THE COSTS OF TRAGEDY: SOME MORAL LIMITS OF COST-BENEFIT ANALYSIS

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ABSTRACT

In all situations of choice, we face a question that I call "the obvious question": what shall we do? But sometimes we also face, or should face, a different question, which I call "the tragic question": is any of the alternatives open to us free from serious moral wrongdoing? Discussing cases of tragic conflict from literature, philosophy, and contemporary life, I argue that it is valuable to face the tragic question where it is pertinent, because facing it helps us think how we might design a society where such unpalatable choices do not confront people, or confront them less often. Cost-benefit analysis helps us answer the obvious question; but it does not help us either pose or answer the tragic question, and it frequently obscures the presence of a tragic situation, by suggesting that the obvious question is the only pertinent question. I apply these reflections to thinking about basic entitlements of citizens, such as might be embodied in constitutional guarantees.

I. TRAGIC PREDICAMENTS

CASE A. Arjuna stands at the head of his troops. A huge battle is about to begin. On his side are the Pandavas, the royal family headed by Arjuna's

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1 I have written extensively about these predicaments, both in Martha Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy, chs. 2 & 3 (1986); and in Martha Nussbaum, Love’s Knowledge: Essays on Philosophy and Literature (1990), especially in the essay Flawed Crystals, at 125; and, finally, in Martha Nussbaum, Tragic Conflicts, Radcliffe Quarterly, March 1989. Fragility, supra, contains a detailed account of the tragic dilemmas in Aeschylus’ Agamemnon and Seven Against Thebes and in Sophocles’ Antigone, with many references both to scholarship on those works and to the contemporary philosophical literature on moral dilemmas. In the latter literature, I have found most helpful: Ruth Barcan Marcus, Moral Dilemmas and Consistency, 77 J. Philosophy 121 (1980); Bernard Williams, Ethical Consistency, in Problems of the Self 166 (1973); John Searle, Prima Facie Obligations, in Philosophical Subjects: Essays Presented to P. F. Strawson 238 (Z. van Straaten ed. 1980); Michael Stocker, Plural and Conflicting Values (1990); Michael Walzer, Political Action: The Problem of Dirty Hands, 2 Phil. & Pub. Aff. 160 (1973).

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eldest brother, legitimate heir to the throne. On the other side are the Kauravas, Arjuna’s cousins, who have usurped power. More or less everyone has joined one side or the other, and Arjuna sees that many on the enemy side are blameless people for whom he has affection. In the ensuing battle he will have to kill as many of them as possible. How can it be right to embark on a course that involves trying to bring death to so many relations and friends? How, on the other hand, could it possibly be right to abandon one’s own side and one’s family duty?

Arjuna saw his closest kinsmen, related to him as father or grandfather, uncle or brother, son or grandson, preceptor as well as companion and friend, on both sides. Overcome by this sight, he said in sorrow and compassion, “O Krishna, when I see my own people ready to fight and eager for battle, my limbs shudder, my mouth is dry, my body shivers, and my hair stands on end. Furthermore, I see evil portents, and I can see no good in killing my own kinsmen. It is not right and proper that we should kill our own kith and kin, the Kauravas. How can we be happy if we slay our own people? . . . O Krishna, how can I strike with my arrows people like the grandsire Bhisma and the preceptor Drona, who are worthy of my respect?” . . . Having said these words, Arjuna threw away his bow and arrows, and sat down sorrowfully on the seat of his car.²

Arjuna poses himself not one but two questions. The first question, which I shall call the obvious question, is the question of what he ought to do. That question may be difficult to answer. It may also be difficult to identify the best method for arriving at the answer. In this case, Arjuna and his advisor Krishna differ sharply about method, Krishna recommending a single-minded pursuit of duty without thought for the unpleasant consequences, Arjuna proposing a careful consideration of all the foreseeable consequences.³ What is not difficult, however, is to see that it is a question that has to be answered, since some action must be taken, and even inaction is, in such a situation, a kind of action. In that sense, the question is obvious: it is forced by the situation. Arjuna cannot be both a loyal dutiful leader of

² Mahabharata (c. 3d century B.C.). This passage is quoted from the translation by Chakravarti V. Narasimhan (1965), which translates only selections from the work, but renders fully those passages it does select (whereas many shortened translations are also reworkings). Van Buitenen’s definitive unedited translation (Mahabharata (J. A. B. van Buitenen trans. 1973)) remains incomplete because of his death and did not progress as far as this passage. The passage cited is from bk. 6, ch. 23.

³ In the passage that has since become famous as the Bhagavad-Gita, Krishna advises Arjuna that he has “a right to action alone, but not to the fruits of action.” Consequences should not be taken into account at all in choosing a course of conduct. “[M]en attain the highest good by doing work without attachment to its results” (Mahabharata, bk. 6, ch. 23).
his family and at the same time a preserver of lives of friends and relations on the other side. He has to choose.

The other question is not so obvious, nor is it forced by the situation. It might easily have eluded Arjuna. I shall call this the "tragic question." This is, whether any of the alternatives available to Arjuna in the situation is morally acceptable. Arjuna feels that this question must be faced, and that when it is faced, its answer is "no." Krishna, by contrast, either simply fails to see the force of the question altogether or recommends a policy of deliberately not facing it, in order the better to get on with one's duty.

The tragic question is not simply a way of expressing the fact that it is difficult to answer the obvious question. Difficulty of choice is quite independent of the presence of moral wrong on both sides of a choice. In fact, in this case as in many tragic dilemmas, it is rather clear what Arjuna should do: much though he is tempted to throw away his arrows, that would accomplish nothing, resulting simply in the deaths of many more on his own side, and possibly the loss of their just cause, while countless lives will still be lost on the other side. So he should fight. Similarly, in nontragic cases, the obvious question may frequently be very difficult, if two or more (nontragic) alternatives are equally balanced. The tragic question registers not the difficulty of solving the obvious question but a distinct difficulty: the fact that all the possible answers to the obvious question, including the best one, are bad, involving serious moral wrongdoing. In that sense, there is no "right answer."

How does Arjuna determine that the answer to the tragic question is "no"? Not, clearly, by weighing up costs and benefits. That he has done already in considering what he ought to do. (That was, in effect, his method, a quite reasonable one in the circumstances.) To answer the tragic question, he appears to consult an independent account of ethical value, according to which murdering one's own kin, especially when they are blameless, is a heinous wrong; but deserting one's family when one is their leader and essential supporter is also morally wrong. Ethical thoughts independent of the "what to do" question, thoughts about respect, kinship, and the right, enter in to inform him that his predicament is not just tough, but also tragic.

I shall argue in this paper that the tragic question is important for us all, when we evaluate our choices, and especially important in situations of public choice. I shall argue that while cost-benefit analysis offers an attractive way of approaching the obvious question, it offers no good way at all of registering the force of the tragic question or of representing a situation in which the answer to that question is "no." (I shall define what I mean by cost-benefit analysis below, in Section III.) Too much reliance on cost-benefit analysis as a general method of public choice can therefore distract
us from an issue of major importance, making us believe that we have only one question on our hands, when in fact we have at least two. But to understand why the tragic question might have a bearing on public choice, we need to return to our tragic cases.

The answer to the tragic question is not always as clear as it is in Arjuna’s situation on the battlefield. To put it another way, it is not always easy to tell whether we have a tragic situation on our hands, or simply a situation in which it is hard to answer the obvious question. Consider another choice Arjuna faces earlier in the poem. The Pandava brothers are living happily in their kingdom, when a certain poor man’s cattle are stolen by thieves. He asks the help of the Pandavas, his rulers. The appeal naturally falls on Arjuna, the gifted warrior. This appeal makes Arjuna very unhappy, because he realizes that he is on potentially tragic ground (case B):

Arjuna thought wretchedly, “The wealth of this poor brahmin is being carried off, and it is certain that his tears must be dried. The king will suffer a great breach of Law by negligence, if I do not protect this man who is weeping at the gate. If I fail to protect, the impiety of us all with regard to protection will be established in the world, and we shall suffer a breach of Law... [But if I take steps to protect him] I must live in the forest. Either a great breach of Law, or death in the forest! But Law wins out, even over the death of one’s body.”

Arjuna initially faces the choice with gloom, both because of the risk of life it appears to require of him and also because he senses that the answer to the tragic question may be “yes.” The failure of a leader to protect an impoverished subject is a gross violation of moral law. (Twenty-three hundred years ago in India, this point was clearly understood.) On the other hand, forfeiting one’s own life also looks unacceptable. It seems, however, that in thinking the choice through Arjuna comes to a different conclusion: hard though the choice is, it is not tragic. One of the choices would involve serious moral wrongdoing, but the other would not. Morality is squarely and unequivocally on the side of protecting, and the other side is just facing his own death, which is unpleasant but not morally blameworthy. The typi-

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4 The reason for this is that the protection will require Arjuna to go to see his older brother the king; but the brothers have all taken a vow that if any of them disturbs the other while he is with Draupadi (the common wife of all five), he must go and live like a hermit in the forest for 12 months.


