Philosophy & Public Policy Quarterly

Formerly *Report from the Institute for Philosophy & Public Policy*

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

Volume 24, Number 4 (Fall 2004)

How the Terror Laws Make Terrorists: Pre-emptive Prosecution in the Homeland

David J. Staudt

When Attorney General Ashcroft announced, shortly after the September 11, 2001 attacks, that the FBI was shifting its anti-terror priorities from prosecution of terrorist actors to prevention of terrorist acts, it was a proclamation we had good cause to believe. Our traditionally retributive system of criminal justice had, by the turn of the century, already incorporated many practices that can only be justified upon an incapacitive or "preventive" theory of justice. That the Department of Justice should adopt a preventive posture in the face of kamikaze attacks that left behind no principal offenders to punish seemed prudent enough at the time. However, it is well known that the preventive theory of criminal justice generates more than its share of anomalies in practice, at least as judged by standards of fairness and accuracy, and the shift to preventive prosecution comes with significant social cost. In the anti-terrorist paradigm, in particular, our legislative race to neutralize any and all persons who aid, abet, conspire with, or think about becoming persons who might subvert our "national security" is leaving behind many collateral casualties. Whether or not collective utility regards this damage as acceptable is beside the point. It is certainly unjust.

My aim here is to show the extent to which our society has blessed new incapacitive measures in the domestic "War against Terrorism," even after their predictable harms to innocents have come to light; but also to show how the new terror laws will be harming categories of persons who have no organic relation to terrorism. In particular, I'd like to show how two predictions of wrongful persecution derided by the right as "hysterical"—the prosecution of political protestors as terrorists, and government monitoring of our reading habits—will reasonably occur under the current criminal code as amended by the USA PATRIOT Act and other recent enactments. Indeed, recent terror investigations show these predictions in the early stages of becoming reality.

More generally, we can see the USA PATRIOT Act and related anti-terrorist legislation as the latest in a series of "preventive" or "incapacitive" motives in Western criminal justice systems, systems whose goals traditionally had been to punish wrongdoers proportionately to their moral dessert for committing socially harmful acts. Consistent with what scholars find most troubling about the preventive theory of criminal justice in general, these newer, preventative measures have generated the majority of sanctions that libertarians and offenders' families find most repugnant. "Three strikes" sentencing laws, civil commitment of "sexually violent predators," the US Sentencing Guidelines' use of criminal history to enhance prison terms, strict-liability pornography laws, and a continuingly broadening set of "inchoate crimes" coupled with harsh mandatory minimums and the abolition of parole, have all been justified by legislators in recent decades as necessary incapacitive measures—and are among the main reasons why minor sex offenders and small possessors of narcotics now typically serve more jail time than rapists and some murderers. But whereas these sanctions are at least roughly confined to socially disreputable activities that citizens know to avoid—drug use, child pornography—we can predict that the new anti-terror laws will cast their net over a large set of traditionally acceptable, even privileged, social and political activities. The unjust anomaly generated by the pre-emptive prosecution of domestic terror conspirators, like the anomaly caused by pre-emptive war, will be that far too many innocents suffer.

Preventive Justice and Its Discontents

If many of the United States Government's tactics in the War against Terror are not simply explained by mean spirit or the President's drive for power, then they can only be justified by a preventive theory of criminal justice. That theory (also sometimes called the "restraint," "disablement," or "incapacitive" theory of punishment) lets society deprive persons of their liberty based upon their level of dangerousness to others, preventing those persons from causing future harms. The theory is usually treated in law schools in opposition with the retributive or "just desserts" theory of punishment, which captures the traditional understanding that criminals are punished according to their level of moral culpability in causing injury to individuals or society's interests. The preventive theory's attraction is that it essentially eliminates the arbiter or legislator's need to determine perpetrators' moral culpability across broad categories of harmful acts—a determination that can often be grossly unjust in individual circumstances. Legal scholars agree that as a stand-alone, normative principle of criminal justice, however, preventive punishment wouldn't be tolerated for very long by the public. As Harvard Law Professor Paul R. Robinson has explained, psychology's tools for predicting dangerousness are still crude; our prison system is designed to punish, not reform; restraints would have logically to be limited to the minimally-restrictive; and any long prison sentence would have to be periodically revisited to determine a convict's ongoing dangerousness. The potential for government abuse or error would be very great, and the disparity of punishments meted out for the same unlawful acts (or for no unlawful acts, since the theory doesn't really require a crime to be committed before it imprisons a dangerous person) would likely strike the community as something other than "justice."

The preventive justification—and its unjustly punitive practices—were employed by federal law enforcement immediately following 9/11, when Attorney General John Ashcroft ordered, in his own words, "a preventive campaign of arrest and detention of lawbreakers." Although many of the estimated 2,000 or more 9/11 detainees were, technically, lawbreakers, in that they were picked up for civil immigration law violations, it was not the criminal penalties for such infractions that kept most of them in jail for three months or longer. Others who were not visa violators, but who were "encountered during the course of the FBI's investigation into the attacks," i.e., present when the FBI picked up the violators, were arrested and then held on "material witness warrants" issued *ex post facto.* In the parlance of the law, these detainees were not being "punished" at all. Rather, they were Muslim immigrants or Muslim associates of Muslim immigrants, which in the FBI's mind was a sufficient index of dangerousness to hold them "until it was determined they were not involved in terrorist activity." Illegal as the whole detention campaign arguably was, the Attorney General got away with it, deporting the immigration detainees, refusing to tell the House Committee on the Judiciary who the material witness detainees were, and benefiting from a decision in the Court of Appeals for the District of Columbia that withheld all details concerning the campaign under a law enforcement exception to the Freedom of Information Act.

The United States Government's tactics in the War against Terror . . . can only be justified by a preventive theory of criminal justice.

In *Hamdi v. Rumsfeld,* the US Supreme Court also recently ratified preventive detention of the citizen-"enemy combatant," to the extent such is defined as "part of or supporting forces hostile to the United States or coalition partner in Afghanistan and who engaged in an armed conflict against the United States." The plurality of four justices rejected the argument of an unlikely dissenting combination of Justice Scalia and Justice Stevens that the US Criminal Code's treason statute, as well as a dozen other federal statutes criminalizing seditious acts, already give the Executive more than sufficient existing tools with which to neutralize or prosecute a Yassar Hamdi. Without endorsing the Government's argument, the plurality nonetheless had no difficulty accepting that detention of unlawful combatants was "an important incident of war" that was "solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."

The preventive tool that is most widely used in the United States is prosecution for "inchoate" crimes, or what Robinson calls the modern penal system's "ability to punish the uncommitted crime." Under the federal criminal code, attempt or conspiracy to commit many crimes may be punished "up to the maximum punishment that would have applied had the offense been completed." Indeed, the Model Penal Code would punish all inchoate offenses as if they had been completed crimes. Robinson argues that this approach maximizes "societal control over dangerous people," since "the offender who fails to cause harm because police are able to interrupt him may be as dangerous as the offender who completes the offense." Currently, the charge of conspiracy is the favorite tool of federal prosecutors, who charge it in most criminal complaints or indictments involving more than one defendant. It appears to be charged in all international terror prosecutions.

Of course, there would appear to be no great injustice in severely punishing active members of a terror cell for conspiracy, especially where the plan were a suicide attack, and the conspirators had already begun physical actions or "overt acts" to attempt the crime. The successful suicide attack usually leaves the most morally culpable perpetrator beyond the reach of law, and it is a rare case in which the retributive principle—at least so far as the suicide bomber goes—entirely fails to match punishment to offense. Since the traditional common law defines conspiracy as an agreement between two or more persons to commit a specific crime, who have intent to commit the crime, and who act in furtherance of the scheme, a suicide bombing case seems a clear mark of severe dangerousness, incarceration for conspiracy of which, as an incapacitive measure, is logically consistent and intuitively just.

Logical inconsistency and moral injustice enter when "terrorism" includes a broad range of activities, some hardly dangerous in their own right. The risk of inconsistency and injustice also increases to the extent that the proof elements of "conspiracy" are diluted or waived. The latter has already occurred in the federal system, due mostly to precedents crafted during the "War on Drugs." One public defenders' association has described contemporary federal conspiracy law as akin to "taking a trip to Lewis Carroll's' Alice in Wonderland," critical of the many ways in which our justice system has enlarged the scope of the common law crime in order to ensure successful prosecutions. For example, the two federal conspiracy statutes for controlled substance offenses eliminate the need to prove any overt act to carry out a plan. Two people who agree to get drugs to sell have already broken federal law, whether or not they take any steps to get the drugs. Under the generic federal fraud statute, only one person of a conspiracy need commit an "act to effect the object of the conspiracy" in order for all members to be punished equally for conspiracy and for all other crimes which the actor foreseeably commits in the course of the overt act or offense. In the federal defenders' opinion, there is "substantial danger that an individual lumped into a mass conspiracy may be found guilty based on evidence that is applicable solely to other defendants."

Logical inconsistency and moral injustice enter when "terrorism" includes a broad range of activities, some hardly dangerous in their own right.

We know, for example, that as a result of judicial precedents in the War on Drugs, federal prisons contain many wives and girlfriends of distributors whose only involvement in the greater conspiracy was that they knew their husbands or boyfriends were selling drugs and that they did some trivial service for them such as depositing the proceeds. The US Sentencing Guidelines, tarring with a broad brush, has nonetheless given these women hard time commensurate with the total amount of drugs handled by "the conspiracy." (An additional anomaly is that since the women often know so little about the actual drug deals, they can't offer material assistance to prosecutors, and wind up doing more time than some of the actual dealers.) Since the advent of the War on Drugs, in particular, conspiracy has come closer and closer to meaning little more than "association" with suspected wrongdoers.

The Department of Justice has deftly applied these modified conspiracy rules to the domestic War on Terror, creating similar anomalies. Civil rights attorney Lynne Stewart fell victim when, after allegedly passing a message from imprisoned client Abdul Rahman to the media, she found herself charged with conspiracy to commit the terrorist acts that the allegedly coded message facilitated. That she may not have known of the plot or any more of its accessories is not, in the government's view, a defense. Indeed, the trial judge who ruled against Zacarias Moussaoui's motion to dismiss his own terrorist conspiracy prosecution cited multiple-defendant drug prosecution precedents, noting that

> [o]nce it is established that a conspiracy exists, the evidence need only establish a slight connection between the defendant and the conspiracy to support a conviction. One may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities.

Seventy-five percent of the indictment against Moussaoui recites the events of 9/11 as the presumed "overt act" of his conspiracy, even though prosecutors concede that Moussaoui did not participate in planning or executing those attacks. The court agreed that once he joined al Qaeda, Moussaoui could be presumed to have agreed to "a conspiracy to attack the United States," and thus could be held responsible for all foreseeable offenses committed by al Qaeda members.

The USA PATRIOT Act

In early law review critiques of the PATRIOT Act, scholars feared that new definitions of terrorism would be applied to monitor and stifle legitimate public protest. In particular, they were concerned about the scope of the following newly-added definition of "domestic terrorism":

> the term "domestic terrorism" means activities that
>
> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or any State; and
>
> (B) appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily within the jurisdiction of the United States.

The troubling aspects of the definition are that almost all demonstrations aim to influence the policy of the government, that "intimidation" is a subjective state, and that tempers can easily get out of hand during protests. One Congressman, reading the text after its passage (we know no legislator read it beforehand) worried that Congress "may be handing a future administration tools to investigate pro-life or pro-gun rights organizations. . . . It is an unfortunate reality that almost every political movement today, from gun rights to environmentalism, has a violent fringe." Many commentators worried the definition would sweep up any domestic political group that had ever been accused of intimidation or property damage, "such as Act Up, [PETA], Operation Rescue, or the Vieques demonstrators." To these we can add picket lines and labor rallies, and urban riots.

The PATRIOT Act's insertion of "domestic terrorism" in the definitions of the federal criminal code chapter on Terrorism is not altogether clear. The Act did not add a new crime called "domestic terrorism," and the term is never used again in the chapter. In addition to the crime of "acts of terrorism transcending national boundaries," there already existed a "Federal crime of terrorism" (defined as any offense "calculated to influence or effect the conduct of government by intimidation or coercion") that violated any one of approximately thirty other federal statutes involving violence or destruction of property.

In early law review critiques of the PATRIOT Act, scholars feared that new definitions of terrorism would be applied to monitor and stifle legitimate public protest.

The new definition may have been included for reasons other than to define a new crime, though. We know in hindsight that the PATRIOT Act was a Department of Justice compiled "wish list" amending over thirty federal statutes to give law enforcement either greater powers (to obtain business records or get Foreign Intelligence Surveillance Act (FISA) warrants, for instance); to remove limitations from existing authorities (such as the geographical scope of warrants and notification deadlines); or to codify or overrule specific judicial rulings (these concern the FBI's ability to use evidence obtained by spying agencies to prosecute criminals—the so-called "wall" on which the Department of Justice blames the 9/11 attacks). Without making "domestic terrorism" a new crime, the PATRIOT Act nonetheless modifies obscure chapters of the criminal code, including one section that grants authority to the Attorney General to reward and protect the identity of any person who "furnishes information leading to the prevention [or] frustration . . . of an act of terrorism against a United States person or property"—which now includes "domestic terrorism."

The new definition may also be a placeholder. The PATRIOT Act amended FISA to allow agents surveillance warrants when "a significant purpose" of the surveillance is to obtain foreign intelligence information. Subsequently, the Domestic Security Enhancement Act of 2003 ("PATRIOT II") sought to amend the language of both FISA and the criminal (or "Title III") wiretap statutes to allow both FISA and normal investigative surveillance to be used on purely "domestic terrorist" groups. The new definition appears to have been part of a Department of Justice legislative strategy eventually to allow surveillance and subpoena of "domestic terror" groups with no connection to foreign powers.

There is plenty of evidence that political dissent is now targeted for surveillance, and that the government is looking to prosecute. In a March 2002 memorandum to the FBI, "What Do I Have to Do to Get a FISA Warrant?," the Attorney General and his department took the position that information submitted to the FISA court in support of surveillance applications "need not be constitutionally reliable." He also interprets "clandestine intelligence gathering activities," one of several statutory predicates for FISA surveillance, to include attempts to collect "trade secrets, economic developments, political information, and even personal information." Political action, when "disguised propaganda" and "harassment," is also, in the Attorney General's opinion, clandestine intelligence gathering activity. At the same time, Attorney General Ashcroft issued new guidelines on investigations, requiring the FBI to "proactively draw on available sources of information to identify terrorist threats and activities . . . with an eye toward early intervention and prevention of acts of terrorism before they occur." Overturning a Vietnam-era reform, he once again "authorized [the FBI] to visit any place and attend any event that is open to the public, on the same terms and conditions as the public" without opening an actual investigation. Peaceful protest demonstrations were specifically addressed in the guidelines under the heading "Terrorism Enterprise Investigations." In May of 2003, Congress again helped bridge the "foreign agent"/domestic free-speaker divide, amending FISA to allow unaffiliated "lone wolf" actors to be considered "agents of a foreign power" for surveillance purposes. Because an "agent of a foreign power" need no longer be cooperating with anyone, much less a foreign power, US citizens became subject to FISA without any necessary foreign nexus.

In perhaps the clearest indication that the Executive finds a rough equivalence to exist between protest and terror, FBI Intelligence Bulletin No. 89 ("Tactics Used During Protests and Demonstration"), issued 10 days before large Washington and San Francisco anti-Iraq-occupation protests, alerted law enforcement to report "possible indicators of protest activity" and other "potentially illegal acts" to "the nearest FBI Joint Terrorism Task Force." Describing protest organizing activities in the same dire terms one would expect the government to use to alert of al Qaeda activity, the bulletin issued such warnings as that protestors may use the Internet "to recruit, raise funds, and coordinate their activities"; that "activists may also use intimidation techniques such as videotaping . . . to hinder the arrest of other protestors." "[E]ven more peaceful techniques," warned the bulletin "can create a climate of disorder . . . and possibly intimidate people from attending the events being protested."

