commingled.

Historically, liberalism is premised on this very notion — that, given the choice, human beings will lead different lives, and that they should be permitted do so. Gray states this liberal orthodoxy as follows: "conflicts of value are what make liberal regimes legitimate.

Liberal regimes enable people whose views of the good life are at odds to live together on terms they can accept as fair." But Gray argues that many liberal thinkers, including Locke and John Stuart Mill, saw toleration as a means, not an end. Pluralism was a temporary stage in human development in which ideas about the good life could be aired and resolved. Left to their own devices, humans would gradually arrive at a uniform understanding of the best life. Other liberal thinkers, among whom Gray includes F.A. Hayek, Joseph Raz, and John Rawls, held that diversity of views about the good is a permanent feature of human existence. Aware that "the goods of life clash," these thinkers sought to "state principles of right and justice that stand aloof from these conflicts." They have attempted to devise a system of political principles that does not stand on any particular conception of the good but rather permits all worthwhile ways of life to flourish. Gray does some of his best work in demonstrating that they have not succeeded.

Some liberal thinkers attempted to devise a system that does not stand on any particular conception of the good but rather permits all worthwhile ways of life to flourish. Gray does some of his best work in demonstrating that they have not succeeded.

Thinkers in the liberal tradition have tended to regard liberty as the most important of human interests, differing, however, in their definitions of liberty and their judgments about which kind of liberty is most fundamental. In *Two Faces of Liberalism*, Gray argues that all liberal systems run up against conflicts of value that cannot be resolved by appeals to liberty. John Rawls sought by his Greatest Equal Liberty Principle to avoid prioritizing one strand of liberty over another. Yet he relies on an assumption that all "basic liberties compose a compossible set." If there are liberties which are not compatible, and which undermine each other, then Rawls has failed, because judgments about what constitutes the greatest liberty "depend on assessments of the relative importance of human interests that different liberties protect." John Stuart Mill's principle of liberty, writes Gray, was no more successful. He proposed to restrict the liberty of an individual only in order to prevent harm to other individuals. Clearly, however, people with divergent conceptions of the good will come to different conclusions about what is meant by harm.

Joseph Raz believed that from value-pluralism followed the idea of freedom as personal autonomy — the ability to be part-author of one's life — since autonomy enables us to choose among rival goods. Gray argues in response that autonomy is a complicated notion, encompassing many different elements: "the absence of coercion, the posses-

sion and exercise of skills in choice-making and an environment which contains an array of options that are worth choosing." Any political system based around the idea of autonomy will not avoid making judgments about which of these elements is most important, nor about the worth of the options that individuals have available to them. "Policies aiming to promote autonomy cannot avoid favoring some options, some purposes, some projects, some values above others," Gray writes. Even Isaiah Berlin's famous effort to devise a minimalist system of liberty — negative liberty, or the absence of coercion — that would escape indeterminacy or arbitrariness (as well as protect against more real-world evils) fails, as "there is no impassible barrier that marks off freedom from other values."

But not only do liberal theories linger in indeterminacy, they also exclude many good ways of life entirely. Discussing Raz, Gray argues that "autonomy cannot be taken to encompass all good things"; furthermore, "some conceptions of the good do not recognize autonomy." No orthodox liberal thinker escapes this problem, Gray argues; all fail to account for ways of life that are not built around the self-governing individual. At most, Gray claims, these liberal orthodoxies permit only "diversity of personal ethical beliefs and ideas," not a genuine diversity of ways of life. Pluralism remains "in the realm of voluntary association." In reality, this assumption excludes most ways of life that exist outside of the United States and a few European countries.

What Gray demonstrates about liberal theory can be seen in liberal practice. Western nations from the U.S. and Britain to Germany and Sweden can all be broadly defined as liberal, but they are marked by different value judgements within a liberal horizon. Which society is more liberal: that which outlaws discrimination by race to protect individual dignity, or that which permits an individual to hire or associate with whomever he or she pleases? That which allows citizens to keep what they earn in the marketplace, or that which redistributes property in the name of equal opportunity? That which strictly enforces separation of church and state, but where religious communities are politically powerful, or that in which religion does not exist as a political force? As Gray writes, all societies "embody local settlements of the claims of rival ideals."