6 Law, Dharma, is a broad notion, encompassing an idea of universal moral requirement and something like natural law.
cal tragic attitude that says, "Which of these is without evils?" never quite materializes: it drops away in favor of a decisive, even cheerful, acceptance of the risky alternative. Once again, it would seem that an independent ethical account has intervened to inform Arjuna: risking or even forfeiting one's own life is just not one of the things that is morally unacceptable.

What is the point of the tragic question? When we think about our two situations of choice, and particularly situation A, it might easily seem that Krishna has a point. The real question is the obvious question, and the tragic question is just a useless distraction. "O Arjuna," he says, "why have you become so depressed in this critical hour? Such dejection is unknown to noble men; it does not lead to the heavenly heights, and on earth it can only cause disgrace." Quite right, one may think: when one has seen where one's duty lies, one ought to get on with it, without tragic moaning and groaning. We do not want military leaders who self-indulgently wring their hands about the blood they are about to shed, or throw away their arrows to sit sorrowfully on the seats of their cars. It does no good for them to think this way, and it may well do harm, weakening their resolve and that of their troops.

On the other hand, one can argue that Arjuna is a better model of deliberation than Krishna: even in a case like this, where the tragedy does not look like one that could have been avoided by better political planning, there is a point to the tragic question. It keeps the mind of the chooser firmly on the fact that his action is an immoral action, which it is always wrong to choose. The recognition that one has "dirty hands" is not just self-indulgence: it has significance for future actions. It informs the chooser that he may owe reparations to the vanquished and an effort to rebuild their lives after the disaster that will have been inflicted on them. When the recognition is public, it constitutes an acknowledgment of moral culpability, something that frequently has significance in domestic and international politics. (Michael Walzer writes eloquently about Hiroshima in this regard.) Most significantly, it reminds the chooser that he must not do such things henceforth, except in the very special tragic circumstance he faces here. Slaughtering one's kin is one of the terrible things that it is always

7 Aeschylus, Agamemnon, 206–11: "A heavy doom is disobedience, but heavy, too, if I shall rend my own child, the adornment of my house, polluting a father's hands with streams of slaughtered maiden's blood close by the altar. Which of these is without evils?"

8 Indeed, we might say that the main importance of reparations, too, is expressive. Obviously the fact that my grandmother-in-law received a regular income from the German government did nothing to bring back the family members who had perished during the Holocaust. Although the financial support was not negligible, its primary significance was as a public expression of wrongdoing and the determination to do things differently in the future.
tragic to pursue. In that way, facing the tragic question reinforces moral commitments that should be reinforced, particularly in wartime.

 Asked to lecture on tragic dilemmas to the undergraduates at West Point, I had one of the best classroom discussions I have ever had, because these students knew that tragedy was not just a myth, it was their own future. And they recognized that the tragic question should be faced, again and again. Most of them thought that not deadening one’s mind to the fact that (for example) one was taking an innocent life was among the first virtues of a good military leader. Clearly the officers in charge of the ethics program thought this as well: that was why the program was there, and I was invited to address this topic. The topic of Lieutenant Calley kept recurring in my informal conversations with the officers. One might say that they saw the purpose of the ethics program as the prevention of such unthinking acts of brutality. Not only higher-ups, but all officers, should have a sense of tragedy.

 Many moral philosophers, among them some distinguished ones,⁹ have insisted that tragic conflicts are conflicts of prima facie obligations only: there can be only one right choice, and once that choice is arrived at the conflicting obligation drops away, no longer exerting any claim. Or, to put it in Cicero’s way, a fine-tuned casuistry will show us that the rule we were applying to one of the alternatives has an exception, and this case is it. The difficulty with this idea is that it makes morality the handmaiden of fortune—the sheer fact that obligation A happens to collide with obligation B brings it about that A (or, as the case may be, B) is no longer binding. And it allows agents to wriggle out of commitments that should be regarded as binding over a complete life. Someone who loves his family, as does Arjuna, and who thinks killing one’s kin abhorrent, should not shift with the winds of chance and decide that it is after all right, at least here. Such a picture of morality yields an unacceptable picture of the moral agent, as lacking principled commitments, as able to improvise his moral identity freely at any time. Sartre, at least, knew what he was up to when he took his line on moral dilemmas, which supported and was supported by the entirety of his philosophy. In essence I am saying that the failure to recognize genuine moral dilemmas commits us to something like an existentialist view of moral personality, in which we boldly take credit for choices that we make, undeterred by remorse for the wrong that we thereby have done. Sartre’s Orestes, however, is a scary figure, in his ability to sever himself

⁹ Among the targets of my earlier writings on this topic are Aquinas, Cicero, Kant, W. D. Ross, R. M. Hare, and Jean-Paul Sartre; I do not say here which of these I take to be “distinguished.”
from any moral tie at all. We do not want our soldiers, our politicians, or ourselves, to be like that.

In my two examples, the person who has the tragic choice before him is also the one who correctly poses and answers the question. (Similarly, the West Point cadets thought of themselves as preparing to face potentially tragic circumstances themselves, and to choose well in them.) But this, of course, is not always the case. Not all deliberators are as alert as Arjuna. And anyone who sees the case has a right to pose the question. In many such cases, the involved agent fails to see the tragedy in which he is implicated, while an onlooker sees clearly. (The Chorus of Aeschylus’ Agamemnon see their king’s tragic choice in a way that the deluded king does not. Lieutenant Calley did not see the nature of his situation, but the court, and the American public, saw more clearly.) Thus tragic dilemmas are not just occasions for one involved person’s pondering: they are occasions for public deliberation, as we seek to get the best account of a situation that has large public consequences.

Obviously enough, the sense of tragedy should inform decent moral choice, rather than substituting for it. We all know too many people who think that if they wring their hands enough they can do anything they like. We should insist that decent emotion does not absolve the actor: that is why, even when the best choice has been made from among tragic alternatives, the person with a sense of tragedy should make reparations, not simply express guilt and sorrow.

When we consider the second case, we see the point of the tragic question even more clearly. For it is an important source of moral clarity to see that moral obligations are qualitatively different from the natural desire one has to preserve one’s own life. In asking himself whether both alternatives are unacceptable, Arjuna has learned something about the difference between self-interest and moral commitment, something that might not have been learned had he approached the case simply in terms of the obvious question.

But there is a further way in which the tragic question brings illumination. Thinking about the second case, we see the further point already: for the reader is likely to think that the Pandavas have made a very foolish arrangement for governing their kingdom, and that it is this foolish arrangement that has caused a possibly tragic situation to materialize. How on earth could they have decided that the king must not be interrupted when he was with his wife? Did they not foresee that sometimes someone else in the

10 See note 4 supra.
family might need to get the king's attention? Stepping one step back from tragedy, and asking about its genesis, we ask how a different arrangement of the relevant values might have prevented disaster.

Consider Sophocles' *Antigone* (case C). Creon tells the entire city that anyone who offers burial to the traitor Polynices is a traitor to the city and will be put to death. Antigone cannot accept the edict, because it asks her to violate a fundamental religious obligation to seek burial for her kin. As Hegel correctly argued, each protagonist is narrow, thinking only of one sphere of value and neglecting the claim of the other. Creon thinks only of the health of the city, neglecting the "unwritten laws" of family obligation. Antigone thinks only of the family, failing to recognize the crisis of the city. We may add that for this very reason each has an impoverished conception not only of value in general but also of his or her own cherished sphere of value. As Haemon points out, Creon fails to recognize that citizens are also members of families, and that therefore a protector of the city who neglects these values is hardly protecting the city at all. Antigone fails to note that families also live in cities, which must survive if the survival of the family is to be ensured. A person who thought well about Antigone's choice would see that it is genuinely a tragedy: there is no "right answer," because both alternatives contain serious wrongdoing. Burying a traitor is a serious wrong to the city, but for Antigone not to bury him involves a serious religious violation. Because neither sees the tragedy inherent in the situation, because neither so much as poses the tragic question, both are in these two distinct ways impoverished political actors.