The reiteration of "intimidation" to describe protestors' effects on event attendees and the police parallels the language of the definitions of "domestic terrorism" and the "federal crime of terrorism," as well as language typically used in indictments of alleged foreign terrorists. By creating "a climate of disorder," no matter how peacefully, protestors are intimidating civilians and possibly even government officials; by attempting to protect themselves from police brutality, they are intimidating the police. Numerous ACLU reports published since May 2002 claim that local police are responding commensurately.

Going after Only the "Bad Guys"?

"Everything they're jumping up and down about is completely untrue," Justice Department spokesman Jorge Martinez said in May of 2003, responding to a nationwide rash of municipal resolutions condemning the PATRIOT Act. "We're not going after the average American. We're only going after the bad guys. If you're not a terrorist you have nothing to fear." During his 2003 "Protecting Life and Liberty" speech tour to law enforcement bodies, Attorney General Ashcroft also derided as "hysteria" American Library Association concerns over the PATRIOT Act amendments to FISA that gave the FBI power to demand library records under a secret FISA warrant or National Security Letter (NSL) issued by the Attorney General. "The Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans," said Ashcroft. "No offense to the [ALA], but we just don't care."

But the "we're only after the bad guys" argument—offered numerous times by the Bush Administration over the past three years whenever confronted with a domestic civil liberties concern—is a contradiction in terms. Every first-year law student knows (and every high school civics student should know) that in a constitutional system of checks and balances, "good" and "bad" is what a jury determines a defendant is at the end of a trial preceded by criminal due process, instead of the start of an investigation. Allowing law enforcement to use a separate investigative procedure on perceived "bad guys" is, in effect, to allow law enforcement to determine the guilt of the suspects.

The risk to the majority of protestors and demonstration planners (those who don't throw stones or even know those who do) is that by the application of current conspiracy doctrine, they could be charged with aiding, abetting, or conspiring to commit acts of terrorism so long as one person in the demonstration commits or attempts a state or federal crime of violence. Addressing this risk, law enforcement officials repeat many variations of the "only the bad guys" assurance. Those "bad guys" whom joint task forces and federal prosecutors have targeted for special treatment lately are less than bomb-throwing anarchists, however. In March 2004, Bill Moyers reported incidents in which local police assigned to anti-terrorist teams or joint federal-state task forces infiltrated anti-war protest groups in Colorado, California, and Washington, DC. In the Colorado case, the undercover sheriff had unsuccessfully attempted to persuade the members to rush the police line into Buckley Air Force base, an action that might have been a federal felony. Under federal conspiracy law, it would not have mattered that the prime instigator would have been a law enforcement officer.

At Drake University this year, The National Lawyers Guild, the Catholic Peace Ministry, and college students held an anti-war demonstration at the Camp Dodge, Iowa, National Guard base. One college student may have tried to scale the base fence. Apparently acting on tips from two local deputies who had attended planning sessions undercover, and who took names, federal district prosecutors convened a grand jury "to determine whether there were any violations of federal law, or prior agreements to violate federal law, regarding unlawful entry onto military property." School officials, including the University president, were served with subpoenas demanding them to turn over the all information they had on the Lawyer's Guild and its membership, including meeting minutes. At least one subpoena was served by a member of the local FBI Joint Terror Task Force. The Grand Jury appeared to have been convened to determine whether there had

"We're not going after the average American. We're only going after the bad guys. If you're not a terrorist you have nothing to fear."
—Jorge Martinez, Justice Department Spokesman

been a conspiracy to "attempt to injure . . . national-defense premises," a crime that can qualify as an offense of the "Federal crime of terrorism," punishable by a sentence of up to ten years.) Just recently, the FBI admitted it had infiltrated, and was monitoring the Internet sites of, groups planning to protest at the Republican national convention, even though the assistant director of the Bureau's counterterrorism division acknowledged it had no evidence to move against any member.

The harm to a free society caused by these threats of prosecution goes beyond disproportionate punishment in individual cases and the chilling effect those threats will have on persons thinking of demonstrating. Changes in criminal punishments don't always reflect pre-existing community norms. As Professor Robinson notes, "a criminal law with moral authority can influence conduct by helping to shape community norms." Robinson cites increased penalties relating to drunk driving and domestic abuse that "painted such conduct as more morally condemnable than previously thought." To these we can add the observation that, since the "War on Drugs" began, upper middle-class professionals generally no longer have marijuana at their parties. I believe this is due not only to fear of mandatory minimum penalties, but also that the penalties themselves are a legislatively imposed judgment that recreational use no longer is socially acceptable. Nowadays we tend to think of recreational users as a different social class of people who recklessly disregard the law. If the government sanction of public dissent rises to the level libertarians think it can, we may begin to view dissenters as similarly lawless. Public dissent may decrease not only because of the chilling effect of random prosecutions, but also because dissent will be no longer respectable Dissent is already, in too many people's minds, "unpatriotic."

Bless the Librarians

After Congress passed the PATRIOT Act without a single member having read it, as the Executive was refusing to talk about the hundreds it had thrown in jail without charges, as the media waved the flag and people lowered their voices in restaurants whenever they talked about the government, librarians loudly rallied to preserve the First Amendment. After section 215 of the PATRIOT Act authorized assistant special agents in charge of FBI field offices to seek a FISA warrant requiring any entity to produce "any tangible things . . . for an investigation to protect against international terrorism or clandestine foreign intelligence activities," the 64,000-member strong American Library Association denounced the provision. Under previous laws, explained Department of Justice spokesman Mark Corallo, federal investigators had had difficulty getting the library records of people who had not committed crimes. "But terrorists have been exploiting that," he told the *Washington Post.* Still, he assured us, "We're only going after the bad guys." By the time PATRIOT I passed, the FBI had already seized computers from a Delray, Florida library on suspicion that some 9/11 hijackers had used them to communicate; the agency also had subpoenaed information on the use of library terminals from the Paterson, New Jersey Public Library. After the bill's passage, the Santa Cruz public libraries began shredding reference requests and computer use records daily; other Bay Area libraries erased caches on hard drives. The Patten Free Library in Bath, Maine, began leaving "no trace" of book borrowing or computer sign-up sheets. The Berkeley Public Library, which was contacted by the Air Force immediately after September 11 with a complaint that someone on a library computer had tried to hack into Travis Air Force Base's files, instructed employees to say, when served with a subpoena, that they "were not in a position to act on it." Instructed the laminated card each employee received, "Do not attempt to give them the information they are looking for."

During his speech tour in September 2003, John Ashcroft derided all this as hysteria, but at the same time refused to disclose how many times section 215 had actually been used to inspect public library records. The ALA subsequently reported that unnamed Department of Justice witnesses had claimed that agents had obtained library information in 50 occasions since 9/11. Independently, the University of Illinois surveyed 1,020 libraries across the country and reported that 85 had been asked by law enforcement officials about patrons in connection with 9/11. A Department of Justice spokesman responded that most of these contacts, if not all, had been part of normal criminal investigations.

Absent specific state or local law prohibiting such, librarians had always had the ability to turn over patron records. Even with such laws, law enforcement could always get the records with a wiretap order or search warrant, assuming they could convince a trial judge or magistrate that they had probable cause that the fruits of such warrants would turn up evidence that a specific target had committed a specific crime. The question is why the FBI needed to have easier access to records of people who are *not* thought to have committed crimes, and to enforce the silence of librarians from whom that information is obtained.

Swapping Recipes

"If you enjoy swapping recipes from your `Joy of Jihad' cookbook," stated John Ashcroft in September 2003, "you *might* be a target of the Patriot Act." This is actually a fairly accurate statement of the law. Prior to PATRIOT, the mere swapping of such "recipes" (presumably Ashcroft means bomb-building instructions, but he could also mean information concerning how to avoid the INS, or how to get money to family overseas), the communication would essentially not be accessible to the intelligence and law enforcement unless one were a foreign national or were suspected of having committed an actual crime. Having successfully made the case for preventive surveillance power, federal agencies may now intercept or retrieve such communications so long as the need for those communications is linked to an investigation into clandestine intelligence gathering.

It's always possible that a Task Force in distinct situations might need to know all the patrons who checked out the anti-Semitic *Turner Diaries* or manuals on explosives. As the short history of terror prosecutions post-9/11 shows us, however, it is more likely that investigators want to dig up everything they can get on individuals targeted for preventive surveillance, including what they read and watch and the Web sites they visit. In a preventive system, anything may be a sign of dangerousness. Even in a retributive justice system, anything is fair game as evidence for motive. Many post-9/11 prosecutions involve the charge of "providing material support to terrorists," and "material support to foreign terrorist organizations." "Material support" is defined, among many things, as "currency . . . lodging, training, expert advice or assistance . . . communications equipment . . . personnel, transportation, and other physical assets." A favorite early target of prosecutors have been young Arab or Muslim men who attended training camps overseas In these cases, reading material, videos, and e-mails often form the core of the evidence proving the defendants' intent to fight.

In *United States v. Masoud Khan,* for example, the inquiry focused on why Muslim college students in northern Virginia played organized paintball every weekend. In early 2000, with the war in Chechnya a current topic in the Muslim community, two of the young defendants apparently discussed playing paintball as "a way of doing jihad." Although the court recognized that "Jihad literally means a struggle, which may range from exercising self-discipline, such as controlling one's appetite, to violent combat," the court construed every subsequent mention of jihad in the evidence as "violent combat." The defendants may or may not have had an actual intention of someday fighting for the rebels against Russia.

On what basis did the court then conclude that the paintball exercises were "not just an opportunity for outdoor exercise [and] fellowship . . . but also as preparation for real combat"? For one, what the defendants read. "The players shared videotapes of war and their paintball Website, which was password protected, was used to disseminate information about jihad." Second, the court noted that after one of the students had been questioned by FBI agents on campus about the paintball games, the games became "more secretive." New players were told not to tell people about the games, and to avoid talking to the police. After 9/11, the students were among others in the Muslim community who met to discuss "how Muslims could protect themselves." Of course, all of this is protected First Amendment activity, and with no more indications of dangerousness than typify activities of "muscular Christians," who read and discuss end-time novels, play paintball at church retreats,

US Anti-Terror Initiatives

1972 In *United States v. United States District Court*, the US Supreme Court holds that the President's surveillance of domestic terror suspects without a warrant is unconstitutional.

1978 Congress passes the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801–1811, establishing a secret *ex parte* court to issue warrants for the federal surveillance of foreign powers. Federal courts gradually allow evidence obtained in such surveillance to be used in domestic criminal prosecutions of citizens so long as the purpose of the surveillance was primarily for intelligence-gathering purposes.

1994 18 U.S.C. § 2339A makes it a crime to provide "material support" to a terrorist.

1996 In response to the Oklahoma City bombing, the President signs the Antiterrorism and Effective Death Penalty Act, severely limiting habeas corpus challenges and adding the new crime of "providing material support or resources to designated foreign terrorist organizations (FTOs)," 18 U.S.C. § 2339B. The classification of an organization as an FTO is left to the Secretary of State's secret determination.

September 11, 2001 Al Qaeda terrorists attack the United States.

October 26, 2001 Congress Passes the USA PATRIOT Act. Amending over 30 federal statutes, PATRIOT now authorizes FISA warrants when "a significant" purpose of surveillance is intelligence gathering on agents of foreign powers. (The Attorney General immediately interprets the phrase to mean that any FISA surveillance can be used to gather evidence for domestic criminal prosecutions as long as "a purpose" of the warrant is to gather foreign intelligence, and is upheld by the US Fourth Circuit Court of Appeals.) The Act also enlarges the term "material support" in 18 U.S.C. §§ 2339A and §2239B to include providing "expert advice or assistance" and "monetary instruments" to terrorists and FTOs, and adds a new definition of "domestic terrorism." To date, only the 9th Circuit Court of Appeals has struck the phrase "expert advice or assistance" as unconstitutionally vague. Section 215 of the Act allows FISA warrants to access library records.

January 10, 2003 The Department of Justice circulates a draft of the "Domestic Security Enhancement Act of 2003" (PATRIOT II), to Speaker of the House Dennis Hastert and Vice President Cheney, after denying its existence to senators for months. Several times larger and even more sweeping than PATRIOT I, PATRIOT II authorizes FISA warrants to allow surveillance and search of "domestic terrorists," gives the Attorney General authority to expatriate US citizens who provide "material support" to terrorists, and gives federal agents administrative subpoena authority. After the Center for Public Integrity breaks news of PATRIOT II a few weeks later, congressional and public outcry grows and the bill is never formally introduced.

May 2003 The Attorney General gives FBI agents permission to attend anti-war meetings and mosques without opening an investigation in order to look for potential terrorist suspects.

October 15, 2003 The FBI publishes an Intelligence Bulletin directing law enforcement agencies to report "possible indicators of protest activity" to FBI Joint Terrorist Task Force.

2004 The Administrative Office of United States Courts' annual Wiretap report shows that for the first time, the number of secret FISA wiretaps (1,777) exceeded all federal and state criminal wiretaps combined for the previous year. The number of FISA wiretaps had been growing steadily since 1979, when a mere 207 FISA warrants were issued.

and support the expulsion of Palestinians from Israel. Viewed through the "bad guy" lens, however, Muslims playing paintball evidences a terrorist conspiracy. For their expert witness, the prosecution called a white Marine Corps trainer who testified that paintball, for many Marines, was "a stepping stone to further military training."

In the now-infamous "Lackawanna Six" prosecution, six young Buffalo, New York, Muslims visited Taliban training camps in Afghanistan prior to 9/11, leaving early after learning what Osama bin Laden and his supporters were actually espousing. Though none of those actually charged would subsequently be found to have harbored any terrorist plans or any weapon more dangerous than one hand gun, and cooperated in answering questions from FBI field agents about the camp openly, their daily lives were scrutinized extensively by the CIA and FBI for many months under FISA warrant, with practically every e-mail communication parsed by the agencies and briefed to the President daily. Though the FBI repeatedly stated there was no case worth prosecuting, CIA agents convinced the President that e-mails referring to an imminent "marriage feast" meant a terrorist attack, and finally arrested the six—one in bed with his new wife on their wedding night. The six were charged with providing "personnel" (i.e., themselves) to al Qaeda by having attended the camp. Dismissing a vagueness challenge to the charged offense, the trial judge adopted Fourth Circuit precedent and held that "one can be found to have `provided material support and resources to a foreign terrorist organization' by . . . allowing one's self to be indoctrinated and trained as a `resource' in that organization's activities." As proof of the indoctrination and belief, prosecutors and the court cited the following items: a movie about the destruction of the *USS Cole* for which al Qaeda claimed responsibility; "conversations about Palestine and Kashmir"; documents the defendants admitted they saw in Pakistan containing "anti-American sentiments;" an audio cassette tape in Arabic entitled "A Call to Jihad" (the defendants disputed this translation); another tape containing "pro-Palestinian, anti-Israeli propaganda"; another entitled "Future of the Islamic Nation"; and another containing recitations of passages from the Koran. That the defendants had not made a cleaner, more public disavowal of the sentiments expressed in these materials was proof of their "conspiracy of silence" as a terrorist sleeper cell. Against the advice of at least one of their defense counsel, the defendants pleaded guilty. Said Attorney Patrick J. Brown, "we had to worry about the defendants being whisked out of the court room and declared enemy combatants if the case started going well for us."

Conclusion

The foregoing should give credibility to the librarians' concerns. Given any particular prosecution theory, one's reading and viewing material is potentially relevant to one's intentions, motives, and beliefs—and therefore one's danger to society. After the next domestic terror attack, whenever it comes, PATRIOT II's wish list is sure to return. Among the new powers will be the ability of FBI field offices to issue their own "administrative" subpoenas for the information.