At the same time, liberal societies do honor distinctive goods — freedom, equality, autonomy — and permit others to wither. In the past decade there has been a chorus of complaint about the weakening of community in America, the decline of civic participation, of neighborhood socializing, of a feeling of rootedness in a particular place. Conservatives worry about the permeation of the family by liberal values of individualism and autonomy, which they claim destroy parents' sense of responsibility to each other and to their children. Those on the left lament the destruction of the environment and the waning of a sense of connection with the natural world. All of these are goods that are given little support in a liberal order. And some ways of life are entirely excluded. No mini-Talibans will be constituted within the United

States. Adults may succeed in joining such a sect, but it will be by their own free choice. If they seek to impose this life upon their dependents, they are likely to be indicted for abuse. And there are limits even on the ways of life that adults may enter into: No adult may contract into slavery or join a polygamous marriage. There may be no *single* way of life in the United States, or in any liberal society, but there is certainly a distinctive *range* of possibilities, limited by liberal values.

But Gray's case for *modus vivendi* is not without problems. For one thing, there is a serious lack of clarity in his presentation of the concept of a "way of life." Early in *Two Faces of Liberalism*, Gray writes, "The lives of a professional soldier and a carer in a leprosarium, of a day trader on the stock market and a contemplative in a monastery, cannot be mixed without loss." But if this list represents the full range of possible ways of life, then Gray's argument is in trouble: All of these lives can and do exist comfortably within contemporary liberal society; all are selected by the individuals who lead them.

Soon, however, Gray is defining "way of life" in terms suggesting something far more collective and unchosen: "Ways of life must be practised by a number of people, not only one, span the generations, have a sense of themselves and be recognized by others, exclude some people, and have some distinctive practices, beliefs and values." And, as we have seen, Gray scoffs at those "recent liberal writings" in which, mistakenly, "the fact of pluralism refers to a diversity of personal ideals whose place is in the realm of voluntary association." Often, in contrast with his discussion of soldiers and day traders, Gray suggests that all autonomous individuals have the same way of life. For example, he writes that John Stuart Mill at times was "a militant partisan" of the idea that "the best way of life is the same for all — the form of life of the autonomous individual."

Thus, the insight of true value-pluralism is that the autonomous life is merely one possibility among several valuable alternatives. Gray argues that nothing about the modern condition has erased this truth. At the same time, however, he insists that in a progressively integrated world, more and more people find themselves beholden to the claims of incompatible ways of life. And he suggests that in this circumstance, choice and autonomy are unavoidable elements of their condition. For instance, Gray places himself in the shoes of a second-generation Asian-American woman who must decide between entering into an arranged marriage or pursuing a more Western courtship: "In that case, an appeal to common practices will not suffice. I must decide which practice I accept." People belonging to multiple ways of life, Gray writes, face these kinds of "recurrent" and "radical" choices; they engage in "self-creation through choice making." As ways of life become more commingled, clashes between traditions occur more often, and the result appears to be that lives based on individual choice — liberal lives — are becoming more and more predominant.

But Gray adamantly rejects the notion than human civilization is moving inexorably towards liberalism. To him, it is an assumption of the

"Enlightenment project" which has been proved false by history. This view — an "Americanocentric version of positivist philosophy" — assumes that societies are becoming both more homogenous internally and more similar to each other, and that "the values on which they converge are liberal values favoring personal autonomy." According to Gray, "none of these assumptions is well founded." To the contrary, many non-Western societies (he offers Japan and Singapore as examples) have modernized and "adapted well to technological and economic change . . . without apparently accepting personal autonomy as a core value." This is also the case, Gray argues, with immigrant groups in Western nations, many of which have achieved success and lead flourishing lives without embracing personal autonomy or "assimilat[ing] to the liberal majority cultures of their host societies."