And this makes a huge difference for the political future. The drama depicts a very extreme situation, which is unlikely to occur often. In this extreme situation, where the city has been invaded by a member of its own ruling household, there may be no avoiding a tragic clash of duties. But a protagonist who faced the tragic question squarely would be prompted to have a group of highly useful thoughts about governance in general. In particular, noting that both the well-being of the city and the "unwritten laws" of religious obligation are of central ethical importance, he or she would be led to want a city that makes room for people to pursue their familial religious obligations without running afoul of civic ordinances. In other

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11 My interpretation is defended with a lot of textual detail and full discussion of the scholarly literature in Nussbaum, Fragility, supra note 1, ch. 3.

12 In Fragility (id.) I note that this interpretation is shared by a number of critics, including I. M. Linforth, Antigone and Creon, 15 U. Cal. Publications Classical Philology 183, 257 (1961); Matthew Santirocco, Justice in Sophocles' "Antigone," 4 Phil. & Lit. 180, 182, 194 (1980); Charles Segal, Tragedy and Civilization: An Interpretation of Sophocles 205 (1981). Linforth: "For all Athenians, the play offers a powerful warning to see to it that the laws they enact are not in conflict with the laws of the gods." Segal: "Through its choral song, the *polis* arrives at self-awareness of the tensions between which it exists. Embodying these
words, he or she would want a city such as Pericles claims to find in democratic Athens, when he boasts that public policy shows respect for unwritten law. Just as Americans believe that we can create a public order that builds in spaces for the free exercise of religion, in which individuals are not always tragically torn between civic ordinance and religious command, so ancient Athens had an analogous antitragic thought—as a direct result, quite possibly, of watching tragedies such as Sophocles’ Antigone.

It was here, indeed, that Hegel found, plausibly, the political significance of tragedy. Tragedy reminds us of the deep importance of the spheres of life that are in conflict within the drama and of the dire results when they are opposed and we have to choose between them. It therefore motivates us to imagine what a world would be like that did not confront people with such choices, a world of “concordant action” between the two spheres of value. In that sense, the end of the drama is written offstage, by citizens who enact these insights in their own constructive political reflection: “The true course of dramatic development consists in the annulment of contradictions viewed as such, in the reconciliation of the forces of human action, which alternately strive to negate each other in their conflict.”

Now in one way Hegel’s approach to tragedy is too simple. For it ignores the possibility that some degree of tragedy is a structural feature of human life. Many distinct spheres of value claim our attention and commitment. As Greek polytheism expresses the insight, there are many gods, all of whom demand worship. But the gods do not agree. Therefore the contingencies of life make it almost inevitable that some disharmony will materialize among our many commitments. The only alternative to the permanent possibility of tragedy would appear to be a life so impoverished in value that it neglects many things that human beings should not neglect. And of course such a life does not really avoid tragedy: it just fails to see the tragedy involved in its own neglect of genuine values. Relations within the family—and between the family and the public sphere—are one area where we might expect a permanent possibility of tragedy, no matter how well we arrange things.

In another way, however, Hegel gives us the best strategy to follow, es-

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14 This was the emphasis of my reading of the Antigone; a similar view is defended in Nussbaum, Flawed Crystals, supra note 1, where I call moral dilemmas a secular analogue of original sin: you cannot live a fully pure life, a life in which you are false to no value.
pecially in political life. (Readers of my previous discussions will notice that my own attitude to the problem of moral dilemmas has become more Hegelian over time, in part because I have increasingly focused on public and political choice.) For we really do not know whether a harmonious fostering of two apparently opposed values can be achieved—until we try to bring that about. Many people in many places have thought that a harmonious accommodation between religion and the state is just impossible. Athens tried to prove them wrong. Modern liberal states—grappling with the even thornier problem of the plurality of religions, and of secular views of the good—all in their own ways try to prove them wrong. To a great extent, a political regime like ours does enable citizens to avoid Antigone-like tragedies. That is what is meant by saying—as the Court said until Smith, and as Congress said in passing the Religious Freedom Restoration Act—that the state may not impose a “substantial burden” on an individual’s free exercise of religion without a “compelling state interest.” Creon, presumably, had such an interest, and so too will quite a few other state actors. Consequently, there will be a residuum of tragedy left even in the Hegelian nation. But we proclaim that we do our best to keep tragedy at bay. We do so because we understand the force of the tragic question: understand, that is, that to require an individual to depart from a religious commitment is not just to impose an inconvenience, it is to ask something that goes to the heart of that person’s being. It is to deprive them of a sphere of liberty to which, as citizens, they have an entitlement based upon justice.

Often we do not know what arrangements we are capable of making, until we have faced the tragic question with Hegel’s idea in view. Consider one more example, a true modern story (case D). Its content is more mundane than that of my mythic examples; in many ways, given that the harms done are smaller and possibly not irreparable, it will look less tragic. But it has a similar structure, and it raises similar Hegelian questions. Tragic cases, recall, are defined by the presence of serious wrongdoing on both sides; the wrongdoing does not always involve killing people; it may only involve neglect of some important obligation.

When I began teaching as an assistant professor at Harvard, philosophy department colloquia always began at 5 p.m., exactly when child care centers closed. Those of us who had child care obligations, consequently, faced many difficult choices. One problem we had was deciding what to do on each occasion. But I felt that we had another problem as well: for, often,

neither of the alternatives looked morally acceptable. Either we would be deseriting our duty to our colleagues or we would be deseriting our duty to and love of our young children. The tragic question kept rearing its head, and frequently its answer was “no.”

Obviously enough, this string of minitragedies was the result of obtuseness. The arrangements my colleagues had made about colloquia were no more sensible than the arrangements made by the Pandava brothers about visiting the king. Because it had never dawned on most men of that generation to think that a person ought to be able to be both a good primary caretaking parent and a good colleague, they had never bothered to think what very simple changes in the daily arrangements might be made to remove the problem. Nobody could talk about this; nobody could draw attention to it. I recall the day when this changed. At an important lecture by a major visiting philosopher, held as usual at 5 P.M. and (implicitly) mandatory for junior faculty, we reached the question period (by now it is after 6—I have gotten a sitter to pick my daughter up from child care). Robert Nozick stood up and said, with the carefree subversiveness of which only the tenured are capable, “I have to go now: I have to pick up my son from hockey practice.”

This was a moment of Hegelian Aufhebung: the first public acknowledgment that there was a tension between two spheres of value and that we had not been managing that tension very well. By coming out as a parent, Nozick had posed the tragic question to us all, challenging us to think better about it. It was unclear whether Nozick thought that his own case had the structure of a tragic dilemma: as a tenured person, and a remarkably independent one at that, he might not have thought he had any duty to attend the colloquium. But he drew attention to the predicament of others who were more vulnerable and who had similar family obligations.\(^\text{16}\)

By now, nonobtuse thinking on these issues is much more common, though by no means ubiquitous. (The world of legal practice, it seems, has been slower to seek “the annulment of contradictions” than has the humanities world, or the legal academy.) What the incident revealed was that many tragedies are produced not by natural necessity or by anything about the character of the contending values, but simply by habit and tradition, treated as natural and inevitable. Colloquia have to be at 5 P.M. The junior faculty seminar led by Burton Dreben has to be from 6 P.M. until 10 P.M. That is just the way life is, and it cannot be otherwise.

\(^{16}\) Later, he also made a formal protest against the nighttime seminar held by Burton Dreben that was (again implicitly) mandatory for junior faculty, pointing out that it was a hardship for those who had children. He did not succeed—the response was simply to say, of course it is not mandatory, but of course it was, and remained so. But the intervention showed that his remark about hockey was no chance matter.
I think that whenever we are inclined to say this about any clash of values, we should always pause and ask Hegel’s question: is there a rearrangement of our practices that can remove the tragedy? In this case rearrangement was straightforward; in many other cases, including many involving conflicts between work and child care, solutions are difficult and also costly: we need to think about public support for child care, about policies of parental leave. All this is much more radically subversive of tradition, and more threatening to entrenched preferences (in part because it is costly), than changing the time of the colloquium. But we need to imagine such alternatives—if only to inform ourselves about the real structure of our situation. Tragedy is rarely just tragedy. Most often, behind the gloom is stupidity, or selfishness, or laziness, or malice.17

Let me recapitulate. In all four of our cases, people face questions about what they should do, which may be more or less difficult. They also face a question of methodology: how shall they go about answering the question about what they should do? This methodological question, too, may be easier or harder. But all four people face, as well, a second and distinct question: the tragic question. There are times when it is not worth pausing very long over the tragic question—if, for example, it is obvious that there is at least one available course that involves no serious wrongdoing. But in all four of these cases the issue of serious wrongdoing is not obvious. Eventually Arjuna answered it in the negative in case B, for the alternative of his own risk of death. But our three other cases seem to involve genuinely tragic dilemmas—at varying levels of gravity and irreparable.

