Lobbying and Self-Defense

JOHN HASNAS*

I. A PARABLE ................................. 391

II. DEFINITIONS, LIMITATIONS, AND STIPULATIONS ............. 394

III. UNDERLYING ASSUMPTIONS ......................... 396

IV. THE ARGUMENT ..................................... 397
    A. Step 1 ........................................ 397
    B. Step 2 ........................................ 399
       1. The Doctrines of Self-Defense and Defense of Others  . 399

V. APPLICATION TO LOBBYING ......................... 401

VI. IMPLICATIONS ..................................... 402
    A. Aggressive Defensive Lobbying ..................... 402
    B. Prophylactic Lobbying ............................ 404
    C. Disclosure ..................................... 407

VII. CONCLUSION ....................................... 411

I. A PARABLE

My father, Irving Hasnas, spent most of his life working in a small family business. I offer his experience as a parable on lobbying.

In 1902, Jacob Hasnas left the village of Roman along the Moldova River in Romania and walked to a port on the Danube River. He had with him the sum total of his cash reserves, which was just sufficient to purchase a steerage class ticket on a ship bound for New York. Seeking to escape the oppression and lack of opportunity he faced as a Jew, he left his wife and two small children behind in the belief that he would earn enough money in America to eventually pay for

* J.D., Ph.D., LL.M. Associate Professor of Business & Visiting Professor of Law, Georgetown University. The author wishes to thank his fellow symposiasts for their thoughtful and stimulating questions and comments and Gregory Warren and Katherine St. Romain for their invaluable research help. The author also wishes to thank Ann C. Tunstall of SciLucent LLP for her comments on a draft of this article and Annette Hasnas of the Burgundy Farm Country Day School and Ava Hasnas of the Montessori School of Northern Virginia for providing first hand experience in how effective lobbying for departure from objective rules can be. © 2014, John Hasnas.
their passage. By 1904, he had, and his wife, Rebecca, their 4 year-old daughter, Rose, and their 2 year-old son, Morris joined him in the United States.

Working as a sewing machine repairman, Jacob earned enough to support his family, which grew to include an additional daughter, Jenny, and two more sons, Ben and Irving. As the oldest son, Morris, approached his teenage years, he found employment after school doing piecework by fastening the metal tips on shoelaces. Over the course of years, he saved up enough money to put himself through electrician school. He and Jacob then opened a business purchasing, reconditioning, and reselling used electric motors. When Ben became of age, he joined the company. Eventually, Irving, who was 10 years younger, did as well.

Over the ensuing decades, this Brooklyn-based company, which Jacob and his sons named Empire Electric Company, slowly grew. It acquired a warehouse across from the Brooklyn Navy Yard, hired local employees as truck drivers and warehousemen, added additional salespeople, expanded the products it reconditioned to include generators and transformers, and eventually became a distributor of new electrical equipment for large corporations such as General Electric. By the 1970s, Empire Electric Company was a moderately successful business employing between twenty and thirty people.

When it became a distributor of new transformers, Empire began stocking large numbers of General Electric’s oil-cooled transformers. The transformers contained oil suffused with polychlorinated biphenyls (PCBs), highly stable chemicals that produce oil of very low flammability. The PCB oil was manufactured by the Monsanto Company.

In the 1970s, studies suggested that PCBs may be carcinogenic. As a result, in the Toxic Substances Control Act of 1976, Congress banned the manufacture, sale, and distribution of PCBs and required the Environmental Protection Agency (EPA) to develop regulations governing the distribution, use, storage, and disposal of equipment containing PCBs such as General Electric’s oil-cooled transformers.\(^1\) EPA issued the required regulations in 1979.

The ban on the commercial use of PCBs effectively converted oil-cooled transformers from valuable business assets into expensive liabilities. Once they could no longer be sold for profit, the important economic question became who would bear the cost of their storage and disposal. During the period from 1976 to 1979 in which EPA was writing its regulations, many of the potentially affected parties had lobbyists in Washington. These parties included large chemical companies such as Monsanto, large manufacturers of electrical equipment such as General Electric, and the larger waste removal companies. Small companies such as Empire who were “middlemen” between the manufacturers and end users of the transformers were not represented by lobbyists.