This seems to me to be blatantly incorrect. It may be the case that Japan and other Eastern countries achieved economic modernization without wholly liberalizing their economies or societies. But it now appears that these nations' illiberal features are preventing them from emerging from a decade-long economic decline. Furthermore, the younger generations in Asian nations have been chafing visibly under the strictures of their parents' social customs and have embraced consumerism and an individualistic ethic. Certainly, evidence does not support Gray's assertion that immigrants in Western countries remain in communities apart, escaping liberal influence entirely. A large proportion of second-generation Asian Americans are thoroughly assimilated into the majority culture, living among and often intermarrying with persons of European ancestry. Gray's own discussion of commingled ways of life helps us to understand why this is the case: When people become cognizant of the existence of different ways of life, are aware that different ways of life are open to them, and are placed in situations in which they cannot help but choose between one way of life and another, they are already on the road to becoming autonomous individuals.

Some Eastern countries may have achieved economic modernization without wholly liberalizing their economies or societies, but these nations' illiberal features are preventing them from emerging from a decade of economic decline.

Thus Gray's historical case against liberalism seems to fail. To be sure, societies throughout the world are not quickly and painlessly converging on liberalism. But the widespread introduction of market economies and of American cultural products has brought liberal elements into societies where they earlier did not exist. These liberal elements have influence, espe-

cially among younger generations. And the assimilation of immigrants to Western norms continues apace.

Gray's moral case fails as well, as his analysis of the state of human affairs departs from the tough-minded realism and reliance on experience he celebrates and claims is lacking from the work of theorists such as Rawls. Indeed, Gray's argument often seems to emerge from just the kind of abstract, deductive reasoning he derides in Rawls and other liberal "legalists." Gray claims that there are many different, incompatible human goods. From this, he proposes that there are many different, incompatible good ways of life. From this, he argues that that there are many different regimes in which human life can flourish. All this seems logical. But if we survey the planet, where do we find human life flourishing outside of liberal societies? Outside of liberal societies, we find mostly dire poverty, oppressive governments, and violent ethnic conflict, and often all three.

By the end of *Two Faces of Liberalism*, Gray has demonstrated persuasively that no theorist can devise a political system, liberal or otherwise, which can be extended to encompass all the ways of life that exist on this planet. He argues instead for building multiple regimes that can achieve compromises between warring ways of life. Certainly, there can be no objection to that goal. But we may be forgiven for wondering why Gray rejects so stridently any effort to expand the scope of liberal norms. There can be no doubt that under a liberal regime some human interests embodied in other, nonliberal ways of life will wither and die. But many such interests are not exactly thriving at present. It may be the case that some goods we associate with the premodern epoch are no longer achievable in human society. This is a tragedy, but it should not prevent us from giving liberalism its due. More important, Gray's successful critique of the pretenses of liberal *theory* should not lead us to throw up our hands in despair at the prospects for liberal *society*, which is remarkably healthy.

As we have seen, Andrew Sullivan's account of the United States as a society defined by toleration fails to capture the heart of the matter, as does his opposition between liberal pluralism and Islamic and other fundamentalisms. There is greater truth in Gray's reference to liberalism as "a species of fundamentalism." Liberalism is not a neutral framework that permits all ways of life to flourish. It is itself a way of life, or range of ways of life. As such, it should be judged in the way Gray asks us to judge ways of life, by holding it up against identifiable human goods. In liberal societies, freedom is not perfect, but it is great. Prosperity is not universal, but it is widespread. Contentment is not ever-present, but neither is misery. There is room for achievement, and room for complacency. And there is peace. Liberalism need not be a framework for complete toleration to be legitimate. And liberal societies need not advance each and every human good to be considered, if not the last, then at least the present best hope of men and women on earth.