"Historically, terrorists have used libraries to plan and carry out activities that threaten our national security. . . . [W]e should not allow them to become safe havens for their terrorist or clandestine activities" warns the Department of Justice on its "Preserving Life and Liberty" Web page. Maybe the librarians should worry for themselves as well as their patrons. Some communities contain large immigrant Arab populations with identifiable Muslim organizations. In these communities, librarians who take special measures to erase caches or shred sign-up lists might be thought one day to foresee the consequences of their actions on police or intelligence efforts—especially if they institute such measures in the aftermath of a terrorist attack. That their stated intention would be to protect the privacy of all patrons would, I suspect, not impress a zealous prosecutor, especially one willing to make a point *in terrorem.* One needn't have attended the cabal at its birth in order to aid it or conceal it; one needn't even approve of it, or even actually aid it in fact, in order to incur culpability. In a pre-emptive war, noncombatants such as these could surely fall.

David J. Staudt
Litigation Department
Barley Snyder, LLC
100 East Market Street, York, PA 17402
dstaudt@barley.com

Sources: John Ashcroft announced his preventive campaign in testimony before the US Senate Committee on the Judiciary, in *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism* (December 6, 2001), http://www.judiciary.senate.gov/print_testimony. An overview of the competing descriptive theories of punishment may be found at Wayne R. LaFave, 1 *Substantive Criminal Law* § 1.5 (second edition, West 2004) , available on Westlaw at 1 SUBCRL § 1.5. See Paul H. Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice," *Harvard Law Review,* vol. 114 (2001), for a discussion of the preventive elements in American criminal justice, and their conflict with this system's essentially retributive goals and methods. On the 9/11 detainees, see US D.O.J., Office of Public Affairs, "Statement of Barbara Comstock, Director of Public Affairs, Regarding the IG's Report on 9/11 Detainees" (June 2, 2003), http://www.usdoj.gov/opa/pr/2003/June/03_opa_324.htm; see also USD.O.J., Office of the Inspector General, "Report to Congress on the Implementation of Section 1001 of the USA PATRIOT ACT" (July 17, 2003), http:

www.justice.gov/oig/special/03-07/index.htm; see generally other critical OIG reports at http: www.justice.gov/oig. The federal district court in *US v. Awadallah,* 202 F.Supp.2d 55, *rev'd,* 349 F.3d 42 (2nd Cir. 2002), thought DOJ's use of the material witness warrant statute, 18 U.S.C. § 3144, was illegal. See DOJ's answers to questions on the material witness detainees posed by the House Committee on the Judiciary in US D.O. J. Office of Legislative Affairs, Letter to Hon. F. James Sensenbrenner (May 13, 2003) (answers to questions 26 and 27), at http://www.house.gov/judiciary/patriotlet051303.pdf. The estimate as to the number of detainees is from David Cole, "The Course of Least Resistance: Repeating History in the War on Terrorism." *Lost Liberties: Ashcroft and the Assault on Personal Freedom.* Ed. Cynthia Brown. (NY: The New Press, 2003). The decision in *Center for National Security Studies v. Department of Justice,* 331 F.3d 918 (D. C. Cir. 2003), *cert. denied,* 124 S.Ct. 1041, 157 L.Ed.2d 888 (2004), effectively sealed all further information concerning the detainees. In *Hamdi v. Rumsfeld,* 124 S.Ct. 2633 (2004), the Supreme Court took up the Administration's arguments on the internment of citizen "enemy combatants." Observations on the federal crime of conspiracy are largely from Federal Defenders of San Diego, Inc., *Defending a Federal Criminal Case.* (San Diego: DFCC 2001), 12-544 to 12-546 (further citations omitted). The Lynne Stewart case is *U S v. Sattar,* 272 F.Supp.2d 348 (S.D.N.Y. 2003); her superceding indictment of November 19, 2003, No. 02-Cr.-395, is available from the US Southern District of New York with PACER access at https://ecf.nysd.uscourts.gov/cgi-bin/login.pl. It is also available from this article's author. Details of the original indictment of Zacarias Moussaoui, may be found in the district court's opinion at *US v. Moussaoui,* 282 F.Supp.2d 480 (E.D.Va. 2003). The passages of the USA PATRIOT Act, Pub. L. 107-56 (107th Cong.), 115 Stat. 271 et seq., discussed in this article are Section 215 (amending FISA, 50 U.S.C. § 1861 et seq.), Section 802 ("Definition of Domestic Terrorism") (amending 18 U.S.C. § 2331), Section 805 (amending 18 U.S.C. § 2339A), and section 808 (amending 18 U.S.C. § 2332b). A good analysis of PATRIOT in plain language is Charles Doyle, "Terrorism: Section by Section Analysis of the USA PATRIOT Act." (Congressional Research Service, December 10, 2001), available at http://www.cdt.org/security/usapatriot/011210crs.pdf. The FISA definition of "agent of a foreign power" was again amended by S.113 (108th Cong. 1st) (May 9, 2003), text at http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.0113 and http://homeland.cq. com/hs/display.do?dockey=/usr/local/cqonline/docs/html/billtext/108. "PATRIOT II" was the Domestic Security Enhancement Act of 2003, section-by-section analyses and complete text of which may be found at the Center for Public Integrity, http://www.cpi.org. After the confidential text of the bill was leaked to the CPI, and criticized in Congress and the media, it was tabled, though the ACLU reports that it is being passed in piecemeal legislation. In this article, I discuss sections 121,122, and 128 of the draft bill. Early fears about PATRIOT quoted are from Sharon Rackow, "How the USA PATRIOT Act Will Permit Government Infringement upon the Privacy of Americans in the Name of 'Intelligence' Investigations," *University of Pennsylvania Law Review,* vol. 150 (May 2002); and John W. Whitehead and Steven H. Aden, "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives," *American Law Review,* vol. 51 (August 2002). The Supreme Court in *United States v. United States District Court,* 407 U.S. 297 (1972) once held that the executive wiretaps of citizens for national security purposes violated the Fourth Amendment as unreasonable searches. The decision led to the passage of FISA. The Attorney General's *Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations,* (May 30, 2002) are available at www.usdoj.gov/olp/generalcrimes2.pdf. US D.O.J., "What do I have to do to get a FISA?" (September 2002) is available at http:www.aclu.or/patriot_fioa/foia3.html. FBI, *Intelligence Bulletin* No. 89 (October 15, 2003), may be found at http://la.indymedia. org/print.php?id=95652. The ACLU has been decrying abuse by local police ever since. DOJ Spokesman Martinez's "bad guys only" argument is reported in Elsa Wenzel, "Who's Afraid of the Patriot Act?" *Medill News Service* (May 27, 2003), http://pcworld.shopping. yahoo.com/yahoo/article/0,aid,110880,00.asp. Ashcroft's remarks on the public hysteria are from US D. O. J., Office of the Attorney General, "Remarks of Attorney General John Ashcroft, 'Protecting Life and Liberty, Memphis, Tennessee, Sept. 18, 2003,'" available at http://ww.usdoj.gov/ag/speeches/2003/091803memphisremarks.htm. Infiltration of anti-war groups was reported during *NOW with Bill Moyers,* PBS, March 5, 2004, transcript available at http://www.pbs.org/now/printable/transcript310_full_print.html. See also Monica Davey, "An Antiwar Forum in Iowa Brings Federal Subpoenas," *New York Times,* Feb. 10, 2004, http://www.nytimes.com/2004/02/10/national/10PROT. html. The FBI program of monitoring, infiltration, and interviewing anti-Republican groups prior to the RNC convention is reported at "Ashcroft defends interviews with protestors," *San Francisco Chronicle* (Aug. 21, 2004), available at http://www.sfgate.com/cgi-bin/article/cgi?file=/c/a/2004/08/21. Gary Bald is the assistant director of the FBI referred to as acknowledging that the Bureau had no evidence of the "Federal crime of terrorism." In calendar year 2003, the number of secret FISA wiretaps granted outnumbered all other wiretaps ordered by federal and state criminal courts combined (1,777 to 1,442). See Administrative Office of United States Courts, "2003 Wiretap Report," http://www.uscourts.gov/wiretap03/contents.html; and Eric Lichtblau, "Search Warrant Requests Increased in 2003." *New York Times* (May 3, 2004). Information on the librarians' protest is from Rene Sanchez, "Librarians Make Some Noise Over Patriot Act." *The Washington Post* (April 10, 2003), A20, available at http://www. washingtonpost.com/ac2/wp-dyn/A1481-2003Apr9; "Libraries Rally Against USA Patriot Act, FOXNews.com (May 7, 2003), http://www.foxnews.com/printer-friendly_story/0,3566,861667,00.html; Dana Hull, "Patriot Act causes libraries to review records." *San Jose Mercury News* (Oct. 20, 2002), available at http://www.bayarea.com/mld/bayarea/news/4327549.htm?template=content; and Jim McGee, "Librarians, Ashcroft Trade Accusations in Search Debate." *Congressional Quarterly Homeland Security* (Oct. 9, 2003), available at homeland.cq.com/hs/display.do?dockey-usr/local/cqonline/docs.html/hsnews/108 or from this article's author. The district court's opinion in *US v. Masoud Khan,* is at 309 F.Supp.2d 789 (E.D.Va. 2004). The "Lackawanna Six" show-prosecution is revealed in all its absurdity in Mathew Purdy and Lowell Bergman, "Unclear Danger: Inside the Lackawanna Terror Case," *New York Times* (Oct. 12, 2003), http://www.nytimes.com/2003/10/12/nyregion/12LACK.html. Remarks from defense attorneys are reported in Alex Gourevitch, "Immaterial and Unsupportable," *The American Prospect,* vol 14, no. 8 (Sept. 1, 2003), available at http://www/prospect.org/print-friendly/ print/V14/8/gourevitch-a.html. The court's opinion in *US v. Goba* is at 220 F.Supp.2d 182 (W.D.N.Y. 2002). John Ashcroft's parting shots to librarians are reported in *The Washington Post,* Editorial, (September 21, 2003), B06, available at http://www.washingtonpost.com/wp-dyn/ articles/A37575-2003Sep19/html; and US D.O.J., "Dispelling the Myths," http://www.lifeandliberty.gov/subs/u_myths.htm.

Making Memory Lose Its Sting

David Wasserman

In early 1994, General Romeo Dallaire, commander of the UN forces in Rwanda, issued urgent warnings to his superiors about the impending genocide there. Not only were his warnings ignored, his already small force was drastically cut. Dallaire became a helpless witness to the mass killing that he, as much as any Westerner, had tried to prevent. According to a retrospective in the *New York Times Magazine* last spring, General Dallaire was so haunted by the memories of wholesale slaughter and his inability to prevent it that he became deeply depressed, even attempting suicide.

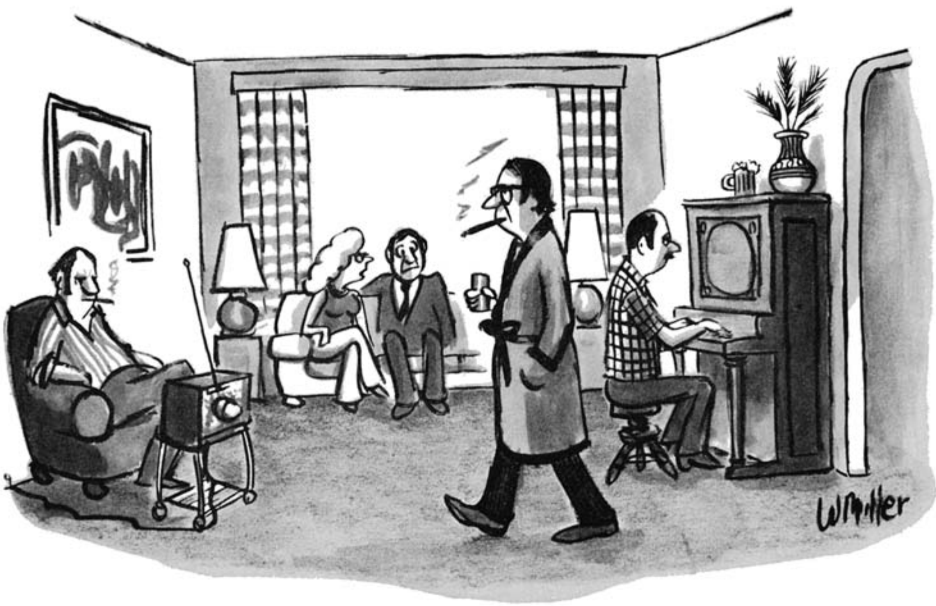
The same issue of the *Times Magazine* featured an article discussing the ethical issues facing those who would utilize emerging technology to reduce the emotional impact of painful, recurring memories, and with it, their detail and accuracy. The author observed the irony in confronting such issues in an area of biotechnology—memory modification—where the objective has long been to preserve and sharpen memory. She defended the use of memory-dulling drugs to ease the crushing burden on people oppressed by the painful, frequent, involuntary recall of traumatic events—at least for people not responsible for those events. She viewed the opposition to such drugs by the President's Commission on Bioethics as glib and insensitive, displaying an excessive concern with the integrity of unaltered memory over the terrible pain it can often bring. Although the Commission's report is more nuanced than her article suggests, it does stress the moral costs of chemically-induced forgetfulness and emotional attenuation—costs ranging from the loss of reliable juridical testimony to the diminution of concern and coarsening of feeling about violence and depredation.

General Dallaire's experience illuminates both sides of the debate over memory modification. On the one hand, because he is perhaps the most powerful and untainted witness to the worst genocide in the second half of the twentieth century, his memories ensure that that slaughter will not be forgotten. Yet there is something disturbing about seeing a man who tried to prevent the genocide falling into suicidal depression when many of its perpetrators are still at large and enjoying untroubled sleep.

Currently, there is little that can be done to ease the pain of General Dallaire's memories. Propranolol, the drug now being used to blunt the edge of traumatic memory, can do so only if taken shortly after the triggering event. But drugs one day may be developed that can have a similar effect long after the traumatic event, when those who experienced it have been able to assess its impact on their lives, and, if needed, to bear chemically-untainted witness to it. If such drugs became available, it would not be feasible to limit their use to those suffering from diagnosed pathologies of memory, such as Post-Traumatic Stress Disorder—the one use that the Commission unequivocally endorsed. The Commission expressed strong misgivings about the use of such drugs for alleviating the "normal" distress occasioned by painful memories, fearing that the divorce of memory from emotion could breed complacency and insensitivity.

But it is one thing to purge memories of their emotion; quite another to temper their intensity. "Normal" distress covers an extremely wide range of affect. The memories of the millions of people to have witnessed the major traumas of the past half century, from the assassination of President Kennedy to the destruction of the Twin Towers, vary widely in their intensity and painfulness. That variation is likely to be found even among those at similar "distance" from the tragedies, e.g., among those who endured no personal loss or risk. The Commission would surely acknowledge that most of these reactions are appropriate to the events recalled.

If so wide a range of emotion is apt, why is it wrong to seek to move to the less painful end of the spectrum? To fault one individual for attempting to reduce the emotional intensity of his memories to the equally appropriate level felt by others is to fault him not for failing to display an apt emotion, but for altering his "natural" feelings. In this, as in so many other areas, the Commission appears to place an undefended, and perhaps indefensible, premium on the "natural" or the given. This preoccupation obscures what I believe to be the more important issue raised by affect-modulation: whether it is appropriate to exercise deliberate control



"Look, will you forget about them? They're in the past. The important thing is what I feel now—about you!"

over the level of one's emotions. In addressing this issue, it will be helpful to examine two others raised by the Commission that are relevant to the ethics of such control—the importance of memory and its associated emotion for personal identity, and the obligation to feel as well as to remember.