It is useful to pose the tragic question for four reasons. First, to do so clarifies the nature of our ethical alternatives, informing us about important

17 Some might hold that if we do not find any of these human causes lurking in the background, the tragic case is just bad luck, and not tragedy in the moral sense. That is, we should not hold agents morally responsible for what mere luck, with no admixture of human error, has brought their way. With Bernard Williams, I dispute this: a murder of a family member is a murder of a family member, no matter how unfortunate the chain of events leading up to that. Clearly we will not blame Arjuna in precisely the same way as we would blame someone who walked out one fine morning and murdered his cousins; but we should feel that his moral life is irrevocably altered, and that he owes not only regret, but also remorse and reparative commitments, to the defeated. Another way of putting this was suggested to me by Philip Quinn: we may borrow Aquinas’ distinction between dilemmas secundum quid—dilemmas an agent gets into through some personal fault—and dilemmas simpliciter, which Quinn calls “no-fault dilemmas.” These are not the result of previous wrongdoing. We would then deny Aquinas’ contention, namely, that there are no real dilemmas simpliciter. Quinn further divides the class of “no-fault” dilemmas into those that are corrigible by some rearrangement of circumstances and those that are not corrigible. I accept (and indeed insist on) that division, but I doubt that it is ever easy to tell whether a dilemmas is or is not corrigible in advance of prolonged attempts to correct the circumstances that give rise to it.
differences between self-interest and commitment, prudential and moral values. Second, to recognize the existence of a tragic dilemma, in those cases where the answer to the tragic question is "no," reinforces commitments to important moral values that should in general be observed. Third, to recognize tragedy and our own "dirty hands" motivates us to make appropriate reparations for conduct that, while in a sense inevitable, was also unethical. Finally, the Hegelian point, the recognition of tragedy leads us to ask how the tragic situation might have been avoided by better social planning; tragedy thus provides a major set of incentives for good social reflection.

Notice that our examples reveal a persistent human tendency to neglect the tragic question in favor of the more straightforward obvious question, a question that can hardly be avoided if action is in the offing. Krishna gives advice that is deeply equivocal in the context of the epic, where he is portrayed as a deceiver, and not at all a simply admirable character. Nonetheless, a lot of people like this advice, as evidenced by the fact that the Bhagavad-Gita (the section of the poem in which Krishna gives his advice) has acquired a life of its own, becoming one of the most influential texts of the history of philosophy, while Arjuna's very sensible response to his dilemma is not revered in this way or, frequently, even considered part of the same discussion. Again, Creon and Antigone prefer the simple focus on issues of choice and action to a more complex reflection on the plurality of conflicting values and the need to arrange things so that they conflict less tragically. Focusing on the moment of choice requires only some decision strategy, and one can always choose in an arbitrary way if a sounder decision strategy does not suggest itself. Asking the tragic question requires, first of all, assuming a possible burden of guilt and of reparative effort, something people, and especially leaders, do not always enjoy doing. Asking it in the Hegelian way requires more: a systematic critical scrutiny of habit and tradition, in search of a reasonable Aufhebung of the contending values. And this scrutiny requires of us nothing less than a comprehensive account of justice and central human goods. For these reasons it would not be surprising if technicians of choice avoided the tragic question in favor of the obvious question.

Our tragic examples show us one thing more that is highly pertinent to our modern-day alternatives. It is that there is a persistent tension between recognizing a plurality of commitments and the avoidance of tragedy. Creon and Antigone both see this clearly: indeed, I have argued that the

18 See Walzer, supra note 1; and Stocker, supra note 1.
strategy of both is to recognize only a single commitment, precisely in order not to have troublesome dilemmas on one’s hands. Fanaticism yields happy choice making. But the play shows us something else: such fanaticism is blind to genuine value. There is more in the world than can be seen by either of these obtuse protagonists. Greek polytheism expresses the view that if one recognizes all the things that are valuable, and pays them sufficient heed, one will not be able to count on avoiding tragedy. Judaeo-Christian monotheism recognizes the same issue by insisting that the commandments are 10 and not one—although not all Judaeo-Christian thinkers have drawn what I take to be the appropriate inference from this fact, namely, that there can be genuine moral dilemmas.19

What this means, in modern political terms, is that the more entitlements a society recognizes as basic and inalienable, the more the specter of tragedy will rear its head, and, therefore, the more delicate the political designing that will need to be done. In that sense, the libertarian state might seem the most rational, in the sense that it is the least likely to saddle us with tragedy. But Hegel did not conclude that Creon and Antigone were right to pursue, each of them, a fanatical course that avoided all tragedy. He concluded that they were blind and obtuse—because they refused to recognize values that should rightly be recognized. We cannot come to a similar conclusion about the libertarian state without extensive argument. Neither, however, can the libertarian state claim an advantage in point of tragedy avoidance. As Creon’s story shows, one does not avoid tragedy simply by saying that one does—for there may be other legitimate claims that are being ignored. Probably there is a limit as to how many intrinsic values a reasonable private or public ethical system can recognize. If a system generates tragic tensions every day, despite the wisest and best planning over a long period of time, it might be safe to conclude that it has recognized too much or set the level too high. In that sense, Creon’s program of simplification was not the dead opposite of what one should do. But his fanaticism is clearly unacceptable—as he himself acknowledges, calling it “the errors

19 Aquinas, famously, took the line that at most one of the conflicting obligations could be valid. Saint Gregory the Great, by contrast, recognized the existence of genuine moral dilemmas, but ascribed their genesis to the devil (see Alan Donagan, Consistency in Rationalist Moral Systems, 81 J. Philosophy 291, 298 (1984)); Josef Stern has argued (in unpublished work) that something like this is Maimonides’ view about Abraham’s sacrifice of Isaac: namely, that the heavenly voice is not really from God, but is a diabolical deception. For extensive exploration of the role of moral dilemmas in Christian thought, see Philip Quinn, Moral Obligation, Religious Demand, and Practical Conflict, in Rationality, Religious Belief, and Moral Commitment (Robert Audi & W. J. Wainwright eds. 1986); Philip Quinn, Tragic Dilemmas, Suffering Love, and Christian Life, 17 J. Religious Ethics 151 (1989); Philip Quinn, Agamemnon and Abraham: The Tragic Dilemma of Kierkegaard’s Knight of Faith, J. Literature & Theology 4 (1990).
of my ill-reasoning reasoning (phrenôn dusphronôn), harsh and death-dealing.’’²⁰ And the Chorus sums up the issue in the play’s final lines: ‘‘Good reasoning (to phronein) is by far the most important part of a well-lived life. One must not dishonor any of the spheres protected by the gods. The big speeches of arrogant people receive big blows as their payment, and these blows teach good reasoning in old age.’’²¹

II. THE TWO QUESTIONS IN CONTEMPORARY POLITICAL DELIBERATION

All contemporary liberal democratic societies ask the obvious question all the time. That is no news: so too do all people. But it is also clear that all contemporary liberal democratic societies ask the tragic question, implicitly at any rate. That is, they commit themselves to a menu of certain social goals, and among those goals they single out some as having a special centrality, holding that they are things to which every citizen is entitled, things that each one has a right to demand. Sometimes the menu of such protected areas of value is relatively narrow, encompassing only the so-called first-generation rights, meaning the political and civil rights. Sometimes the menu is broader, taking in a group of economic and social rights. And all such nations have some account, however elastic or indefinite or disputed, of where the threshold falls with respect to each of these entitlements: what deprivation of liberty, or of property, is so unacceptable as to be a violation of a basic constitutional (or otherwise protected) norm. Thus our Bill of Rights carves out certain areas of entitlement that are held to be fundamental to our society. Usually their importance is understood in moral terms: these are things it is morally bad for citizens to lack. Thus most Americans would think that certain limits on freedom of the press, on the right to vote, or on liberty of conscience are not just big costs to be borne, but costs of a very particular kind, costs that consist in being made to bear a burden that no citizen should have to bear, costs that are not just disadvantageous, but wrong. We differ, of course, in many ways about where the line falls between permissible though disadvantageous and morally impermissible deprivations in these areas. Thus, Americans differ about whether the burden faced by the Native Americans when they were denied the right to use peyote in their religious ceremony is a violation of a fundamental moral entitlement. They differ even more intensely about whether the impediment to publishers of pornography that would be created by the MacKinnon/Dworkin civil damage ordinance is or is not an impermissible burden on the freedom of speech. But all would agree that there is some

²⁰ Sophocles, Antigone, 1262–64.
²¹ Id. at 1347–53.
such class of morally central entitlements and that violating one of these is different in kind, not just in degree, from depriving someone of some advantage or service. They agree, that is, that in a case of putative conflict between two public goals, where one goal seems likely to be sacrificed, the tragic question must be posed: we must ask whether one or more of the values in question is among the fundamental entitlements of all citizens. For if it is, then any choice made against it involves an especially tragic type of cost, a cost that should be avoided if at all possible and that should be lamented if not avoidable.  