When the regulations were issued in 1979, they did not require General Electric to recall unsold transformers in the hands of its distributors. They did

not require Monsanto to bear any of the cost of disposing of the PCBs. They mandated a rigorous and expensive process for disposing of PCBs that created a profit opportunity for the waste removal companies.\textsuperscript{2} They required that the now economically valueless transformers be stored under special conditions designed to ensure that none of the oil leaked into the environment.\textsuperscript{3} They banned the shipment of PCB transformers for commercial purposes other than disposal.\textsuperscript{4}

Complying with these regulations imposed considerable costs on the small businesses that held the transformers as distributors. Regulations required a specified amount of square footage per PCB transformer that consumed valuable warehouse space,\textsuperscript{5} the construction of special dykes to contain any potential spillage,\textsuperscript{6} and the maintenance of a regular inspection schedule.\textsuperscript{7} Further, these costs were virtually inescapable because of the shipment ban. (Empire attempted to give its PCB transformers away to companies in the Dominican Republic who could benefit from the technology, but was denied permission to ship them.) Finally, disposing of PCBs in compliance with the regulations was extremely difficult. The number of waste disposal facilities capable of compliance was so small and the demand for disposal was so great that the wait to dispose of one’s transformers, even at great cost, was measured in years.

In short, virtually all the costs associated with the storage and disposal of the existing stock of PCB transformers was borne by small businesses like Empire.

My father and his brothers were not legally sophisticated businessmen. In fact, they were not sophisticated people in any way, and could have been characters straight out of a Frank Capra movie. They had the stereotypical immigrant mentality that saw the United States as the land of opportunity, and they had the immigrant’s faith that its government functioned neutrally according to the rule of law and could be depended on to ensure justice for the little guy.

When the EPA regulations were issued in 1979, they were shocked. They could not understand why the large corporations that had manufactured the PCB oil and transformers did not have to bear any of the costs of the oil and transformers’ disposal, or why the regulations were structured to allow the waste removal companies to profit from the PCB ban. They could not understand why small companies like theirs that served only as middlemen in the sale of the transformers were forced to bear 100% of the costs of the transformers’ storage and disposal. They could not understand why the entire burden of what was supposed to be a public safety measure should be placed on their backs.

The costs imposed by the EPA regulations coupled with the “stagflation” of

\textsuperscript{2} See 40 C.F.R. § 761.60 (b)(1)(i)(B).
\textsuperscript{3} Id.
\textsuperscript{5} 40 C.F.R. § 761.30.
\textsuperscript{6} Id.
\textsuperscript{7} Id.
the late 1970s was sufficient to drive many of the small companies that acted as distributors of the transformers into bankruptcy. In the case of Empire Electric, the regulations were an economic blow from which the business could not recover, and it was eventually liquidated. And so, the business that had sustained two generations of Jacob Hasnas’ family came to an end.

My father, who was somewhat embittered by his experience, lost his Frank Capraesque view of the American government. Late in his life, I asked him what lessons he had learned from his career as a small businessman. His response was, “Make sure you have a representative in Washington.”

Was he correct? Is lobbying an essential aspect of doing business in the United States? If so, when is it ethical to engage in lobbying? The purpose of this essay is to answer these questions.

II. DEFINITIONS, LIMITATIONS, AND STIPULATIONS

Lobbying is a notoriously amorphous term. Many works on the subject begin by noting the lack of consensus over what counts as lobbying. As currently used, “lobbying” can encompass a wide range of activities. For example, lobbyists often characterize what they do as providing useful information to legislators that the legislators might not have the time, staff, or expertise to obtain for themselves. On this view, lobbyists supply a valuable service to legislators by doing research on and analyzing the effects of proposed legislation in order to enable the legislators to make more informed decisions.

Similarly, lobbyists frequently identify their activities with the exercise of the First Amendment right to petition the government, arguing that because “[p]ublic officials cannot make fair and informed decisions without considering information from a broad range of interested parties,” their job is to ensure that “[a]ll sides of an issue [are] explored in order to produce equitable government policies.”

---

8. This story is offered as a parable, not as a strictly factual account of events. Indeed, at this late date, it is impossible to verify all of the facts of the story, and much of the account comes from the recollections of one who was admittedly politically naive. But because it is being offered as a parable, strict factual accuracy is not required.

9. See DONALD E. DEKEEFER, THE CITIZENS GUIDE TO LOBBYING CONGRESS 4 (2007) (noting that the legal definition of lobbying was one of the most controversial questions in the American political system); LIONEL ZETTER, LOBBYING: THE ART OF POLITICAL PERSUASION 3 (2008) (stating that no definition has ever been agreed upon); see also Brian W. Schoeneman, The Scarlet L: Have Recent Developments in Lobbying Regulation Gone Too Far?, 60 CATH. U. L. REV. 505, 508 (2011) (discussing the various definitions of lobbying).

10. The Association of Government Relations Professionals (formerly known as the American League of Lobbyists) asserts that the ‘principal elements [of lobbying] include researching and analyzing legislation or regulatory proposals; monitoring and reporting on developments; attending congressional or regulatory hearings; working with coalitions interested in the same issues; and then educating not only government officials but also employees and corporate officers as to the implications of various changes.’ Association of Government Relations Professionals, What is Lobbying, http://www.alrc.org/publicresources/lobbying.cfm.