Memory, Numerical Identity, and Narrative Identity

The Commission's report speaks eloquently about the role of memory in establishing and maintaining a person's identity over time. Its view accords with many recent theories of personal identity that assign a critical role to psychological continuity. An individual who could recall none of what "he" had actually done or felt in the past decade might well become a different person, especially if he had a different, inconsistent set of memories. The price of such complete forgetfulness would be the loss of an individual or his replacement by another—a steep price indeed, even for the surcease of sorrow. No one, however, outside of science fiction, is proposing such wholesale changes in recall. But even partial or selective memory loss might be regarded as threatening identity. A person who forgot several key episodes in his adolescence, traumatic but formative, could be said to lose some of his identity. This claim, however, requires a distinction, made by philosophers such as David DeGrazia and Hilde Nelson, between narrative and numerical identity: in forgetting such key episodes, the individual would remain the same entity or being, but he would now have large gaps in his autobiography. This discontinuity might also be a significant loss, for a life without coherent themes or plot structure would arguably lack meaning and depth. But the threat to narrative identity might be insignificant in many cases. Would General Dallaire's life story lose its coherence or meaning if he forgot, or blurred the detail of, a few of his most traumatic memories—of one group of children screaming vainly for their lives in places of promised sanctuary, of one pile of corpses neatly stacked by the orderly genocidaires?

There is one feature of his narrative identity that General Dallaire would surely lose by a successful course of propanolol (assuming, contrary to present knowledge, that it could be effective so many years after the traumatic events). He would no longer be a man oppressed by his unavoidable failure. To a certain kind of romantic sensibility, such a loss would indeed be regrettable. But that sensibility is more appropriate for novelists than for psychiatrists or policymakers. As long as Dallaire could lose his sleep-denying visions without losing his broader memory of the events he witnessed in 1994, his life would be better and richer, and his narrative might be no less coherent or interesting for becoming less tragic: a man rising above the horror he had witnessed rather than being consumed by it.

Moreover, there would be significance in the fact that Dallaire had *chosen* to forget and had not merely forgotten. If people can write their lives, they may soon be able to rewrite them. Whatever its threat to veracity, pharmacologically-assisted authorship may strengthen rather than reduce narrative identity. In choosing to forget some aspects of his past, Dallaire would edit his autobiography, instead of having it altered only by the vagaries of neurobiology.

Except for those who regard personal memory as no less sacrosanct than wilderness, the mere fact of human interference will not be presumptively wrong. What may be morally problematic is the failure to honor obligations of memory—instead of trying to remember, one deliberately forgets. That could certainly be subject to moral reproach in some circumstances. But not in General Dallaire's. What Rwandan victim would deny that he had more than discharged any obligation he had to remember the victims' shattered lives? Most cultures have a period of prescribed mourning for significant others; Dallaire has surely exceeded any such period in his mourning for virtual strangers. But this raises the more general issue: what sorts of obligations do we have to whom and for what? To feel, or merely to recall?

The Duty to Remember vs. the Duty to Suffer

We all want to be remembered by our loved ones after we die; some of us even feel we survive in those memories. But do we want these memories to be painful? Unlike ancient kings, we hardly expect our loved ones to entomb themselves with us. Surely, though, we want them to experience some sense of loss. We would feel disturbed by the prospect that our loved ones would merely recalled us fondly, as if we had gone on a long vacation; such an untroubled response would seem to deny the reality of death. Once that reality was acknowledged by a brief period of mourning, however, many of us would be pleased if memories of our lives were largely pleasant, if they brought joy more than sorrow.

But the pharmacological remedies currently available offer a difficult tradeoff: they can only ease the pain at the cost of erasing much of the detail. While many of us would want to be remembered happily, how much detail and accuracy would we want our loved ones to sacrifice to make their memories less painful? Would we rather be remembered sadly but sharply and richly, or happily but dully and vaguely? It is not clear how much this tradeoff owes to the limitations of current drugs, how much to the nature of memory. Surely much of the horror of General Dallaire's memories are in their details. To recall the minutiae of a genocide conducted largely with machetes without feeling horror and revulsion would denature one's memories; it would, in effect, substitute the memories of a sociopath, fully detailed but devoid of affect. Perhaps the appropriate way to remember less painfully *is* to remember more vaguely. But that preserves the dilemma.

One kind of memory we would clearly not want to soften would be that of the individual's own evil, cruel, or blameworthy deeds. The painful memory of such deeds helps constitute conscience; as the Commission report argues, it would be wrong to "cure" Lady Macbeth of her guilty torment. But even here, it is difficult to endorse an absolute prohibition. If Lady Macbeth experienced her guilty torment over jaywalking rather than regicide, we might regard her as an appropriate candidate for propranolol.

What may be morally problematic is the failure to honor obligations of memory—instead of trying to remember, one deliberately forgets.

What, however, of murderers who experience no more remorse than jaywalkers? The development of affect-reducing drugs thus raises the specter of affect-preserving or enhancing drugs. Even if we consider only the alteration of affect associated with memory, the possibilities are staggering. Some might suggest that for particularly heinous crimes, enhancement of guilt-ridden memory could serve as a form of punishment, a kind of forced internalization. Doubtless, the Commission would be wary of letting feelings of guilt or responsibility be imposed or enhanced from without. And it would have a point. Better that Raskolnikov's guilt over his brutal, gratuitous murders arise from his conversations with Inspector Petrovich than from the injection, even the voluntary injection, of an affect-enhancing drug. If it is not felt spontaneously, remorse should be hard won by soul-searching, not effortlessly acquired by a fast-acting drug. To draw a rough analogy the Commission might find congenial, taking a drug to achieve remorse is like taking steroids to achieve muscle bulk; much as one's physique should be improved by tough exercise, one's conscience should be strengthened by self-scrutiny and close attention to the feelings and needs of others.

But in the absence of earnestly acquired remorse, would drug-induced contrition be better than none?

Would Lady Macbeth's "guilty torment" have been appropriate to inflict as a punishment had it not been self-imposed? If we used memory for punishment, would we vary the dosage of memory-and affect-enhancing drugs in proportion to the heinousness of the crime? The penal use of induced memory raises the disturbing specter of legitimizing claims we now tend to reject: that the conscience-stricken perpetrator of a brutal crime should be punished less harshly, or not at all, since he has already punished himself as much as the state could. We often doubt the veracity of such claims—why should an offender bent on painful remorse request mitigation? But we may question the appropriateness of such mitigation even if we believe the offender's claim is sincere. We may believe that retribution is *ours* as a society; that it cannot be preempted by the perpetrator's remorse, however sincere.

Related questions would arise about the grief of the victim or his loved ones. For those, now including many US judges, who believe that the psychological impact on the victim or his loved ones is relevant to the magnitude of the offender's punishment, would the victim have any duty to mitigate that impact by taking drugs that made her memories of trauma or violation less painful? Could a defense attorney argue that the impact of his client's acts should be discounted by the victim's failure to do so? Or would victims have some kind of entitlement to their "natural" feelings, perhaps even a prerogative to enhance them, the better to honor their duty not to forget the violations they suffered?

Self- as well as state-imposed pain or mitigation raises ethical issues of control akin to those raised by genetic engineering: is it enough that we feel aptly, or must we come by our feelings in an apt way? To be apt or authentic, must they come on us, rather than being induced, at least directly induced, by a drug or other external stimulus? Or are "natural" memory stimulants—our usual self-reminders and mnemonic devices—more acceptable than "unnatural" ones when clear recall is needed? And are "natural" memory suppressants, from distraction to repression, more acceptable than "unnatural" ones like propranolol, when forgetfulness is permitted?

Control over Painful Memories and the Capacity to Feel Grief, Remorse, and Empathy

Popular music and great literature are pervaded by the idea that those we have loved or wronged can haunt or obsess: "You really got a hold on me"; "I Can't Get You Out of My Mind;" Banquo's ghost crashing Macbeth's banquet. We see these unbidden, often unwelcome visitations as evidence of our emotional and moral susceptibility: our unrequited love, our continued mourning, or our abiding guilt. These susceptibilities, which we see as expressing our capacity for love, our recognition of loss, or our conscience, may be threatened not only by the use of memory-altering drugs but by their very availability. If we could reduce the frequency or intensity of these reminders, would our unrequited or lost loves, as well as our unappeased victims, have less of a hold on us even if we did not actually attempt to exclude them? What if Macbeth could take a pre-dinner pill that would prevent the arrival of spectral visitors? Would Banquo lose some of his grip on Macbeth's conscience even if the usurper declined to take the pill (perhaps to better describe the vision to his psychotherapist), since Banquo would now be an invited, if not welcome, guest? Or would Macbeth's capacity to prevent Banquo's appearance introduce moral complexity by allowing Macbeth to choose whether, or how often, Banquo's ghost could (to borrow from another

Self- as well as state-imposed pain or mitigation raises ethical issues of control akin to those raised by genetic engineering: is it enough that we feel aptly, or must we come by our feelings in an apt way?

Shakespearean play) "prick the conscience of the king?" Would Macbeth display a form of penance formerly unavailable to him by refusing to take the pill at all out of a sense that Banquo's appearance was a fitting reproach to his bloody usurpation? Would Macbeth display, or forge, an even harder heart by taking the pill?

In the context of mourning rather than remorse, we might not welcome such moral complexity. A jilted lover who chose to increase the intensity or frequency of his memories of his beloved would seem to be engaged in denial, or even in a kind of inverted stalking. If he merely declined to take his propranolol, he might be accused of "wallowing." On the other hand, a jilted lover who banished bittersweet memories with a pill (even one who did so defensively, like the protagonist of *Eternal Sunshine of the Spotless Mind,* in response to a similar memory-purge by the woman who jilted him) might seem to engage in a kind of self-betrayal by trivializing his deep investment in his lost or unrequited love. Similarly, a recently bereaved spouse might not want the opportunity to control the intensity or duration of her mourning. Whether she feared that she would mourn to little or too much, the availability of drugs to sharpen or soften her memory might offer her unwelcome temptations. Their availability might also corrupt the attitudes of third parties and the social practices of mourning. Employers or suitors might be too eager to provide propranolol to employees or prospective partners who had lost loved ones—after a "decent" but ever-shrinking interval. Or perhaps, in our busy world, the bereaved and their communities would substitute intensity for duration, opting for shorter but more intense periods of mourning, achieved with the assistance of memory-and affect-modifying drugs.

On the positive side, those who now lament their insensitivity to loss could make themselves more sensitive. Would their pharmacologically-enhanced sensitivity be any less valid for being chosen? Would their mere desire to enhance their sensitivity be more elevating if it were less idle—if they could do so with a pill? The capacity to modulate one's emotions in this way raises two broader issues I cannot resist broaching. First, a generation of scholars influenced by philosopher Harry Frankfurt has found appeal in the notion that what makes us free, or responsible, is the alignment of our first-order desires—what we want—with our higher-order desires—what we want to want. We are free in the only sense we can be in a deterministic universe,

A person who does not feel as he wants to feel, like a person who does not desire what she wants to desire, arguably lacks what (philosopher) Harry Frankfurt calls wholeheartedness.

Frankfurt argues, if we have the will we want—roughly, if we act according to first-order desires endorsed or ratified by our higher-order desires. The preceding discussion suggests that it is important for us to have not only the desires but the emotions we want to have. A person who does not feel as he wants to feel, like a person who does not desire what she wants to desire, arguably lacks what Frankfurt calls wholeheartedness. The prospect of using drugs to bring one's feelings into alignment with one's higher-order desire to feel raises the specter of wholeheartedness in a pill. Perhaps psychopharmacology can give us the kind of feelings and character, if not the will, that we want; perhaps if we fail or refuse to avail ourselves of pharmacological realignment, we do not really have the higher-order desires we think we have.

Second, pharmacology may affect our capacity for empathy in at least two ways. The more direct is by control of the feelings we have upon hearing of another's distress. If we could choose to feel, or not feel, another's pain, fear, or frustration, would our refusal to feel it vicariously be more "cold-hearted" than our mere inability to do so, while our choosing to feel it would show greater care and devotion than spontaneously feeling it? Or does empathy require spontaneous feeling, so that the attempt to elicit it is self-defeating? But wouldn't a pill that made us more vulnerable to others' emotions give us all the spontaneity we needed? A less direct, but no less powerful, effect might result from muting or suppressing our pain, fear, or frustration at our own past traumas. In doing so, we might become less capable of empathy, or less willing to cultivate it. While the choice to feel other's pain when one suppressed the experience of one's own might display a kind of altruism that is not possible at present, it might also be that the regular suppression of our own emotions would make it far more difficult to experience those of others, with or without pharmacological assistance. It is not clear whether this threat to empathy is really an empirical one, or whether it would simply make no sense to say that we displayed empathy in feeling for others what we did not, or chose not to, feel for ourselves.

Like empathy, forgiveness may be closely tied to emotion; the question is whether the pharmacological control of emotion can yield the genuine article. We may soon have drugs that seem to promise us help in fulfilling the injunction to forgive but not forget, by softening the emotion while preserving the memory. But that promise rests on a reductive understanding of the injunction, and of forgiveness. A victim who no longer felt the pain of a remembered injury or insult might only be capable of only a superficial forgiveness, much as a perpetrator who felt no remorse, merely an impersonal duty to atone, would be capable of only a shallow atonement. Forgiveness arguably requires the victim to let go of his anger but not his pain. Could this requirement be fulfilled by a more targeted prescription than is currently available, one that would dull

The prospect of using drugs to bring one's feelings into alignment with one's higher-order desire to feel raises the specter of wholeheartedness in a pill.

anger but not hurt? Or would such a prescription leave out a critical element of process or control? Letting go of one's anger while preserving one's hurt is an extraordinarily difficult but indispensable part of forgiveness. Someone who never felt anger at a serious injury or insult, as opposed to overcoming or "surrendering" her anger, would ordinarily display a lack self-respect that made forgiveness impossible, and someone who "overcame" her anger but not her hurt by taking a pill might seem to achieve something closer to self-denigration than true forgiveness.

But couldn't the very taking of the drug express an appropriate "higher-order" desire to forgive, even if it could support only a poor mimicry of actual forgiveness? Perhaps someone who took a pill that reduced anger at past slights could express a sincere desire to forgive, even if he couldn't achieve full-bodied forgiveness. Yet for those who believe that that such a drug could only produce a degraded simulacrum of forgiveness, how could taking it express an apt desire?

Obligations to Ourselves

A final question is how the loss of memory and associated emotion would affect our relationship with ourselves. Philosopher Derek Parfit famously argued that memory plays an integral role in self-identity; that we lose ourselves if we lose too much of it. But what about the loss or attenuation of emotions associated with memory? Here, any threat is not so much to self-identity, either numerical or narrative, as to self-attachment or loyalty.

We do not always find self-betrayal in the attenuation of the emotion associated with a painful or traumatic experience. Many women having their second or third child claim that they would never have done so if not for their partial amnesia, their failure to remember just how god-awful their labor was. But most of those women welcome rather than regret the amnesia. A similar kind of amnesia may follow the experience of combat.

More broadly, we may well be less reluctant to undergo painful or frightening experiences again if we can dull our recollections of the pain or fear we felt. And we may even be more willing to undergo such experiences for the first time if we know that we will, or can, experience such emotional amnesia. Whether this is a good thing depends to some extent on whether willingness to undergo the experience one or more times is a good thing. This is a matter on which people will differ, to the extent they differ about population- and family-size, or war and combat. But apart from the morality or utility of the changes in behavior we can effect through emotional amnesia, inducing such amnesia may affect the strength or the depth of our relationship to ourselves. It might well make it weaker or shallower, and result in a kind of self-estrangement. Reducing our emotional affinity with our past selves would be a lot like reducing our empathy for other people. Indeed, philosophers such as Thomas Nagel and Derek Parfit find close if partial parallels between our concern and feeling for our own past (and future) selves and our concern and feeling for others. Even though there are sometimes good reasons to become strangers to our selves, it would represent a loss of something we value dearly.