Because I myself have a view about which human entitlements should be politically central, which I have recommended as a basis for the formulation of fundamental constitutional principles, it seems wise to introduce it now, so that we can pursue the issues further using an account that gives definite answers to some of the theoretical questions before us, rather than arguing endlessly over the proper understanding of the U.S. Constitution and its various parts, as we would otherwise be likely to do. But it should be remembered that I introduce this view for the sake of having a discussable example. It is no part of my intention in this paper to defend the view, or even to explain it more fully. The arguments of this paper can be applied to any theory of fundamental entitlements one likes.

In my view, then, all citizens of any modern state are entitled, as a matter of basic minimum justice, to the following capabilities:

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22 This issue is clearly seen by John Finnis, Natural Law and Natural Rights (1980). Although I disagree with a great deal in his more detailed formulation of his position, on this matter, and on the difference between the pursuit of basic rights and the pursuit of efficiency, he seems to me entirely correct.

The Central Human Capabilities

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation:
   A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
   B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis
of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. Play. Being able to laugh, to play, to enjoy recreational activities.
10. Control over One’s Environment:
   A. Political. Being able to participated effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.
   B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

The capabilities list goes well beyond the U.S. Constitution in its explicit recognition of material entitlements; yet it is offered in a similar liberal spirit, and it has at times been argued that the U.S. Constitution should be understood to make similar commitments to a meaningful level of welfare. In any case, the idea is that the acceptable political goal is not the actual functioning of citizens—for they may well choose not to avail themselves of one or most of these capabilities, in accordance with their comprehensive view of life and their own conscience—but the capability to choose the functioning (or not to choose it) in each area. (Thinking of the “free exercise of religion,” and why the Constitution puts the entitlement that way, rather than specifying a definite preferred type of functioning, should help to make this point clear.) The reason for making capability, not functioning, the goal is grounded in respect for persons. Except in areas involving harm to others, and areas involving the health and education of children, we extend options to citizens, rather than dragooning them into a definite mode of life, because we respect their ability to design and lead a life.

That same respect, however, requires that we do not rest content with removing government interference from people’s lives: the capabilities approach demands affirmative support, in such a way that the person really is

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24 See Frank Michelman, States’ Rights and States’ Roles: The Permutations of “Sovereignty” in National League of Cities v. Usery, 86 Yale L. J. 1165 (1977); Lawrence Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065 (1977); Owen Fiss on access to the political process; Rawls on the fair value of the political liberties, and so on.
able to do the thing in question. A society that gives women the vote on paper, and then does nothing to protect them from private intimidation and harassment when they attempt to get involved in the political process, has not secured to women the capabilities involve in citizenship.

The capabilities approach is a moral conception. It is a partial moral conception, because it specifies very little of what people’s lives should include, and leaves to them a great deal of latitude in determining what goals to pursue. But (very much like the principles defended in John Rawls’s political liberalism) it has a definite moral content. It asks citizens to sign on to this list not just as a list of efficient means to promote wealth or contentment, but as a set of basic entitlements of persons, required by human dignity itself.

This moral understanding of the list entails that there is always a potential for tragedy to arise, whenever citizens are pushed beneath the threshold on any one of the 10 capabilities. Thus not to have the freedom of speech (as specified further in the nation’s constitutional tradition) is always a tragedy, not to be made up for by the presence of other items on the list, such as material well-being and health and even bodily integrity. Much further work must go into specifying the acceptable threshold level of each capability. I have left things deliberately vague at this point, in the belief that the most appropriate way for the threshold to be more precisely set—at least in liberal democratic societies—is by the citizens of each nation, as they elaborate and refine their constitutional traditions. Both legislation and, where there is a written constitution, a tradition of judicial interpretation will be involved in this process. Once some determination of the threshold level is made, however, the tragic question comes into play: for wherever we find citizens beneath the threshold on any one of these, social justice has not been done and people are incurring a particular kind of cost, a cost that no human being ought to have to bear, a cost implicated in the idea of human dignity itself.

In a modern state, two kinds of situations require us to raise the tragic question. First is the situation typified by my Nozick example: institutional actors are not directly involved, but we notice that citizens are facing an unusually high degree of tragic choosing, in ways that seem to implicate fundamental entitlements. In terms of my theory, it would appear that they are being forced to choose all the time between values of affiliation and employment-related capabilities; let us suppose that it is clear that the society agrees these capabilities are both important, and at the level raised by the example. Then the ubiquity of tragic choices demands Hegelian rethinking of our arrangements: how can we bring it about that citizens do not face such tragic choices all the time? A second way in which the tragic question may arise is when an institutional actor has a choice to make that seems
as if it might involve choosing between two fundamental entitlements of citizens—as might be the case, for example, when religious claims appear to clash with values of sex equality. In both cases, institutional actors will have to get involved ultimately; but in the first case, because they are not involved already, it is easier to miss the fact that there is an institutional tragedy in the works.

Armed with the tragic question, a decision maker approaches a complex situation of choice. What does my approach urge her to do? First, she must examine all the available alternatives, holding them up against the account of basic entitlements, together with her society’s current specification of them. She must get very clear about whether any of the alternatives involves violation of a fundamental entitlement. If none of them does, then she may proceed with the obvious question—which may frequently, of course, be very difficult to answer. If one or more involves violation of a fundamental entitlement and the others do not, then there is an extremely strong case for striking the tragedy-bearing alternatives off the list; indeed, it would be hard to know what could make one keep them on the list, other than a suspicion that the list had been badly constructed, or the levels of entitlements set too high. Then, having eliminated the morally unacceptable alternatives, she may, again, proceed with the obvious question, using whatever techniques she has at her disposal to answer it.

It is important to notice that many questions faced by administrative agencies will come into one of these categories: either the risk involved is not one that basic entitlements forbid or at least one of them is not of that character. An economic loss, for example, will not make a case into a tragedy, unless it is related to capability in the way I have described, pushing citizens beneath the threshold of capability in some area. Thus asking the tragic question will commonly not disable the use of cost-benefit analysis as it is standardly used by administrative agencies, as described, for example, in Cass Sunstein’s work on “risk-risk” trade-offs. Even if our nation did recognize a basic health right, as I think it should, the level of that right should not be set so high that any cancer risk or any pollution at all is a violation.25

If, however, the answer to the tragic question is “no”—both or all of the alternatives involve violation of a basic entitlement—then Hegelian thinking must come into play. In addition to choosing as well as she can in the immediate case—posing the obvious question as wisely as she can—

25 For the way health rights have been understood under international human rights law, see Brigit C. A. Toebes, The Right to Health as a Human Right in International Law (1999). Basic child health and equal access to available health services are among the salient points stressed in such documents.
the institutional decision maker will also acknowledge that this is a really bad situation. Both cases have unacceptable costs, and long-range planning had better begin immediately, to make sure that we do not face choices like this in the future.

My approach entails, then, answer to the tragic question will be "no" only when we find that we cannot get citizens above the capability threshold in one area, without pushing them below it in another area. (For example, that we cannot get all children in a nation educated without making their parents suffer economic losses that push them below the threshold—as is currently the case in India.) Such cases are tragedies, according to my definition; they will be regarded as blots on a decent society, and we will be on Hegelian notice that we should do everything in our power to arrange things so that we are not confronted with such choices—as quickly as possible.

Notice that there is some connection between the obvious question and the tragic question, when citizens try to figure out what the acceptable threshold level of a central capability shall be. That is, asking what our options actually are, and figuring their costs and benefits, informs the process of reflection on the tragic question as well, by telling us that some ways of arranging or rearranging things are just impossible, or too costly, to be at all feasible as ways of thinking about basic entitlements. Suppose a certain religious group demands the right to withdraw its children from the entirety of compulsory education, saying that their free exercise of their religion requires this. Literacy and the associated capabilities are simply not a part of what they think children should have.26 We think about what we should do here, and we reckon the costs and benefits. This process informs us that the alternative of allowing them to do this is probably extremely costly, not only for their own children and the state's interest in their education, but also for other citizens, who will seek similar exemptions, possibly destroying the entire system of education that is the basis for intelligent citizenship in a pluralistic democracy. Let us suppose this is what we think when we ask the obvious question. Now we turn to the tragic question: is this one of those instances where denying them this putative right is denying them a fundamental entitlement involved in the very notion of the freedom of con-

26 A real-life case close to this is that of the Romanian gypsies, who insist that they should be exempt not only from compulsory education but also from laws prohibiting child labor and related forms of child abuse, because their culture requires a nomadic unlettered existence supported by begging and the use of small children in both begging and theft. All gypsies hold this, but only in Romania, where they form around 20 percent of the population, do they have sufficient political clout to maintain these views forcefully in the public sphere. Although the state does not accept their arguments, de facto they have prevailed so far, and the relevant laws are not generally enforced.
science, something that all citizens have a right to have? It seems clear that we will be inclined to say that it is not one of those cases: the answer to the question whether any of the available courses is morally acceptable is "yes." We can give people an acceptable level of liberty of conscience while insisting on compulsory primary education. We say this, in part, because we do not think freedom of religion in a pluralistic democracy can reasonably be interpreted to demand something that will erode the foundations of civic order. In that way we draw a connection between our two questions, and thinking about costs and benefits informs our inchoate deliberation about where to set the threshold for purposes of the tragic question.