LETTERS

The Realities of Warfare

SIR, — If Scott Cooper is correct ("The Politics of Airstrikes," June/July 2001), and the problem isn't political micromanagement but the realities of coalition warfare, we, as the "lone superpower," had better learn how to fight and win on our own. Our "coalition partners" will cost us American lives as constant coordination, compromise, confusion, and delay make our "OODA Loop" unravel like ramen soup noodles in boiling water.

However, I suspect that micromanagement by politicians and senior commanders *is* a real problem, because that is the way we practice in peacetime, and that is the way we fight in wartime, and have done so since at least the 1960s. Why does this happen? Because the higher in position a commander or leader is, the more likely he will be in the crosshairs of the piranha-like press at the first hint of error, failure, delay, or loss of momentum — all of which happen constantly in war. Commanders and leaders who are subject to instant and insistent monitoring — and likely to be rebuked or canned if a significant error or disappointing performance occurs — tend to act the same way towards their subordinates, thanks to the dubious blessings of modern command-and-control communications and computers — that bad news rolls at increasing velocity downhill until every fighter pilot, department head, and platoon leader is under constant zero-defects-driven micromanagement.

Limited war is a reality, and limited wars are especially and closely tied to political decisions. In a free republic, elected civilians make the political decisions, establish goals and objectives, and approve doctrine and top-level strategic plans. However, if the civilians go beyond that to micromanaging individual target selections (rather than targeting criteria) and individual mission flight paths (as opposed to general operating areas and restricted areas), and providing specific orders to tactical commanders (instead of guidance in the form of the Rules of Engagement and implicit reliance on "good military judgment"), they are guilty of a very common mistake. They are confusing responsibility and authority with expertise and focus.

A very good president is more often than not able to make good strategic judgments. But even the best president cannot simultaneously be a very good Marine platoon leader or Navy tactical action officer or Air Force pilot (who is also increasingly his own navigator and bombardier). Nor can his generals and admirals. They just aren't there, and all the near-real-time reporting won't replace the situational awareness and tactical experience of that junior or mid-grade officer.

War — especially limited war — is indeed an extension of politics, but it is also a real-time, life-and-death struggle

to fight and win, and political and uniformed seniors need to do their jobs building that two-way trust and confidence and developing their subordinates, so that when war comes, the seniors can do *their* jobs — planning the next battle and the battle after next, and supporting the engaged forces — and let the operational and tactical commanders fight the battles of the moment.

That mutual trust and confidence also includes accepting that in war, especially the confused and ambiguous combat environments common in limited war, mistakes will be made, troops will be lost, and even, sadly, non-combatants will be injured or killed on some occasions. While military professionals seek to minimize absolutely non-combatant casualties, it is impossible completely to eliminate them. Non-combatants cannot simply disappear when one is bombing a nation's infrastructure to dust. Nor are they always able to escape a ground battle when the warring sides are mounted in armored vehicles while they are fleeing on foot or on tractors pulling their belongings in a harvest wagon.

Cooper's argument about the failure of Rolling Thunder and the success of the Linebacker campaigns is largely correct. Strategic (non-nuclear) bombing alone, especially when heavily constrained, will not destroy or break an adversary's will or ability to fight, but it may bend the adversary to a sufficient degree — constraining actions or encouraging concessions he might otherwise not make. What Cooper overlooks is that the Vietnamese Lao Dong Party leadership knew our overall strategic situation better than we did. Ultimately, they gave up "concessions" to stop the heavy bombing campaigns, knowing that the concessions didn't matter — the U.S. was only looking for a face-saving way out of a defeat, and once U.S. forces left Indochina, they would be gone for good. The North Vietnamese made promises they didn't intend to keep, knowing that the U.S. would be very unlikely to follow through on the punitive clauses in the peace accord. They judged wisely. Also, there was not especially significant dissent among the senior military leadership on the overall air warfare strategies.

The problem was that overly simplistic or fundamentally erroneous understandings of who the enemies were, what they were, and what they were after; how committed they were to their objectives; and what their underlying philosophy of war directed them to do to win led to largely inappropriate, ineffectual, and sometimes counter-productive American strategies, both in the air and on the ground.

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Letters to the Editor

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