Will dulling the emotions associated with memory encourage a cavalier attitude towards our own pasts? Or will it make at least the more painful aspects of our pasts more accessible, by discouraging or helping to overcome repression and disassociation? Freud believed that we could only undo repression, and thereby make ourselves more whole, by bringing out repressed memories. But he may also have believed that many of those memories, tinged by fears we had long mastered or dismissed, would no longer be so painful. This would hardly be so for all memories, however, such as early memories of child abuse or later ones of torture and near-death. Would anesthetizing ourselves to the recall of such memories make us more or less whole?

To some extent, this is an empirical question; the psychologist of memory who testified before the Commission regarded it as an open one. But the issue of what kind of relationship we want with our past selves is also a moral one. Perhaps we should seek a mean between emotional distance and obsession; between relegating our pasts to prologue and wallowing in them.

But again, the issue is not merely the emotional affinity we will have with our past selves and can expect to have with our future selves. It is the fact that we—our present selves—will exercise some degree of control over that affinity. As I suggested earlier, selective forgetting or dulling may strengthen, not attenuate, narrative identity, by making us authors of our own internal lives in a way that was previously impossible. The availability of memory-altering drugs will, so to speak, shift the balance of power in our extended temporal relations to ourselves ever more to the present and future. It will allow us to break or weaken the grip of the past, while leaving us in the present with the uneasy awareness that our capacity to shape ourselves by what we chose to do, experience, and remember is tentative and indefinitely revisable. We will have more freedom to re-invent ourselves, but less security about who we are, or will end up being. I cannot even hazard a guess as to whether this will, in general, be an acceptable tradeoff.

David Wasserman
Institute for Philosophy and Public Policy
School of Public Policy
University of Maryland
dwasserman@umd.edu

I am grateful for suggestions from Judith Lichtenberg and Rachel Luban.

Sources: Guy Lawson, "The Rwanda Witness," *New York Times Magazine* (April 24, 2004); Robin Henig, "The Quest to Forget," *New York Times Magazine* (April 24, 2004); The President's Council on Bioethics, "Happy Souls," which appears as Chapter 5 in *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (October 2003) and is available at www.bioethics.gov; Derek Parfit, *Reasons and Persons* (Part Three) (Clarendon Press: Oxford 1984); Avishai Margalit, Chapters 1 and 6 of *The Ethics of Memory* (Harvard UP, 2002); Erik Baard, "The Guilt-Free Soldier: New Science Raises the Specter of a World without Regret," *Village Voice,* (January 22-28, 2003); James Bowman, "Memory and the Movies," *New Atlantis* (Spring, 2004).

How the Academically Rich Get Richer

Judith Lichtenberg

It's not surprising that students from lower-income families are underrepresented in institutions of higher education. At four-year institutions, the disproportion is particularly striking. In 1989–90, entering students from the highest socioeconomic quartile outnumbered those in the lowest by more than 10 to 1. At the most selective colleges, according to a 2002 *New York Times* article, "only 11 percent of students are from the lower end of the economic spectrum." And the proportion of rich students attending selective institutions is increasing.

Explanations are not hard to find. Richer students grow up in households with advantages that contribute to academic success. As a result, they tend to learn more and to acquire the skills necessary for higher education better than do students from less privileged backgrounds. These differences are reflected in a variety of measures of academic performance: test scores, grades, class rank, breadth and depth of academic curriculum. Even if one thinks these measures are flawed, failing to give the full picture of students' qualifications, it's undeniable that low-income students are generally less qualified academically than more affluent students who have had superior educational opportunities.

Yet some advantages more affluent students possess are not relevant to their academic success: they do not genuinely enhance students' qualifications for admission. That richer students possess *irrelevant advantages* as well as relevant ones compounds the inequities in the college admissions process.

Irrelevant advantages are those that do not enhance students' real qualifications yet give them a leg up in admission to selective institutions. Some general and pervasive advantages of this kind include connections, old-boy networks, and the search procedures employers and admissions offices use to simplify their tasks, such as giving more weight to the applications of students from better schools. In this essay I discuss more specific examples of irrelevant advantages: money and financial aid; legacy preference; early admission policies; disparities between rich and poor students in the use of special accommodations for disabilities in test-taking; inequities in the quality of college counseling and, more generally, in students' pre-college experiences. (One important issue not discussed here is coaching and test preparation. In *Leveling the Playing Field: Justice, Politics, and College Admissions,* Robert Fullinwider and I argue that the advantages gained by coaching are in fact more modest than either the coaching companies or the behavior of large masses of students who flock to them suggest.)

Money

Money is the irrelevant advantage *par excellence.* However much socioeconomic status may correlate with academic achievement, no one argues that having money or wealth in itself makes a student more qualified. Yet among equally able students, those who have more financial resources are more likely to go to college, and to graduate, than those who have less.

It's undeniable that low-income students are generally less qualified academically than more affluent students. . . . Yet some advantages more affluent students possess in the competition for admission to college are not relevant to their academic success. . . .

High-achieving students who are poor are five times more likely not to go to college than high-achieving students who are rich. And the situation for low-income students has deteriorated over the last twenty years. Between 1980 and 1993, according to economists Michael S. McPherson and Morton Owen Schapiro, "the gap in enrollment rates between students from the lowest-income quartile and those from the other three quartiles grew by 12 percentage points." The concentration of students from families with incomes

"We want you to have fun, as long as it's fun that enhances a college-admission application."

The New Yorker Collection, 2004,
Barbara Smaller from cartoonbank.com.

below $30,000 at community colleges has grown, and low-income students are increasingly uncommon at four-year colleges.

Three main factors account for the deteriorating financial picture for low-income students over the last two decades: rising college costs, the changing nature of federal aid, and the kind of aid provided by colleges and universities.

College costs. The costs of going to college have increased sharply. According to the College Board, between 1981 and 2000 median family income in the US rose 27 percent; tuition at four-year private institutions rose 112 percent and at four-year public institutions it rose 106 percent. One reason is that the contribution of both state and local governments to public colleges and universities has declined over the last fifteen years. In 1979–80, according to Ronald Ehrenberg, "state governments contributed 45 percent of all of higher education revenues, almost all of it through direct support of state-run institutions. By 1992–93, that share had fallen to 35 percent and has almost certainly fallen further since." Offsetting these decreases are rises in tuition at state colleges and universities. Although college enrollments are at an all-time high, lower-income students are, in economists' terms, "price-sensitive"; higher-income students are not.

The changing nature of federal aid. Although the federal government has contributed about the same share of public education revenues through aid to students since the mid-1970s, the nature of its aid has changed. Aid to students falls into three categories: grants or scholarships, loans, and work/study opportunities. Over the last two decades, the proportion of federal loans has increased and the proportion of grants has decreased.

The primary source of federal grants to students since 1974 has been the Pell Grant program, most of whose recipients are poor. A 1995 study by the General Accounting Office shows that increasing subsidies to students through the Pell Grant correlates directly with decreasing the drop-out rate, especially for minority students. Yet the percentage of tuition covered by federal aid has decreased significantly. In 2000-2001, the maximum Pell Grant was $3,300, covering about 40 percent of the costs at a four-year public college and about 15 percent at a private college. The Pell's purchasing power is much less than it was twenty years ago. And low-income students are often reluctant to borrow money they're not sure they will be able to repay.

Aid from colleges and universities*.* Apart from federal loans, which account for about half of all student aid, the largest single source is colleges and universities themselves, which provide about 20 percent of student aid. Here again, there have been changes in the way such aid is allocated that have not generally benefited lower-income students. Over the last decade, many four-year institutions, both public and private, have reserved an increasing proportion of their financial aid budgets for merit-based, as opposed to need-based, grants. As a result, even in public institutions upper-income students constitute a larger share of students than they used to. These changes have occurred as many colleges have begun to think of students somewhat as the airline industry conceives of passengers, and as admissions directors have been transformed into "enrollment managers." Potential students are in the market for seats; like air travelers they have different propensities to buy and thus varying "sensitivities to price," so colleges do well to charge them different rates depending on their willingness to pay.

About 20 percent of US colleges and universities say they meet 100 percent of the demonstrated need of students they accept. These are the most selective private colleges and universities in the country. With some exceptions, they practice "need-blind" admissions; they promise to meet the "full need" of students they admit; and they offer only need-based scholarships and no merit scholarships. But few institutions apart from the very richest and most sought after can afford *not* to balance students' financial need against other considerations in making decisions about admissions and financial aid. Even those institutions seemingly committed to need-blind admissions, meeting students' full need, and need-only scholarships sometimes depart from the purity of that model.

Important to the recent history of financial aid at highly selective institutions is a suit brought by the Justice Department in 1991 charging price-fixing against the Ivy League schools and MIT. After World War II and the Korean War, colleges began to see—in part through the GI Bill—the potential for increasing access to higher education. But students were relatively scarce and colleges had to compete for them. In 1954 the College Scholarship Service (CSS), an offshoot of the College Board, was created to develop objective criteria for determining students' need. The working assumption was that a student with offers at similarly priced colleges should, theoretically, receive roughly equivalent financial aid packages. Students could then choose their college on educational rather than on financial grounds, and the colleges could avoid bidding wars. For some years the Ivy League schools and fourteen other selective private schools—known as the Overlap Group—met every spring to discuss the financial situation of students admitted to more than one of the colleges in the group. In keeping with the CSS's assumption that need is objective, they aimed to offer such students equivalent aid packages.

After the Justice Department expressed concern about anti-trust violations in the late 1980s, the Ivy League schools agreed to stop sharing information about particular students before making offers, although they could still discuss definitions of need in a general way. The result was a resumption of the bidding wars the CSS was created to avoid. The concept of need has been interpreted in an elastic way allowing different colleges to offer a given student varying financial aid packages, and to offer students in apparently similar financial situations different packages.

The current situation clearly benefits some highly sought-after students. But many students gain nothing, and some—those who might have received aid that instead goes to a few stars—lose out. The colleges, meanwhile, find themselves in a financial arms race. To keep up with rivals in the competition for students each college has to up the ante; in the end everyone ends up as they would have if no one had bid up in the first place. As the economist Fred Hirsch once put it, when everyone stands on tiptoe no one sees any better.

> ***Three main factors account for the deteriorating financial picture for low-income students over the last two decades: rising college costs, the changing nature of federal aid, and the kind of aid provided by colleges and universities.***

Such "prisoner's dilemma" situations are not limited to elite colleges and universities. Schools down a notch (or two or three) can find themselves in the same situation, bidding for students against other institutions with similar profiles. These schools—with smaller aid budgets and endowments, and smaller applicant pools, than the most selective colleges—can afford such wasteful expenditures far less than their higher-ranked cousins.

Yet for these colleges the decision-making context is more complex than for the top-ranked schools. Not only are they trying to attract students away from colleges "in their league" (as are the most selective schools); they also aim to draw students away from higher-ranked institutions, by offering them aid they would not receive at those schools.

So the use of merit aid is associated, as McPherson and Schapiro observe, with two kinds of competition among schools. One is the attempt by colleges to recruit students away from more prestigious institutions. When they succeed, the result is that more qualified students are less concentrated in the most prestigious institutions and are distributed more evenly among colleges of different ranks. That in turn may produce certain benefits. First, it could improve the educational and intellectual climate at those institutions. Second, over time the more even distribution of talented students among colleges could mitigate somewhat the name-brand, winner-take-all mentality that characterizes prevailing attitudes. Both effects would be beneficial from an equity point of view, because basic goods—quality education and status—would be more evenly distributed across students attending institutions at different levels.

Over the last decade, many four-year institutions, both public and private, have reserved an increasing proportion of their financial aid budgets for merit-based, as opposed to need-based, grants.

But the other aspect of competition—schools vying with others "in their league" for the same group of students—benefits no one except the most sought-after students. Students in that group in need of financial assistance ought, of course, to receive it, according to consistent criteria that would dictate similar aid packages at similarly-priced institutions. But arms races in which institutions at the same level compete for students impose costs both on the institutions, and on students for whom the price of an education makes a difference.

The Legacy of Legacy

Most selective colleges follow an admissions policy of legacy preference: they favor children of alumni, accepting them at a higher rate than other applicants. James L. Shulman and William G. Bowen provide data showing that for the years 1976, 1989, and 1999, legacy applicants at 30 selective colleges and universities were on average 20–26 percent more likely to be admitted than nonlegacies, after controlling for SAT scores. By contrast, the admissions advantage for minorities declined sharply during this period—for men, from 49 percent in 1976 to 18 percent in 1999; for women, from 51 percent to 20 percent.

The argument for legacy preference takes two forms, which might be called the *soft* and *hard* versions respectively. The soft version invokes the value of community; it says that the identity and vitality of a university are partly constituted by tradition and human relationships and are therefore buttressed by the glue of family ties. As Stanford argued in 1958, "Strong family ties with Stanford are valuable in themselves."

The hard version of the argument for legacy—generally thought to be its main rationale—rests on the assumed financial benefits of admitting the family members, especially the offspring, of alumni. "Without legacy preference," according to Sheldon Steinbach of the American Council on Education, "there would be a significant decrease in giving from a core body of traditional support—families in which at least a second generation has gone to the institution."

To put legacy in context, it's useful to see how it evolved.

Until well into the twentieth century, few colleges were selective. A survey in 1920 of the most famous colleges and universities in the country showed that only thirteen were turning away any applicants at all; Yale accepted everyone who satisfied its basic entrance requirements. As late as 1950, Stanford admitted 77 percent of all who applied; the following year it accepted 85 percent.

[Data show] that for the years 1976, 1989, and 1999, legacy applicants at 30 selective colleges and universities were on average 20–26 percent more likely to be admitted than nonlegacies, after controlling for SAT scores.

Obviously the climate of college admissions has changed a great deal since the 1920s, and especially over the last forty or so years. A legacy with minimally respectable credentials could expect to be admitted even to very prestigious universities in 1960. (It was said that although legacy could not raise the dead it could heal the sick.) That is no longer true. University admissions offices today are more likely to say that a legacy connection is a thumb on the scale or a tiebreaker between otherwise equally qualified candidates. In no sense is legacy status a sufficient condition for admission.

That is a far cry from the old policy. But legacy still plays an important role in admissions to selective colleges, as the figures from Shulman and Bowen cited above show. The most selective schools are bombarded with applicants, many of them highly qualified. Over the last decade alone, applications—for approximately the same number of places—have increased at many colleges and universities by 50 to 100 percent. In this climate students have reason to be grateful for the mere thumb on the scale.

Is there anything wrong with preferences for legacies? Compare legacy with "development" cases, where a university admits a student whose family makes or is expected to make a large financial contribution to the institution. Development cases seem to involve a direct tit-for-tat. Although everyone understands why colleges might admit the children of big donors, and while some might think doing so is sometimes justified on pragmatic grounds, the practice makes most people uneasy. It smacks of bribery.

Universities suggest that they approach legacy differently—that they don't look at a family's past giving practices, or its wealth, when deciding whether to admit the children of alumni. Rather, the legacy advantage involves a general assumption by the institution ("Families of legacy admits tend to contribute more than others"), not particular knowledge of a family's wealth and giving habits ("This family has contributed a lot of money, so we will give their child a boost"). That vaguer basis—the broad generalization as against the particular judgment about a family—seems less odious; it does not imply a clear tit-for-tat.

We say that universities *suggest* that this is how they approach legacy applicants. But suppose that, as some suspect, in deciding which alumni children to admit, universities do look at the family profile. Has the family made contributions before? How much? What are they likely to give in the future? If calculations of this kind enter into the admissions decision, legacy begins to resemble the troubling development cases.