We should not, however, take this connecting too far. My colleagues at Harvard might have concluded that changing the time of the colloquium would wreck the foundations of the social order; that indeed is how people are inclined to view many irritating changes in their habits. As recently as 1873, the U.S. Supreme Court held that to allow women to be lawyers would wreck the foundations of the social order and go against "the nature of things."\(^{27}\) Knowing that we are not reliable judges of the meaning of change for the overall order of society, we should not hold fundamental entitlements hostage to current social possibilities. We should be skeptical of claims that the costs of securing a central capability to all citizens will be prohibitive: let us try first, we should say, and see how things go. And we should also be prepared to recognize that some very important social goods, which should remain on the capability list, are not available, or not available without prohibitive costs, in our current social environment. This gives us a motivation to design things better, so that we will be able to secure the capability to people at some future time. Setting the level too low, in response to current possibilities and impossibilities, may be a recipe for social lassitude.

Consider the case of compulsory education in India. All Indian states require primary education; in many cases, secondary education is compulsory as well. But literacy rates remain low: about 35 percent for women, 65 percent for men in the nation as a whole. Economic necessity is clearly involved in this distressing pattern: poor parents need to rely on the labor of their children, whether in the home or outside it. As I have noted above, many families would be at risk of going under completely if they were to send all their children to government schools. And yet there are also signs that intelligent planning can make a difference. The state of Kerala, a relatively poor state, has an adolescent literacy rate of 99 percent for both boys and girls. The difference has a great deal to do with state policies: aggres-

\(^{27}\) Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
sive campaigning in favor of literacy; incentives to poor parents, in the form of a nutritious school lunch that goes some way to offsetting the losses to parents in child labor; and flexible multisession school hours.\textsuperscript{28} If we look to states where literacy is particularly low, we find, correspondingly, an absence of intelligent planning. In some rural areas (in Andhra Pradesh, for example), there are neither schools nor teachers, since state government is corrupt and inefficient and has not bothered to make things happen. In many others areas, government schools fail to offer flexible hours that make schooling possible for working children; nongovernmental organizations sometimes fill the gap, but sometimes they do not.

All this suggests that there is some point to setting a high threshold with regard to education, in a way that gives education the moral force of a basic entitlement—even if the level set cannot currently be achieved in many areas. This is in fact what India is now doing: a proposal to amend the Constitution’s list of Fundamental Rights to include a fundamental right of primary and secondary education has been introduced, and has broad support.\textsuperscript{29} Obviously enough, amending the Constitution does not all by itself change the conditions I have described. But it does give education a new moral and legal emphasis: it is now a fundamental entitlement of all citizens, the deprivation of which constitutes a tragic cost. It will also be possible to litigate against states or other public actors that deprive children of this fundamental right through deficient planning. Raising the tragic question gives a new urgency to political planning.

Who should raise and who should answer the tragic question? In my analysis, the level of each basic entitlement is specified loosely in a constitution, and then spelled out further, as time goes on, through a combination of legislative and judicial action. Public deliberation can often contribute a great deal toward this process. When a choice is confronted that seems potentially tragic, institutional actors should not deliberate on their own, for the most part: they should turn to public deliberation and to legislative and/or judicial deliberation—certainly for the Hegelian part of the process, planning for a future nontragic society, but also, often, for the determination

\textsuperscript{28} See Jean Drèze & Amartya Sen, India: Economic Development and Social Opportunity (1995). Kerala’s relative poverty, Drèze and Sen argue, is due to its bad economic policies: permitting unions to drive wages up very high has caused employment to shift to neighboring states. On the other hand, health and education have been well promoted in the absence of robust economic growth. (They use this example, among others, to illustrate the fact that, even in the absence of economic growth, one may achieve progress in these areas; on the other side, focusing only on economic growth—as other states have done—does not achieve progress in these areas.)

\textsuperscript{29} See Archana Mehandale, Compulsory Primary Education in India: The Legal Framework, 13 From the Lawyers’ Collective 4 (April 1998).
of whether a given situation is or is not tragic. Thus with compulsory education in India, the determination that this deprivation is a violation of a basic entitlement is being arrived at through a complex process of public deliberation about the proposed constitutional amendment. If the amendment is adopted, the right will be further interpreted by the courts. Usually the hard cases will not involve creation of a new constitutional right, but rather the determination of exactly how to demarcate an existing right. Those cases are typically hammered out through a combination of legislative and judicial action.

At times, an administrative agency may find itself having to make a decision that involves interpretation of a fundamental entitlement. In a nation that has a vaguely specified health right, or environment right, such agencies will have to make choices about which risks are acceptable, and I have said that they ought to do this invoking the tragic question. But their interpretation of basic entitlements should always be regarded as a tentative first step only. In other words, the minute it is clear that the tragic question has a point, and that one or more of the alternatives may violate a fundamental entitlement, public deliberation is called for and the agency should seek to initiate a deliberative democratic process.

III. COST-BENEFIT ANALYSIS: ITS ROLE AND ITS LIMITS

Whenever the capabilities approach is presented to an audience containing economists and policy makers, the first question that is typically posed is, How do we make trade-offs when we cannot provide people with all the capabilities on the list? In other words, some kind of framework for cost-benefit analysis is requested. How much would such an analysis inform us, and what significant issues might be bypassed in the process of focusing on this approach?

For these purposes, I define cost-benefit analysis as a strategy for choice in which weightings are allocated to the available alternatives, arriving at some kind of aggregate figure for each major option. Although the most common way of doing this is the so-called willingness-to-pay approach, I shall not define cost-benefit analysis as equivalent to willingness to pay, because willingness to pay involves not only a commitment to numerical weighting and ranking but also a particular, and highly controversial, idea of how the weights are to be allocated—namely, in accordance with unrefined preferences. I believe, and have argued elsewhere,\(^{30}\) that there are major and insoluble problems with any such approach. Preferences are the creation of experience and, therefore, also of laws and institutions. Willingness

\(^{30}\) Nussbaum, supra note 15, ch. 2.
to pay does not even make the exclusionary moves that are by now common in the literature on social choice—for example, omitting preferences based on ignorance and haste, preferences deformed by malice, envy, resentment, or fear, and preferences that reflect adaptation to a bad state of affairs that is thought to be the only one possible.\textsuperscript{31} Still less does it ask, or permit its users to ask, the deeper questions raised by Amartya Sen and Jon Elster, as to whether even corrected preferences could give us a reliable way of ranking social alternatives. So I think that there are devastating objections to be made against willingness to pay, quite independently of what I say here. But these objections do not disable cost-benefit analysis, since the weightings can always be assigned in some other way. Out of charity, then, I define cost-benefit analysis in a way that does not entail any particular way of assigning the weightings, although I do specify that there will be an aggregate number for each choice alternative.

Nor does cost-benefit analysis entail Utilitarianism, that is, the view that the aim of the exercise is to maximize social utility.\textsuperscript{32} The aspects of choice we consider worth attending to in producing our weightings may be of many kinds; utility is only one thing that might occur on the benefit side. For, as I shall argue below, cost-benefit analysis does not entail the view that there is only one currency of value in all the heterogeneous material of choice.

Finally, cost-benefit analysis as construed here does not entail consequentialism, that is, the view that the right way of assessing alternatives in a choice situation is to look to the consequences they produce.\textsuperscript{33} Some forms of nonutilitarian consequentialism are so elastic that they can include in the statement of consequences things that usually seem like fatal omissions in consequentialism: such as, the protection or violation of rights, and

\textsuperscript{31} For a general discussion of these debates within welfarist social choice theory, see \textit{id.}; some of the prominent examples of such corrections discussed there are Christopher Bliss, Lifestyle and the Standard of Living, in Nussbaum & Sen eds., \textit{supra} note 23; John Harsanyi, Morality and the Theory of Rational Behavior, in Utilitarianism and Beyond 39–62 (Amartya Sen & Bernard Williams eds. 1982); and, from philosophy, Richard Brandt, A Theory of the Good and the Right (1979).

\textsuperscript{32} See Amartya Sen & Bernard Williams, Introduction, in Sen & Williams eds., \textit{supra} note 31, at 3–4; they show that Utilitarianism actually requires combining consequentialism with two other ideas: a focus on utility (or pleasure) as the source of value, and "sum-ranking," meaning that in sorting out the rankings of alternatives, we simply add up individual utilities or pleasures. Cost-benefit analysis clearly does not entail Utilitarianism's account of the source of value; whether it entails sum-ranking may be disputed, but I think, once again, we should say that it does not, if sum-ranking is taken to entail that we have rendered all the alternatives commensurable in terms of a single homogeneous measure of value: see below.

\textsuperscript{33} For a similar definition, see \textit{id.} at 3–4; also Consequentialism, at xiii (Philip Pettit ed. 1993).
the special value to agents of their own personal involvement in an action. If consequentialism is construed so elastically, cost-benefit analysis as I construe it may seem closely linked to consequentialism. But often looking to consequences is contrasted with looking to something else, for example the intrinsic value of an action, or of the agent’s role, or the overwhelming importance of the protection of rights. In this way of thinking of consequentialism, cost-benefit analysis does not entail consequentialism. We can look at any features of the choice situation we judge significant, and assign our weightings accordingly.

As should already be clear, I find cost-benefit analysis useful in answering the obvious question. It is not the only way of answering it: Krishna has a different strategy, one that forbids any weighting of diverse considerations where duty is involved. Many moral rigorists have followed Krishna here, arguing that an appeal to the totality of the factors can often lead moral thinking in the wrong direction. But here I think we should side with Arjuna: one thing we certainly need to know, before we act, is how the costs and benefits balance out, looking at the totality of the factors. Cost-benefit analysis provides a handy model, or group of models, for representing our practical thinking on complex questions of choice, where we must choose among plural and diverse goods and where our choices have complex consequences as well as involve complex issues of intrinsic value.

Nor would I object to cost-benefit analysis, as some have done, on the ground that it necessarily presupposes the homogeneity of all values, their commensurability on a single scale of value. This would be the case if all choice involving a comparison between diverse values necessarily involved a commensuration of all of them in terms of a single scale. Joseph Raz, for example, takes the line that we have two options only: total noncomparability, or commensurability, understood as comparability along a single linear scale of value, in which all the diverse values are imagined as reduced to a common coin. But it seems to me that Henry Richardson is right: we often make comparisons among diverse values, and choices among options in-

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34 This is true, for example, of the form of consequentialism that Amartya Sen has advocated for some time: see Amartya Sen, Rights and Agency, 11 Phil. & Pub Aff. 3 (1982); Amartya Sen, Well-Being, Agency and Freedom: Dewey Lectures 1984, J. Philosophy 82 (1985); Amartya Sen, Rights, Duties and Consequences, The Heffers Lecture (Dep’t Philosophy, Cambridge Univ., November 27, 1998). I discuss Sen’s consequentialism, and the general problem of giving a demarcation of consequentialism, in such a way that it still represents a distinctive type of moral theory, in Martha Nussbaum, Goodness, Consequences, and Tragedy (2000), a reply to Judith Jarvis Thomson’s Tanner Lectures (in press 2001).

volving different values, without commensurating in this reductive way.\textsuperscript{36} Often such choices involve judgments about what is better or worse overall: and the bare fact that we are able to make these comparisons of overall good and bad does not, it seems to me, imply that we have all along been reducing them to a single metric of value.\textsuperscript{37} One way in which we standardly represent this weighting is to attach numbers to the alternatives, or even dollar amounts, as in willingness-to-pay and willingness-to-accept approaches.

To assign a monetary value to an option does not, however, imply that we have reduced the good so valued to nothing but the common coin of cash. The fact, for example, that most of us assign a certain monetary value to our intellectual labor does not mean that we believe that intellectual labor is just money and has no special qualities of its own.\textsuperscript{38} One might certainly wonder whether assigning a monetary value to a good or a service might not ultimately change the way we value it, making us less sensitive to its distinctive value-qualities.\textsuperscript{39} Clearly, we ought to worry about this possibility, and it would be a bad thing if it materialized. But whether such a shift in our modes of valuing is an inevitable consequence of assigning a monetary value is an empirical question, requiring empirical inquiry for its answer. There appears to be no good evidence that such a deep shift in mode of evaluation always, or even typically, occurs when a monetary value is assigned.\textsuperscript{40} Certainly if we reflect about the way in which intellectual labor has developed since scholars began to get salaries, we have no reason to believe that all salaried scholars must be hacks, valuing their labor only as a certain amount of cash. As I have argued elsewhere, such claims sound all too much like claims that used to be made by the wealthy leisureed classes in order to impugn the character of working-class people, Jews, and other nonlandowning types: they are just crass money-grubbing individuals, who have no appreciation of the finer things in life.\textsuperscript{41}

Now admittedly, cost-benefit analysis does not seem to do any very pro-

\textsuperscript{36} Henry Richardson, Practical Reasoning about Final Ends, chs. 5 & 6 (1994).
\textsuperscript{37} See Nussbaum, Fragility. \textit{supra} note 1, ch. 10.
\textsuperscript{38} See Martha Nussbaum, “‘Whether from Reason or Prejudice’: Taking Money for Bodily Services, 27 J. Legal Stud. 693 (1998); and also in Nussbaum, Sex and Social Justice, \textit{supra} note 23, at 276–98.
\textsuperscript{39} As is claimed, for example, by Elizabeth Anderson, Value in Ethics and Economics (1993); and Elizabeth Anderson, Is Women’s Labor a Commodity? 19 Phil. & Pub. Aff. 71 (1990); Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987); and, with a more nuanced view, Margaret Jane Radin, Contested Commodities: The Trouble with the Trade in Sex, Children, Bodily Parts, and Other Things (1996).
\textsuperscript{40} See Scott Altman, (Com)modifying Experience, 65 S. Cal. L. Rev. 293 (1991).
\textsuperscript{41} See Nussbaum, “‘Whether from Reason or Prejudice,’” \textit{supra} note 38.
found work on its own: all the work of evaluating has to be done beforehand.\textsuperscript{42} If the weightings are right, the analysis will give us good guidance concerning what we ought to choose. If the weightings are assigned badly, it will give us bad guidance. But cost-benefit analysis will not itself tell us how to assign the weightings—unless we construe cost-benefit analysis in terms of willingness to pay—which, as I have argued, we should not do, if we want to defend it as supplying plausible answers to the obvious question. At most, then, it is a useful technique of analysis for people who have already managed to assign plausible weightings to the alternatives before them. Nonetheless, that is not nothing; and there is no reason to think that the use of such a technique will lead us to perdition, as some would suggest.\textsuperscript{43}

On the other hand, I think that there is something that we should be worried about in the ubiquitous use of cost-benefit analysis in public policy. This is, that we will focus on the obvious question, to which cost-benefit analysis is very well suited, and neglect the tragic question, to which it is not well suited at all. Cost-benefit analysis asks us to figure out, among the options open to us, which contains the largest net measure of good. But it does not encourage us to divide the alternatives into two distinct classes, those that involve serious ethical wrongdoing and those that do not. To continue with the capabilities approach, it does not encourage us to ask which options involve denying some citizens a central entitlement, one that they have a right to demand, and which options do not. Cost-benefit analysis does not pose the tragic question; if anything, it suggests that there is no such question, the only pertinent question being what is better than what.

Nor could we even represent the insights of the tragic question within the parameters of cost-benefit analysis. Let us see this by imagining how we might try to do so. Our most obvious strategy would be to assign a very large cost to the options that involve denying citizens some capability that they have a right to have: a kind of “tragedy tax,” if you will. Notice that even to get this far we already have to pose the tragic question from without, so to speak: the question posed by cost-benefit analysis is not that question. And we also have to have some independent strategy by which to answer it: some independent ethical theory, for example, such as the capabilities list together with the theory of human dignity that supports it. So we will not even get to the point of assigning the tragedy tax unless we

\textsuperscript{42} See Richardson, supra note 36, for an excellent discussion of this point.

\textsuperscript{43} On the other hand, I am sympathetic to the worries raised in Henry Richardson’s paper for this conference (The Stupidity of the Cost-Benefit Standard, in this issue, at 971–1003): even when used in this way, cost-benefit analysis does not embody some key virtues of practical intelligence, such as the ability to reformulate ends in the process of deliberation.
are already engaging in a form of ethical reasoning that is quite distinct from cost-benefit analysis and which cost-benefit analysis is likely to deter or obscure.