It's natural to reply that the question in both the development and the legacy cases is whether the applicant is *qualified* for admission. If not, our doubts and worries are justified: students are *buying* their way in, and that's wrong. But if a student is actually well-qualified and the preference is simply a thumb on the scale, it might be argued, there's nothing wrong with giving preference to legacies (or to rich applicants).

One problem with this response is that it conflicts with the claims by selective institutions—described in the previous section—to subscribe to "need-blind" admissions policies. Legacies at selective colleges tend to come from privileged backgrounds; when the motive for admitting them is partly the prospect of financial gain, admissions is in effect not need-blind. More important, in the current climate, where large numbers of students are extremely well-qualified, legacy makes more of a difference than the argument suggests. If the decisive question is "*Could* this student be admitted but for the prospect of financial gain for the university?," it rules out the unqualified. But if the question is "*Would* this student be admitted but for the prospect of financial gain?" then it chooses a subset of privileged students—on account of their privileged status—from the set of qualified applicants.

One thing is clear. Both defenses of legacy preference—the soft as well as the hard—give a boost to those who need it least, for reasons having nothing to do with their personal attributes.

Early-admission Policies

Today many colleges have adopted early-admission policies, which exert a great deal of influence on the admissions process. The early admission scene is in a state of flux and changes every year. But generally it includes two kinds of programs. Early-*decision* programs require students to apply by November 1 or November 15, in contrast with the January deadlines typical of regular admissions. In exchange for a decision from the college by the middle of December, the student promises to enroll if accepted. It follows that students can apply to only one school early-decision. Students who are deferred or rejected then have a few weeks to put in applications to other colleges.

The most serious flaw of early-admissions policies is that they give already privileged students one more advantage in the admissions process—an advantage having nothing to do with superior qualifications.

Early-*action* programs adhere to the same timetable as early decision but are nonbinding: students get an answer from the college in December but may apply elsewhere during the regular admissions process and make up their minds in the spring, on the regular admissions cycle.

The rationales for early-decision policies from the colleges' point of view are clear. The college can be certain of securing a proportion (increasingly, in some cases, a large proportion—30 or 40 percent or more) of its entering class with enthusiastic students who require no wooing once admitted. Moreover, colleges are in the business of "crafting a class," in the words of Elizabeth Duffy and Idana Goldberg: not simply admitting a group of qualified students but finding the right mix and filling particular niches. Early decision enables the admissions office to lock in that much-needed French horn player or football quarterback. From the college's perspective, early decision is a rational and efficient approach to matching supply and demand.

There is also a more strategic reason for it. The more students a college accepts early, the lower its acceptance rate from the larger pool of regular decision applicants and the higher its "yield"—the number of accepted students who ultimately enroll. A low admissions rate and a high yield are marks of a college's status. Colleges zealously monitor the figures, which—because students monitor them—can affect an institution's fortunes.

From the student's point of view, the reasons for preferring early admission also seem clear. To gain admission to your first-choice college in December rather than April after having filed only one application and waiting only a few weeks, instead of sweating over a half dozen or more and learning only months later of the results—what student wouldn't take that path if she could?

But serious drawbacks accompany the advantages of early-admission policies. Some affect students as a whole, and some affect less privileged students in particular.

The most serious flaw of early-admission policies is that these policies give already privileged students one more advantage in the admissions process—an advantage having nothing to do with superior qualifications. They do so for several reasons.

First, more affluent students have better information, and they have it earlier, than less affluent students. Lower-income students are less oriented toward college admissions generally, less knowledgeable about the pluses and minuses of particular colleges, and less likely to know of the advantages of applying early. Affluent students begin looking at colleges in their junior year (at the latest), and so are more likely to be ready to commit themselves by November. Lower-income students rarely make the junior year spring break tours, and would therefore take a risk by binding themselves early to one college.

Most important are the financial aspects of early decision. Students admitted early tend to receive less financial aid, since they lock themselves into matriculating and the colleges have no incentive to win their favor. (Students can be released from the commitment if the school does not offer sufficient financial aid to make enrollment feasible. But the process is cumbersome and unpleasant—not how a student wants to spend her time while nursing more college applications.) Those who apply early deprive themselves of the opportunity to compare financial aid packages and negotiate with colleges in the spring.

These problems arise in part from the rules that now govern financial aid decisions at selective colleges. The section on money described how selective schools used to meet to agree on need levels for accepted students, so that students received roughly equal financial aid packages from different schools and the colleges avoided bidding wars. When the Justice Department in the early 1990s struck down this practice, these schools had to change their procedures. As a result, students accepted to more than one school can now receive very different financial aid packages. In one recent case, a student who applied regular decision to both Yale and Princeton received a $3,000 financial aid offer from Yale and $19,000 from Princeton. (Since the Ivy League schools offer no merit aid, both were allegedly need-based scholarships.) Clearly, had this student applied early decision to Yale he would have been significantly disadvantaged.

Colleges obviously gain from these student handicaps. And because the pool of early applicants is richer than the regular applicant pool, the greater the number of students a college accepts early the lighter its financial burden is likely to be.

Members of minority groups, financial aid applicants, and public school students are in fact less likely to apply early for the reasons described. Early decision policies, then, give affluent students another leg up over lower-income students in the admissions process.

Students who receive extended time on standardized tests for learning disabilities are much more likely to come from affluent families and schools. . . .

An Uneven Outbreak of Disabilities

Between 1992 and 1997, the number of students who took the SAT I with "accommodations"—special test conditions—as a result of disabilities doubled; the number of students taking the test with accommodations for disabilities has increased an average of 14 percent a year. From 1989–90 to 1995–96, the number of students who took the ACT with accommodations nearly tripled, from 8,519 to 23,463.

A student may require accommodations because he is blind, and needs a Braille or cassette version of the test, or, as in a recent case, because he has no hands, and needs a computer with a trackball. But according to the College Board "about 90 percent of all requests for accommodations are for students with learning disabilities and over two-thirds of these accommodations are simply for extended time." The learning disabilities include ADD (attention deficit disorder), ADHD (attention deficit hyperactivity disorder), and dyslexia. Some students with disabilities receive time-and-a-half, some get twice as much time as nondisabled test-takers, and a few are permitted even more than that.

Testing with disabilities raises several questions about fairness and justice. One concerns comparability. Giving disabled students extra time (or other benefits) aims to compensate them for their disabilities so that their opportunities to perform their best equal those of nondisabled students. But the question is how much extra time a particular learning-disabled student should get: too much time would give him an unfair advantage, too little would not compensate him adequately.

A second issue concerns disclosure of the accommodations made for disabled students. In 2000, Mark Breimhorst, the student without hands who took the GMAT on a computer with a trackball, brought a federal lawsuit challenging as discriminatory ETS's policy of sending out scores with the notation "Scores obtained under special conditions." Breimhorst and his lawyers argued that the policy is a scarlet letter stigmatizing disabled students and rendering them more susceptible to discrimination. In 2002, the College Board announced that as of September 2003 it would no longer flag the scores of students receiving accommodations. Some fear the new policy will result in an increase in the number of students who apply for accommodations—including requests from students who are not genuinely disabled.

The problem of potential abuse is related to a third question of justice. Students who receive extended time on standardized tests for learning disabilities are much more likely to come from affluent families and schools, and the new policy of not flagging scores is likely to exacerbate the problem.

An audit by the state of California in 2000 showed "wide demographic disparities" among high school graduates in 1999 who took the SAT with extended time because of claimed learning disabilities. Students at private schools were four times more likely to get special accommodations as those in public schools. The auditors found that "in six of seven school districts in wealthy areas," including Beverly Hills and Palo Alto, there were "questionable and potentially unwarranted cases of students receiving special treatment."

Claudette Sharpe, a guidance counselor at Eastern High School, a school serving low-income students in the District of Columbia, remembers only three students in twelve years who received extended time on the SAT. According to the National Center for Policy Analysis, 10 percent of students at 20 New England prep schools got extra time on the SAT, while not one of 1,439 students at ten Los Angeles area high schools did.

Affluent and educated parents often push to have their children classified as learning-disabled as early as elementary school. Parents of poor children, and the teachers and counselors in low-income schools, are less likely to know about special services available for learning-disabled students, and less aggressive in seeking them out.

College Counseling and Conspicuous Educational Consumption

In private and select public schools, a ratio of one counselor to 50 or 60 students is not unusual, and counselors may spend as much as six hours a year with each student. In most large public schools, the ratio may be one counselor to 300 students or more. At Cardinal Hayes High School in the Bronx, a Catholic school serving many low-income students, the college counselor works with more than 200 students while working a second job supervising custodians; when he explains the college admissions process at an assembly for juniors most of them "have not given it a moment's thought." The college counselor at Grover Cleveland High School in Queens engages in a kind of academic triage, concentrating her efforts on the top third of more than 450 students, many of whom are impoverished immigrants.

Among other things, counselors are responsible for writing a "counselor letter of recommendation" for each of their students. A counselor with hundreds of students—and who is also responsible for other aspects of guidance—will generally be unable to say anything very meaningful about most of them, nor can she adequately advise so many students. In elite schools counselors may be devoted to the college process alone; their letters tend to be replete with detail and nuance.

Rich students who demand more attention than their school counselors can provide sometimes avail themselves of the services of private college consultants. Admissions Consultants advertises a rate of $95 an hour on its website. Another company, College Admissions Consultants, offers a contractual relationship that provides ongoing access for a fee: four years of consultation beginning in ninth grade for $1400, three years beginning in tenth grade for $1200, etc.

At least as important as the services provided by school counselors or independent consultants is the general atmosphere in which more affluent students grow up, and the very different environment in which lower-income students find themselves. There is strong evidence, according to a 2001 College Board report, that by ninth grade and possibly as early as seventh grade "most students have already developed occupational and educational aspirations," and that these are strongly related to socioeconomic status. For affluent students, going to college—and more specifically going to high-status colleges—has always been in the air. They rely for up-to-date information on parents, other close adults, older siblings of friends and relatives who are already attending college, college guides, and a variety of websites and online chat rooms.

Ambitious high school students know that internships at scientific institutes and nonprofit organizations look good on one's college application. They know that colleges like to see Advanced Placement courses on the transcript. (Of course, these activities produce relevant as well as irrelevant advantages.) Until last year, affluent students knew they could employ "Score Choice," which allowed them to withhold SAT II results from colleges unless they were satisfied with their scores. As the College Board explained in its recent decision to abolish Score Choice, the policy "encouraged 'gamesmanship' and favored students wealthy enough to repeat tests."

In private and select public schools, a ratio of one counselor to 50 or 60 students is not unusual. . . . In most large public schools, the ratio may be one counselor to 300 students or more.

Low-income students generally lack these resources and role models. Parental encouragement is the strongest factor predicting students' educational aspirations; parents' knowledge of financial aid possibilities is also crucial. But these factors are correlated with socioeconomic status. Low-income students must rely mainly on their guidance counselors for information; their parents don't know the ropes or don't have the time to oversee their children's applications.

But these problems are not unrelated. Students who inflate their qualifications may squeeze out others equally qualified although not as slickly packaged. Admissions officers often deny that they are impressed by the slickly packaged student; they say they look for a student who is "simply being himself or herself." The sentiment is surely sincere, and admissions officers are savvy. But it is also clear that college-conscious students today expend a great deal of effort in their applications to "be themselves."

A Silver Lining?

Yet the news may not be all bad. The mounting frenzy surrounding college admissions and the vagaries of supply and demand may contribute to a leveling effect. With the rise in competition and college costs, and the growth of merit-based aid, the quality of students at less elite colleges and universities is rising. Students who might have attended fancy private schools may opt for state universities, many of which now offer special programs to attract more talented students. The leveling effect also results from the dismal job market for academics that has endured for thirty years, which has meant that talented scholars have found jobs at colleges—if they have not changed careers because of their poor prospects—of lesser reputation than they might have hoped. As a consequence, the quality of education at those institutions has improved.

There is also some evidence that students do not sacrifice their longterm material prospects in foregoing high-status schools. Economists Stacy Berg Dale and Alan Krueger found that "students who attended colleges with higher average SAT scores do not earn more than other students who were accepted and rejected by comparable schools but attended a college with a lower average SAT score." Krueger and Dale's intriguing findings run counter to the conventional wisdom and to other evidence that going to an elite college makes a difference to one's later material prospects.

Some equalizing of the prestige and the quality among colleges would be a welcome, if paradoxical, side-effect of the heightened competition for places in selective schools. This leveling effect could help to mitigate the disparities in educational advantages between students at different socioeconomic levels, at least slowing the rate at which the academically rich get richer.

Judith Lichtenberg
Institute for Philosophy and Public Policy and Department of Philosophy
University of Maryland
judith@umd.edu

This article derives from *Leveling the Playing Field: Justice, Politics, and College Admissions,* by Robert K. Fullinwider and Judith Lichtenberg (Lanham, MD: Rowman & Littlefield, 2004).

Sources: Patrick T. Terenzini, Alberto F. Cabrera, and Elena M. Bernal, *Swimming Against the Tide: The Poor in American Higher Education,* College Board Research Report No. 2001-1 (New York: College Board, 2001); Robert M. Shireman, "Enrolling Economic Diversity," *New York Times* (May 4, 2002); "College Kids Nationwide—Including Chicago Students—Are Richer Than They Used to Be," *University of Chicago Magazine* 96, no. 6 (August 2004), p. 10; Jacques Steinberg, "More Family Income Committed to College," *New York Times* (May 2, 2002); Michael S. McPherson and Morton Owen Schapiro, *The Student Aid Game: Meeting Need and Rewarding Talent in American Higher Education* (Princeton: Princeton UP, 1998); College Board, *Trends in Student Aid, 2001,* at www.collegeboard.com; Ronald G. Ehrenberg, *Tuition Rising: Why College Costs So Much* (Cambridge: Harvard UP, 2000); GAO study: American Association of University Professors at www.aaup.org/govrel/studentaid/pell.htm; Jacqueline E. King, "Student Aid: Who Benefits Now?," *Educational Record* (Winter 1996); Stephen R. Lewis, "Ensuring Access, Strengthening Institutions," *College Board Review,* No. 175, (Spring 1995); NACAC survey: Elizabeth A. Duffy and Idana Goldberg, *Crafting a Class: College Admissions and Financial Aid, 1955–1994* (Princeton: Princeton UP, 1998); Fred Hirsch, *The Social Limits of Growth* (Cambridge: Harvard UP, 1976); James Shulman and William Bowen, *The Game of Life: College Sports and Educational Values* (Princeton: Princeton UP, 2001); Jean H. Fetter, *Questions and Admissions: Reflections on 100,000 Admissions Decisions at Stanford* (Stanford UP, 1995); Daniel Golden, "Family Ties: Preference for Alumni Children in College Admission Draws Fire," *Wall Street Journal* (January 15, 2003); David O. Levine, *The American College and the Culture of Aspiration, 1915–1940* (Ithaca: Cornell UP, 1986); Daniel Golden, "Many Colleges Bend Rules to Admit Rich Applicants," *Wall Street Journal* (February 20, 2003); Christopher Avery, Andrew Fairbanks, and Richard Zeckhauser, *The Early Admissions Game: Joining the Elite* (Cambridge: Harvard UP, 2003); Wayne J. Camara and Dianne Schneider, "Testing With Extended Time on the SAT I: Effects for Students with Learning Disabilities," Research Notes RN-08 (January 2000), (New York: College Board, 2000); Tamar Lewin, "Disabled Student Is Suing Over Test-Score Labeling," *New York Times* (April 11, 2000; Tamar Lewin, "Abuse Is Feared as SAT Test Changes Disability Policy," *New York Times* (July 15, 2002); Kenneth R. Weiss, "Audit Confirms Disparities in SAT Testing: White, Affluent Students Are Granted Disproportionate Share of Time Extension Based on Learning Disabilities, State Report Finds," *Los Angeles Times,* (December 1, 2000); Jay Mathews, "Parents' Push Gives Students More SAT Time," *Washington Post* (May 8, 2000); National Center for Policy Analysis, at http://www.ncpa.org/pi/edu/pd011100a.html; Ken Gewertz, "COACHing the High-jump to Higher Education," *Harvard Gazette* (September 30, 1999); Jane Gross, "Different Lives, One Goal: Finding the Key to College," *New York Times* (May 5, 2002); Admissions Consultants: www.admissionsconsultants.com/college/payment.asp; College Admissions Consultants: www.iapplycollege.com/about_us.shtml#fee; http: //www.collegeboard.com/sat/html/scorechoicesum.html; Stacy Berg Dale and Alan Krueger, "Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables" (Working Paper #409, Princeton University, December 1998).