But even if we get this far, relying on our independent theory, the tragedy tax will not solve our problem. The tragedy tax says, for example, that depriving children of education is very, very costly. We can set that cost as high as we want it; we can make it so high as to be prohibitive. But representing things this way does not tell us what we need to know: that depriving children of their education is not just very, very costly but exacts a cost of a distinctive kind, namely, a cost that no citizen should be asked to bear, a cost that is incompatible with what human dignity requires. In today’s India, giving children an education is, by anyone’s analysis, very, very costly. So to show what is at stake in the choice between giving children an education and not giving them an education, we need to take a stand about people’s basic entitlements, saying that some are just fundamental in a particular way, namely, things that people have a right to demand.

We could always set the tragedy tax so high that it will exceed every other cost. That would get us round the particular problem I have just identified. Of course it would not help us at all if we have a truly tragic situation on our hands, that is, one where there are no morally acceptable alternatives: for then we would just have to assign infinite cost to them all, so that none could possibly exceed any other. But let us imagine proceeding this way in a case in which (like Arjuna’s second case) only one of the alternatives is morally unacceptable. Again: the proposed way of proceeding tells us a part, not the whole, of what we want to know: it tells us that the option is very very very costly, but not that it is a cost of a distinctive kind. Finally, notice that we get even this far only by asking the tragic question ourselves, independently of cost-benefit analysis, and answering it in some independent way, perhaps by using a theory of central human capabilities. We are in effect rigging things so that the cost-benefit analysis turns out the same way (or a way as close as possible to the same way) that an independent ethical analysis turns out. And that means that we really are not getting anything out of the cost-benefit analysis. It is just a crude and only partly adequate representation of what we have already figured out on our own.

Interestingly, the tragedy tax fails for a second reason as well. For it is not always true that it is very, very costly to deprive citizens of something that they have a right to have. In terms of standard willingness-to-pay models, most U.S. citizens would probably demand only a small amount of

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44 Since my case actually involves willingness to accept, we should note that this may not always coincide with willingness to pay: see Richard Thaler, Quasi-Rational Economics (1993).
money to forfeit their right to vote at the next local election. (Many Indian parents think this way about education of their children, particularly female children. In fact, in many regions where women are traditionally secluded, you would probably need to pay parents to allow their daughters to be educated, rather than the reverse.) The point that is brought home by the tragic question is not how much or how little people would demand to forfeit such a good; some people will not demand very much to forfeit a basic right, in some contexts. The point the tragic question makes is that this is a good of a particular sort, namely, one that all citizens are entitled to as part of a package of fundamental entitlements. It is something one simply should not be asked to forgo or trade off.

Now one could try to respond to this last point by saying that, no matter what actual people say about what they are willing to pay, we are always entitled to tack on the tragedy tax whenever, in our judgment, a fundamental right is at issue. But then we seem to have diverged from at least one very common type of cost-benefit analysis, which relies on actual preferences. More important, we have simply brought ourselves back to the first problem: for tacking on the tragedy tax is just not a very good way of representing the fact that these are losses of a distinctive kind, namely, losses that no citizen should be asked to endure. Finally, once again, we get this far only by asking and answering the tragic question for ourselves, together with an independent theory of value. We are just trying to rig things so that our cost-benefit analysis conforms to the results of our independent ethical inquiry.

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45 Thus Gary Becker's proposal to give parents education vouchers for their girl children in developing countries, while it might work for some countries and for some parents, surely would not work in, say, rural Rajasthan, where the rate of female literacy is around 5 percent: parents would throw such vouchers down the toilet if they had toilets. Becker is to be applauded for seeing the crucial importance of female education for development, but (perhaps because he focuses on Latin America, where such a strategy will encounter less profound resistance) he underestimates the depth of the problem. See Gary S. Becker, Why the Third World Should Stress the 'Three R's', in The Economics of Life 67–68 (Gary S. Becker & Guity Nashat Becker eds. 1997).

46 In his Response to Nussbaum, read at the American Philosophical Association Eastern Division Meeting, December 28, 1999, Philip Quinn points out that one can find a way of formally representing this aspect of tragic dilemmas: for one may associate with each alternative for choice an ordered pair. The first member of the pair will be the aggregate figure arrived at by ordinary cost-benefit analysis; the second member will be 1 in case the alternative does not involve a basic entitlement violation, and 0 in case it does. The decision rule will then take the following form: ‘‘(1) If some of the alternatives have an associated ordered pair whose second member is 1, choose one of them associated with an optimal first member, breaking optimality ties randomly; and (2) If none of the alternatives has an associated ordered pair whose second member is 1, choose an alternative associated with an optimal first member and second member 0, breaking optimality ties randomly.’’ I have no deep quarrel with this proposal; but I think it is a lot of fuss in order to tell us what we already know in
Once again, we may note that cost-benefit analysis can actually help us when we are in doubt about where to set the threshold of citizens’ basic entitlements. In environmental and regulatory areas, for example, seeing the cost of various levels of protection is helpful when we consider exactly what level of protection is a basic entitlement: for we do not want to specify basic entitlements in an absurdly utopian or unworldly way. More generally, all rights have costs, so thinking about where to set the threshold level of any right is sensibly done with these costs in mind. Once again, however, we should not take this worldliness too far: some things are exceedingly costly at the present time because of past injustice, or corruption, or laziness: such is the case with compulsory primary education in India; such is in manifold ways the case with the skyrocketing costs of medical care in the United States. So keeping our eyes on the costs should not be permitted to deter us from asking why something that seems quite important is, or has become, terribly costly: who has put the costs up so high? (To take just one example, ACT-UP is to be commended for forcing such questions onto the public agenda, where the inflated costs of AIDS medications are in question.) Costs may have a natural element, but they usually also have an element of human greed. We should not treat the greed as a given; we should exercise imagination in a free Hegelian spirit, asking what steps might be taken to produce a world that is free of some life-crushing contradictions.

Should a reasonable public order aim at the minimization or even the total removal of tragedy? For three very different reasons, I would oppose that goal. The first reason is relatively uninteresting: it is simply that some possibilities of tragedy that remain within a society are not very probable. If the likelihood of a tragic choice arising is very low—if, say, a given political order would give rise to tragic choices only in a case of civil war, and the society is a stable one—then it is surely not worthwhile expending effort to remove that possibility of tragedy.

The second reason is connected to my criticism of Creon: a sure way to remove tragedy is to have only one, or very few, basic entitlements. If tragedy removal were our salient goal, a very inadequate and unjust order might begin to seem more attractive than it is.

The third reason is connected to my point about the residuum of tragedy at the heart of human life: some rich and complicated aspects of life just are likely to be in tension with some other rich and complicated aspects,
and even the wisest Hegelian will not be able to remove the possibility of tragedy—except by a radical simplification of the sphere of value that would be Creonic in its ruthlessness. Thus we could always remove tensions between religion and sex equality by doing everything in our power to get rid of religion. We could always remove tragic tensions between children's rights over their lives and parent’s rights to control over their children—if we said, as for so long we have said, that children are simply their parents’ property and have no rights. The appeal of the children-property idea surely derives in part from the fact that it does indeed make deciding hard cases very much easier. But that, like the discouragement of religion, is a Creonic course; it simply does not recognize what ought to be recognized. In that sense we have made progress by recognizing many cases in this sphere as involving tragedy, when we did not do so before—even if no Hegelian thinking will altogether remove the tension.

IV. TRAGIC AUFHEBUNG IN THE PUBLIC DOMAIN

When we see clearly that the tragic question is distinct from the obvious question, and that cost-benefit analysis does not answer it, or even enable us to represent well the asking of it, we see something further: that we badly need an independent ethical theory of basic entitlements to guide us in analyzing public policy choices. Whether we go for the capabilities approach or the (closely allied) human rights approach,48 or whether we just consider our own Constitution and similar documents that describe the fundamental entitlements of citizens, we need to figure out, at least in a tentative and revisable way, what entitlements shall be treated as central and matters of tragedy should they be denied. Once we have gotten clear about this issue—or at least taken a stand for practical purposes on some plausible account of it—we will be able to analyze situations of conflict with Hegelian Aufhebung in our minds. That is, in addition to reckoning the costs and benefits, we will notice, like Arjuna and Bob Nozick, and unlike Creon, Antigone, and some Harvard philosophers, that some costs have a distinctive nature; they are bad in a distinctive way. No citizen should have to bear them. But then we will be spurred to use our imaginations, thinking how we might construct a world in which such conflicts do not confront citizens, or confront them as rarely as possible. With Hegel, I think this change in our consciousness would itself be progress.

48 For the relationship between the two, see Nussbaum, supra note 15, ch. 1; and Nussbaum, Capabilities and Human Rights, supra note 23.