Complicity in Mass Violence

Stephen L. Esquith

In 2003 the Food and Agriculture Organization of the United Nations concluded that "Overall, the number of undernourished people in the countries in transition grew from 25 to 34 million between 1993–1995 and 1999–2001." The concept of "transition" has come to mean many things during this period. Recently we have witnessed the expansion of the European Union from fifteen to twenty-five countries, the tenth anniversary of the first democratic elections in South Africa, the tenth anniversary of the Rwandan genocide, and the intensification of the war in Iraq. Fifteen years after the euphoria of 1989, it is unclear in what direction "countries in transition" are moving, or even who is "in transition" and who is not. It is clear that what is occurring in "countries in transition" cannot be separated from the larger processes of globalization and that 'transition' covers a much wider range of countries than was thought when the Berlin wall fell.

In this context, I want to discuss the question of responsibility for mass violence, and its relationship to democratic citizenship. The conventional wisdom is that responsibility for mass violence comes in two forms: moral and juridical. Moral responsibility is less stringent in the sense that so long as coming to the aid of those in need is not too risky, then regardless of who is at fault, moral persons have a duty of beneficence to intervene and help. If it is too risky for them, regardless of who is at fault, they are not bound to act on this duty. In contrast, juridical responsibility depends upon who is at fault, and in cases of mass violence those who have contributed causally, either through their actions or omissions, ought to be held legally liable. Juridical responsibility is a matter of justice, not a matter of moral beneficence, and failure to meet this responsibility is punishable by law.

One finds attempts to fill in the space between these two forms of responsibility with a general notion of political responsibility. Citizens in, for example, a democratic society bear more political responsibility for the violent acts of their government than do subjects of a tyranny. But, many forms of mass violence are not the acts of governments, let alone democratically elected governments. What responsibility, if any, do democratic citizens have for mass violence when it occurs through complex international, multinational, and other global institutions? How are we to map the responsibilities of democratic citizens in a world in which one finds many types of democracy and in which our conventional intuitions about moral and juridical responsibility are at best insufficient?

I suggest that we use two related ideas, complicity and re-enactment, to make better sense of the responsibilities of democratic citizens in the current context. Complicity refers to a wide range of responsibilities between moral responsibility on one side and legal liability on the other. Re-enactment refers to a particular form of democratic political education that enables citizens to recognize their constitutive roles in the generation of political power and the imposition of mass violence. Asking 'complicity' to do this much work is itself risky. The term comes to us with strong connotations. Relying on re-enactments is no less dangerous; re-enactments can just as easily provide vicarious and cathartic experiences as they can prompt greater clarity and civic engagement.

What responsibility, if any, do democratic citizens have for mass violence when it occurs through complex international, multinational, and other global institutions?

Having said this, however, it still seems possible to articulate how certain kinds of re-enactments can encourage appropriate feelings and beliefs about responsibility for mass violence among democratic citizens. As Martha Nussbaum has noted, this was the Greek playwright Euripides's purpose in *The Trojan Women.* At a time when Athenian democracy was committing mass violence on the island of Melos, Euripides found a way to re-enact that massacre through a play about the aftermath of the Trojan War. Similarly, contemporary playwrights often return to classical themes in order to bring to life the issue of responsibility for mass violence. Peter Sellars's production of *The Children of Herakles* aspired to be a similar vehicle for political education after the events of September 11, 2001. Re-enactment is a particular kind of democratic political education that can make better use of the notions of complicity in an age of escalating violence and deepening poverty across national borders. To be effective as democratic political education, re-enactments must prompt democratic deliberation, not substitute catharsis and polemic for it.

My goals are (1) to explore the relationship between complicity and responsibility, (2) to understand why moral sympathy is an inadequate virtue for democratic citizens, and (3) to suggest how re-enactment as a form of democratic political education can clarify and motivate political responsibilities.

Complicity

Determining who is an accomplice to a crime, after or before the fact, is never easy. Distinguishing between collaborating with an occupying force and sharing some responsibility for the consequences of occupation short of criminal guilt is equally, if not more difficult. So much is left to chance that settling accounts can become arbitrary. Yet, the urge to identify and punish complicity, not in round numbers but down to the decimal point, is hard to resist.

This is only part of the problem. The report of the South African Truth and Reconciliation Commission (TRC) identified institutional, not just individual, accomplices after the fact, including religious denominations and parts of the legal profession. Beyond that, the report criticized the Commission itself for focusing on exceptional perpetrators while ignoring the "little perpetrator" in each of us: " . . . it is only by recognizing the potential for evil in each one of us that we can take full responsibility for ensuring that such evil will never be repeated."

If talk of complicity in crimes against humanity may only produce frustration and hyperbole, why raise the issue of complicity in global poverty? The lines of causation are even *more* intricately woven, suggesting to many that only duties of beneficence based upon moral sympathy can possibly exist for mass violence. Before addressing the inadequacy of moral sympathy as a response to global poverty and mass violence, let me note an important assumption about the connections between poverty and violence in the argument that I am about to make.

I assume that there is an unhappy, close relationship between war, on the one hand, in the form of civil wars, militia terrorism, and wars of aggression, and deprivation, in the form of poverty, hunger, and famine on the other. Some attempts to reduce global poverty have actually exacerbated mass violence, and unless the political causes of mass violence are addressed, global economic development programs will fail. In this essay I will refer to deprivation and war together as mass violence, leaving aside the very complicated question of how they influence each other in particular cases.

Responsibility

What can be done to sharpen the sense of responsibility of citizens who are committed to democracy, and benefit from global economic development, but at the same time fail to recognize their own complicity in the global structures of power that generate unprecedented levels of mass violence?

Commonly, we think of responsibilities of beneficence or justice as the responsibility that an individual has for his or her actions. In this case, responsibility depends upon the freedom of the individual to make and act on his or her decisions. Varying degrees of freedom lead to varying degrees of responsibility. One must also consider responsibility to others to remedy existing conditions, or to compensate for past wrongs and ill-gotten gains. It is in discussions of responsibilities to others that the vexed question of collective responsibility for the causes of and benefits from the exercise of power, as well as the effects of mass violence arises.

Collective responsibility requires less a **philosophical** *investigation into the notion of free will than it requires a* **political** *investigation into the fabric of democratic citizenship. . . .*

Collective responsibility requires less a *philosophical* investigation into the notion of free will than it requires a *political* investigation into the fabric of democratic citizenship, which is why there is a need for the concept of complicity as a type of political responsibility not reducible to individual moral guilt or legal liability. Complicity in this sense is a symptom of compromised democratic citizenship, that is, alienation from the democratic political process. In this sense, victims, perpetrators, and bystanders share an important characteristic: for complex and different reasons they all find themselves outside the democratic political process. This kind of damage to the body politic can only be repaired through democratic political education.

Democracy

Consider the practice of democracy—not the classical or the modern ideal, but actually existing democracy, what Thucydides attempted to describe in ancient Greece and what Tocqueville thought he saw in nineteenth-century America. The practice of democracy today is not the constitutional rules of the road for individual citizens of nation-states. It is a network of intersecting and overlapping structures of power, including multinational corporations, multi-lateral organizations, international nongovernmental organizations, social movements, and (but not centered on) nation-states. It is this complex network that defines how we use the democratic language of citizenship, participation, and membership. Like the ancient Athenian assembly, today's global institutions and movements determine how we *practice* democracy. They are the engines of power that drive actually existing democracies and they are what the contemporary distinction between transitional and consolidated democracies attempts to capture. This theoretical attempt is failing, but that is no reason to abandon the notion of democratic transition. On the contrary, properly understood, the notion of democratic transition can help us restore the fabric of democratic citizenship in practice. At a time when self-described consolidated democracies have lost the qualities of a participatory and deliberative democratic political culture that have been thought to distinguish them from merely transitional democracies, a more inclusive notion of democratic transition can provide the ground for more extensive bonds of political responsibility.

Over the past half century many post-colonial and post-authoritarian societies in Latin America and Africa, then in Eastern Europe and the area covered by the former Soviet Union, have moved erratically towards democracy. By comparison, liberal democratic societies initially prided themselves on their records of successive electoral regime changes, stable democratic culture, and sustained economic growth, in other words, democratic consolidation. It has been politically expedient for politicians and intellectuals seeking a justification for the distortions caused by the half-century of Cold War mobilization to make invidious comparisons between their own consolidated democracies and the travails of barely transitional new democracies. They have done this without recognizing how closely linked are consolidation and transition. Without the support of client states, mercenaries, guest workers, and illegal and unfair terms of trade, consolidated states would not have been able to maintain their relative stability.

It has become hard to distinguish between the stranger in our midst to whom even limited sympathy is owed, and the distant foreigner with whom we have more contact than our most intimate compatriots.

However, as the Cold War era gave way to a new period of warfare, mixing hi-tech spectacles, cruel ethnic campaigns by local militias and warlords, and conventional territorial warfare, it has become much more difficult to ignore the relationship between consolidation and transition. It has become clearer that consolidation, understood as political stability and economic growth for some, often has been purchased at the expense of violent instability and deprivation for others. One sees this in disputes about import quotas and crop subsidies, not just in the pitched battles between client states and mercenaries on one side and insurgents on the other.

Grudgingly, citizens of self-proclaimed consolidated democracies have grasped the transitional nature of their own democratic projects. Sometimes this recognition has taken the form of monetary reparations paid to living survivors or their families by the state and corporations complicit in past crimes against humanity (or guilty of less serious violations of human rights). For example, in 1999 the German government, in cooperation with the United States, arranged to limit reparations to survivors of slave labor from corporations that collaborated with the Nazi regime. More frequently, reparation has been symbolic. For example, some universities have opened their books to allow for discussion of the involvement of their founding fathers in slavery, and some municipalities have begun to require that private contractors disclose any ties to the history of slavery before they can be employed on public projects.

Further evidence of the need to expand our working concept of democracy is the way that the related distinction between nationals and foreigners and the distinction between nearby and distant strangers are failing us. Democracy, whether we call it transitional or consolidated, has also been associated with territory on which fellow citizens enjoy commonly-understood conceptions of justice. The patterns of migration, remittance, and illicit trafficking in arms, drugs, and human beings that have made national boundaries so porous have not just increased the speed and range of international trade and war. As philosopher Eduardo Mendieta describes, what is ‘now’ is not always what is ‘here,’ what is ‘here’ is sometimes distant yet familiar; sometimes nearby, routine *and* still unfamiliar. One thing that this compression of time and space has done is forced citizens in democratic societies to re-examine the familiar notion of sympathy. It has become hard to distinguish between the stranger in our midst to whom even limited sympathy is owed, and the distant foreigner with whom we have more contact than our most intimate compatriots.

Sympathy

As these changing circumstances have put pressure on the boundaries of democratic citizenship, the task of democratic political education has changed as well. Citizens can no longer simply be taught to abide by the rule of law, participate in periodic elections, and be prepared to play the role of the loyal opposition. Such liberal democratic virtues were designed for idealized self-sufficient nation states. Unable to separate clearly transitional and consolidated democracies, and unable to distinguish between distant and nearby strangers, citizens committed to democracy now need a more practical democratic political education. If they are to act responsibly in the unavoidable transitions continually faced by democratic societies, citizens must learn how to recognize the constitutive roles they already play in a complex global network of power and violence.

How can democratic citizens find enough footing to recognize their complicity in this complex network? Some have argued that the answer to these questions may depend upon restoration of the moral sentiment of sympathy, not an easy task. Philosopher Jonathan Glover, for example, argues that any sympathy for the victims of mass violence is today likely to be eroded by (1) the vast physical distance that separates victims and perpetrators, (2) the seemingly 'clean' and 'smart' technologies that are used to impose violence, (3) the precedents that already exist for relying on mass violence in political conflicts, and (4) the slippery slope that leads to the escalation and spread of mass violence. Only if we can find a way to restore our moral imagination, that is, our capacity to recognize the shared humanity that unites victims and perpetrators, are perpetrators or bystanders likely to feel much sympathy for victims. Even a realistic political scientist such as Robert O. Keohane seems unable to resist the lure of sympathy, or what he calls "transnational bonds of empathy":

Our moral principles are in no better shape than our intuitions.

> Our principal task as scholars and citizens who believe in more accountability is to build support within our powerful, rich countries for acceptance of more effective and legitimate multilateral governance to achieve human purposes, for stronger transnational bonds of empathy, and for the increased external accountability that is likely to follow.

Glover's chronicle of the erosion of moral sympathy, unfortunately, leaves us wondering how such "bonds of empathy" possibly can arise. The moral intuitions we normally rely upon to guide our actions toward the world's poor are indeed in disarray. Similarly, our moral intuitions about what counts as a crime against humanity are equally flawed. Instead of seeing these crimes as products of corrupt state power and the militia groups this corruption spawns, we remain mesmerized by the immorality of individual perpetrators and bystanders. Our moral principles are in no better shape than our intuitions. The principles that have been offered to reorder our moral intuitions are either too stern or too idealized. Political philosopher Thomas Pogge, for example, scolds us for being "hunger's willing executioners," suggesting a parallel between blind consumerism and collaboration with Nazi war crimes. Ethicist Onora O'Neill rightly rejects John Rawls's principles of justice because they rest upon an idealization of the self-sufficient nation-state and its basic institutions while ignoring the way that transnational institutions *actually* shape our desires and needs.

In theory, the Rawlsian method of reflective equilibrium—that is, the movement back and forth between moral intuitions and institutional principles in order to get a better fit between the two—seems like a plausible approach to the problem of philosophical justification. However, so long as our intuitions remain in such disarray and the principles to which we are most wedded are out of step with transitional and global circumstances, we will need something more to prompt our imagination then reflective equilibrium. We must find a way to move back and forth between the competing points of view of those O'Neill calls "impoverished providers" and the complicity of bystanders to—as well as perpetrators of—mass violence. This is not a purely reflective process. It requires forms of embodied participation in the overlapping worlds of unfamiliar neighbors and distant strangers. Describing exactly what this might look like is not easy, but at least for students *and faculty* it would include civic engagement projects, community service-learning programs, and study abroad programs that were part of an integrated curriculum, and not isolated experiences.

The needed moral imagination, then, will not take the form of sympathy (or "empathy") for, in Rawls's words, "the least advantaged class." Compelling images of the starving poor and the innocent victims of violence may prompt vague feelings of guilt and sympathy, but the results of this sympathetic reaction in the current context are often perverse. Consider journalist Philip Gourevitch's admittedly outraged assessment of the United Nations refugee camps built in Zaire for refugees of the 1994 genocide by members of Hutu Power in Rwanda:

> This was one of the great mysteries of the war about the genocide: how, time and again, international sympathy placed itself at the ready service of Hutu Power's lies. It was bewildering enough that the UN border camps should be allowed to constitute a rump genocidal state, with an army that was regularly observed to be receiving large shipments of arms and recruiting young men by the thousands for the next extermination campaign. And it was heartbreaking that the vast majority of the million and a half people in those camps were evidently at no risk of being jailed, much less killed, in Rwanda, but that the propaganda and brute force of the Hutu Power apparatus was effectively holding them hostage as human shields. Yet what made the camps almost unbearable to visit was the spectacle of hundreds of international humanitarians being openly exploited as caterers to what was probably the single largest society of fugitive criminal against humanity ever assembled.

Sympathy under these conditions may not be even a necessary condition, let alone a sufficient one, for appreciating the networks of transitional and global violence that link the victims of Hutu Power with, Gourevitch goes on to say, "all of us who paid taxes in countries that paid the UNHCR" (The United Nations' High Commissioner for Human Rights). If recognizing complicity requires that we place ourselves squarely within this shifting frame of reference, we actually may have to make an effort to resist feelings of sympathy for the dramatic images of starving and suffering refugees. Such feelings only may reassure us that we have not lost our capacity for sympathy. We also will have to find a democratic practice through which more fine-grained distinctions regarding complicity can be made. Holding *all* taxpayers accountable is no better than holding *no* taxpayers accountable.

Re-enactment

Democratic citizens in the current context have a better chance of learning to recognize their complicity in the exercise of power and the creation of mass violence through a process of deliberation and discussion prompted by re-enactment than through the cathartic evocation of moral sympathies. By re-enacting our imperfect ways of politically coming to terms with global power and local violence, we may be able to see ourselves within this complex picture, instead of uncritically identifying with victims or observing them more comfortably from afar. Tribunals and commissions are necessary for this process, but alone they are not enough. As development ethicist David Crocker has argued, when war crimes tribunals, truth commissions, and other political proceedings are re-examined under a critical light, citizens are better able to see the limitations of legal punishment and moral forgiveness. Actively engaged as an audience to the re-enactment of these spectacles, philosopher Hannah Arendt argued, citizens can begin to form political judgments in particular cases. It is in this sense that re-enactments may enable citizens to move with poise and humility between their familiar surroundings and the worlds of impoverished providers and bystanders. These re-enactments most often take the form of films and dramatic performances, but they can also be sculpture, poetry, and fiction. What they have in common is the goal of prompting a critical understanding of the complicity that links the "impoverished providers," bystanders and perpetrators who have appeared before tribunals and commissions seeking justice, understanding, and sympathy.

Democratic citizens . . . have a better chance of learning to recognize their complicity . . . through a process of deliberation and discussion prompted by re-enactment than through the cathartic evocation of moral sympathies.

Schematically, re-enactment is a public performance that creates a temporary space in which to contest official efforts to counter mass violence. Within this space, one finds the opportunity for critical self-reflection on the relationship between complicity and other types of responsibility.

Re-enactments, such as the work of the filmmaker Mandy Jacobson (*Calling the Ghosts; The Arusha Tapes*) and the artist William Kentridge (*History of the Main Complaint; Ubu and the Truth Commission*), create a space in which viewers, listeners, and readers can see themselves among the sufferers and benefiting bystanders of mass violence without losing sight of differences in degree as well as kind between actual sufferers and beneficiaries who regret this suffering.

William Kentridge's *Ubu and the Truth Commission*, performed in 1997 in collaboration with Jane Taylor and the Handspring Puppet Company, is particularly instructive because of its approach to understanding the goals of democratic political education in an age of mass violence. Despite its serious limitations, South Africa's Truth and Reconciliation Commission (TRC), like other truth commissions and war crimes tribunals, has created an almost unprecedented opportunity for democratic political education. What distinguishes the TRC and these official institutions from re-enactments such as *Ubu and the Truth Commission* is the way that the latter frame questions of responsibility and raise questions about the evolution of power in a manner that encourages democratic imagination and practice rather than cynicism, apathy, or moral relief.

Kentridge is perhaps best-known for his animated film studies of the responsibilities of beneficiaries of apartheid, most notably *The History of the Main Complaint* (1996). The medical examination of the white tycoon Soho Eckstein takes us inside Soho and back through his entanglement in the violence of apartheid. Soho's diagnosis is performed in the protected space of a hospital room, with Soho surrounded by a wall of sympathetic doctors. However, in a coma Soho is haunted by his own complicity with apartheid as he 'drives' back in time. Nobel Laureate writer J.M. Coetzee describes the action in Soho's dream this way:

> A third drive sequence begins. Soho passes by a body lying at the roadside. He passes a roadside fight in which two men attack a third, kicking and beating him brutally (the sequence looks forward to the appalling torture sequences in the 1997 theatre production, *Ubu and the Truth Commission*, with their strong debt to cartoon violence). The points of impact on the victim's skull are marked with red crosses. The skull is superimposed over Soho's, his too, in an X-ray, is revealed to be marked. A whole field of crosses appears on the windscreen, and is wiped away. An eye blinks, with the same effect. In the space of the screen, created by Eisensteinian montage, windscreen and eye and monitor become metonymically the same.

It is this internalized violence that torments Soho and that takes center stage in *Ubu and the Truth Commission.* The challenge, Kentridge suggests, is to render the proceedings of the TRC so that this violence is neither obscured and forgotten nor harmlessly preserved in memory.

Ubu and the Truth Commission consists of Kentridge's animated drawings projected on a screen at the back of a stage on which actors, puppets, and puppeteers re-enact testimony before the TRC and the accompanying dramas that surrounded the official hearings. According to Kentridge, there is a great, unavoidable irony in the TRC's efforts to come to terms with mass violence. He notes that as, "people give more and more evidence of the things they have done they get closer and closer to amnesty and it gets more and more intolerable that these people should be given amnesty." Democratic citizens after mass violence must learn to interpret and live with this irony. The more effective the TRC is in providing a relatively peaceful public forum for the private stories of victims and perpetrators, the more it denies this irony and the more unacceptable it is as a method for resolving the disputes over intentions and responsibilities that it has opened up. *Ubu* is designed to contest the peaceful closure some advocates of the TRC hoped to achieve, but in a way that advances the process of political dialogue.

The casting and imagery in *Ubu* captures this irony without declawing it. The movements and expressions of the long-suffering puppets who testify before the TRC are much more human than the human figures, Ma and Pa Ubu, who venomously battle to see who will shred the records and who will use them to buy amnesty. It is this juxtaposition, Kentridge observes, upon which the success of the re-enactment turns.

> But the question of how to do justice to the stories bedevils all of us trying to work in this terrain. With *Ubu and the Truth Commission* the task is to get a balance between the burlesque of Ubu and Ma Ubu and the quietness of the witnesses. When the play is working at its best, Ubu does not hold back. He tries to colonize the stage and be the sole focus of the audience. And then it is the task of the actors and manipulators of the puppets to wrest that attention back. This battle is extremely delicate. If pushed too hard the danger is that the witnesses become strident, pathetic, self-pitying. If they retreat, they are swamped by Ubu. But sometimes, in a good performance and with a willing audience, we make the witness' stories clearly heard and throw them into a wider set of questions that Ubu engenders around them.

In the end Pa Ubu sacrifices the three-headed dog puppet that represents the secret police and other "dogs of war" in order to finagle his amnesty. He and Ma Ubu sail off into the setting sun animated on the back screen—a sun that is also an open eye that may see them for what they are. We cannot be sure. This tentative promise of a future day of reckoning suggests that the TRC is only the beginning of the story, not the final chapter on apartheid. "This theatre," Kentridge writes:

> rekindles each day the questions of the moment. How to deal with a guilt for the past, a memory of it. It awakes every day the conflict between the desire for retribution and a need for some sort of social reconciliation. Even those people (and there are a lot) who will have nothing to do with the Commission and who are in denial of the truths it is revealing are, in their very strident refusals, joining in the debate.

Admittedly, this is still an optimistic view of the prospects for democratic discourse. Cultural re-enactments like *Ubu and the Truth Commission* remind us, in director Jane Taylor's words, that the TRC is a "monumental process, the consequences of which will take years to unravel." The significance of cultural re-enactments like *Ubu and the Truth Commission* is that political education conveys a sense of unavoidable indeterminacy. In Kentridge's own words,

> To say that one needs art, or politics, that incorporate ambiguity and contradiction is not to say that one then stops recognizing and condemning things as evil. However, it might stop one being so utterly convinced of the certainty of one's own solutions. There needs to be a strong understanding of fallibility and how the very act of certainty or authoritativeness can bring disasters.

Films like *Calling the Ghosts,* which traces the subsequent political odyssey of women who were victims of genocidal rape at Omarska, and productions like *Ubu and the Truth Commission* are encouraging signs that our democratic imagination has not entirely failed us in these most difficult times. Such cultural re-enactments provide a language that citizens can use to come to terms with the complexity of political responsibilities. They also create a space within which citizens can learn how to adapt this language to their own particular circumstances.

Cultural re-enactment must be done in local dialects but in such a way that protects the cosmopolitan promise of democracy, even if it can never be fully realized. Kentridge reports this response of one audience member after a performance of *Ubu and the Truth Commission.*

> And after a performance of *Ubu and the Truth Commission* a woman came up to us, obviously moved by what she had seen. She said she was from Romania. We expressed surprise that the play had been accessible to her as it was so local in its content. "That's it," she said. "It is so local. So Local. This play is about Romania.

Ubu is no more about Romania than *The Trojan Women* or *The Children of Herakles* is about September 11, 2001. However, just as adaptations of ancient plays can provide an open-textured language for political resistance and a means for affirming democratic principles of justice, cultural re-enactments of war crimes tribunals and truth commissions can broaden the meaning of complicity and responsibility so that these terms carry across national boundaries. Their audiences do not fall into the trap of acknowledging the suffering of others only to bring attention to their own capacity for sympathy. Rather than act as judges of guilt, innocence, or sincerity, with the aid of re-enactments they may become self-critical participants in a dialogue over what they are responsible for beyond the reach of legal indictment and outside the realm of moral forgiveness. By rephrasing the indictments of war crimes tribunals and the amnesties of truth commissions, re-enactments can become vehicles for democratic political education. That is, they are ways of orienting citizens through various forms of democratic participation toward the power and violence for which they are responsible.

Stephen L. Esquith
Department of Philosophy
Michigan State University
esquith@msu.edu

Sources: Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy*, vol.13, no. 1 (2002); for a discussion of the responsibility of democratic citizens for mass violence when it occurs through complex international, multinational, and other global institutions, see Thomas Pogge, *World Poverty and Human Rights* (Cambridge, MA: Polity, 2002); Martha C. Nussbaum, "Compassion & Terror," *Daedalus* (Winter 2003); the quote concerning the "little perpetrator" in each of us occurs in Mark Sanders, *Complicities: The Intellectual and Apartheid* (Durham and London: Duke UP, 2002); for a discussion of the political causes of famine, see Alex de Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (Bloomington, IN: Indiana UP, 1998); for a discussion of the escalation of mass violence in the twentieth century, see Charles Tilly, *The Politics of Collective Violence* (New York: Cambridge UP, 2003); on aspects of democratic consolidation, see Juan J. Linz. and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: The Johns Hopkins UP, 1996); for a discussion of the Cold War era giving way to a new period of warfare, see Mary Kaldor, *Global Civil Society: An Answer to War* (Cambridge, MA: Polity, 2003); on the 1999 case in which the German government arranged to limit reparations to survivors of slave labor from corporations that collaborated with the Nazi regime see *Burger-Fischer v. Degussa*, 65 F. Supp.2d 248; Eduardo Mendieta, "The Ethics of Globalization and the Globalization of Ethics," *Latin American Perspectives on Globalization: Ethics, Politics, and Alternative Visions*, ed. Mario Saenz (Boston, MA: Rowman & Littlefield, 2002); Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (New Haven and London: Yale UP, 2000); Robert O. Keohane, "Global Governance and Accountability," *Taming Globalization: Frontiers of Governance*, edited by David Held and Mathias Koenig-Archibugi (Cambridge, MA: Polity, 2003); on the point that the moral intuitions on which we normally rely upon to guide our actions towards the world's poor are in disarray, see Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (New York: Oxford UP, 2001); on the point that state corruption is the source of crimes against humanity, see Richard Vernon, "What is Crime Against Humanity?" *Journal of Political Philosophy*, vol.10, no. 3 (September 2002); Onora O'Neill, *Bounds of Justice* (New York: Cambridge UP, 2000); Philip Gourevitch, *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda* (New York: Farrar Straus and Giroux,1998); on the unintended link between human rights advocacy and militarism, see David Chandler, "The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda," *Human Rights Quarterly*, vol. 23 no. 3 (August 2001); David A. Crocker, "Punishment, Reconciliation, and Democratic Deliberation," *Buffalo Criminal Law Review*, vol. 5 (2002); the observation by Hannah Arendt occurs in Eric B. Gorham, *The Theater of Politics: Hannah Arendt, Political Science, and Higher Education* (Lanham, MD: Lexington Books, 2000); Mandy Jacobson, *Calling the Ghosts* (Executive Producer: Julia Ormond; Directed by Mandy Jacobson and Karmen Jelincic, 1996, 63 min.) and *The Arusha Tapes* (video, 2001); William Kentridge, *History of the Main Complaint* (1994, four-minute animated film) and *Ubu and the Truth Commission*, published by Jane Taylor, *Ubu and the Truth Commission* (Cape Town, South Africa: University of Cape Town Press, 1998); J.M. Coetzee, "History of the Main Complaint" in *William Kentridge* (New York: Phaidon, 1999); on distinctions between contemporary cultural re-enactments and ancient public theater, see Rush Rehm, *Radical Theatre: Greek Tragedy and the Modern World* (London: Duckworth, 2003); for a discussion of the role of cultural re-enactments of war crimes and truth commissions in broadening the meaning of complicity and responsibility, see Stephen L. Esquith, "Re-enacting Mass Violence," *Polity*, vol. XXXV, no. 4 (July 2003); the point that audiences should acknowledge the suffering others but not fall into the trap of bringing attention to their own capacity for sympathy, see Elizabeth V. Spelman, *Fruits of Sorrow: Framing Our Attention to Suffering* (Boston: Beacon Press, 1997).

Established in 1976 at the University of Maryland and now part of the School of Public Affairs, the Institute for Philosophy and Public Policy was founded to conduct research into the conceptual and normative questions underlying public policy formation. This research is conducted cooperatively by philosophers, policy makers and analysts, and other experts both within and outside of government.

To make its research readily available to a broad audience, the Institute for Philosophy and Public Policy publishes this quarterly journal. Articles are intended to advance philosophically-informed debate on current policy choices; the views presented are not necessarily those of the Institute or its sponsors.

Editorial Policy: While the principal mission of *Philosophy & Public Policy Quarterly* (ISSN 1067-2478) is to present the work of Institute members, the work of individuals who are not members of the Institute also appears in the *Quarterly* from time to time. Interested individuals should direct submissions to the editor. Articles that appear in the *Quarterly* may be made available in whole or in part to third-party indexing sources.

Correspondence with Contributors: Readers may direct their correspondence to authors, whose mailing addresses and e-mail addresses follow their articles, or in care of the editor.

Subscriptions: A subscription to *Philosophy & Public Policy Quarterly* is free of charge to anyone making a request. Please let us know of changes in address, or whether you are receiving multiple copies of the *Quarterly*.

Electronic Access: The Institute for Philosophy and Public Policy directs interested individuals to its Web site: **www.puaf.umd.edu/ippp.** Current and past issues of the *Quarterly* are available on the site. Copies of articles may be downloaded for personal use free of charge. Downloading for classroom or other use requires permission.

UNIVERSITY OF MARYLAND
18 56

Non-Profit Organization
U.S. Postage
PAID
Permit No. 10
College Park, MD

Institute for Philosophy and Public Policy
School of Public Affairs
University of Maryland
College Park, MD 20742

Address Service Requested