11. Id.
Historically, lobbying was closely associated with efforts to influence legislators directly. Thus, the Oxford English Dictionary identifies lobbying as a term originating in the United States that means “[t]o influence (members of a house of legislature) in the exercise of their legislative functions by frequenting the lobby. Also, to procure the passing of (a measure) through Congress by means of such influence.”12 Similarly, Black’s Law Dictionary traces the term back to 1837, defining it as “[t]o talk with or curry favor with a legislator, usu. repeatedly or frequently, in an attempt to influence the legislator’s vote . . . . To support or oppose (a measure) by working to influence a legislator’s vote.”13

More recently, the term has lost its necessary connection to efforts to influence legislators, and is now applied to efforts to influence any government official with a policy-making role. Thus, a useful contemporary definition of lobbying is “the deliberate attempt to influence political decisions through various forms of advocacy directed at policy makers on behalf of another person, organization or group.”14

Given the broad range of activities covered by the term lobbying, it is worth beginning this essay with a specification of the way I intend to employ the term. In the first place, I do not intend to discuss purely public-spirited efforts to supply legislators with information or analyses that they could not otherwise obtain. I also do not intend to discuss efforts to ensure that all parties’ First Amendment rights are respected. I am not interested in these aspects of lobbying because, in the present context, they are not interesting. This symposium is about the ethics of lobbying, and to the extent that these aspects of lobbying are truly public spirited—to the extent that they are designed merely to ensure that government is fair to all parties—they are clearly ethically unobjectionable.

Secondly, I intend to abandon the historical limitation of the term to activities intended to influence only legislators. In this essay, I will employ the term lobbying to refer to efforts to influence the conduct of any government official with policy-making authority. Thus, lobbying can include efforts to alter the behavior of the President, governors, executive agency officials, regulators, and judges.

Finally, I do not intend to address efforts to alter government policy by influencing election outcomes. Lobbying is usually distinguished from electoral activity, being restricted to the efforts to influence legislators rather than replace them. I intend to adhere to this distinction and limit my discussion to efforts to sway the conduct of sitting policy makers.

13. See Lobby, Black’s Law Dictionary (9th ed. 2009). See also, United States v. Harriss, 347 U.S. 612, 620 (1954) (defining lobbying as “to direct communication with members of Congress on pending or proposed legislation”).
One further stipulation. For purposes of this essay, I intend to treat government as a black box—that is, as an inscrutable policy-making machine. In taking this approach, I am intentionally ignoring all of the knowledge generated by those who study public choice economics. I do this to focus attention on the ethics of lobbying rather than its mechanics.

The government is not a machine, and is, of course, comprised of human beings who respond to incentives. To a large extent, lobbying is about manipulating the incentives of the individuals who comprise the government to produce a desired policy outcome. Much study has been devoted to how to restructure the incentives of government officials to make them more resistant to such manipulation. Further, much moral criticism has been directed toward government officials for responding to their individual incentives rather than acting exclusively for the public good.

The purpose of this essay, however, is to evaluate the conduct of lobbyists, not those being lobbied. Thus, to keep attention focused on this subject, I am consciously ignoring questions of government reform and the moral evaluation of government agents. In this essay, I assume that the government will continue to function and make policy in essentially the same way that it does at present. I intend to explore the question of what constitutes ethical lobbying under this assumption.

III. UNDERLYING ASSUMPTIONS

The argument I intend to offer rests on some underlying assumptions inherent in political liberalism that I will assert, but not defend. I do not regard this as problematic in the present context in which we are exploring the ethics of lobbying in a liberal democratic society. For purposes of such an inquiry, it does not seem inappropriate to take the fundamental principles of liberalism for granted.

The first of these underlying assumptions is that coercion requires justification. Coercion is the use of force or the threat of force to override another’s free will. Because respect for individual autonomy is one of the fundamental moral values of liberalism, there is an initial presumption against the use of coercion that gives rise to a prima facie obligation not to employ it to obtain one’s ends.

Like all prima facie obligations, the prohibition on the use of coercion may be overridden. Coercion may be legitimately employed when doing so is necessary to realize some more important moral value. For example, one may coercively appropriate another’s car when doing so is necessary to rush an accident victim to the hospital in order to save his or her life. Similarly, one may sometimes employ coercion for another’s own good such as when one restrains another from committing suicide in a fit of despair. But in all such cases, the use of coercion is justified by the more significant moral end that cannot be obtained without its use. Should no such end exist—where the necessary moral justification is missing—the prima facie obligation is not overridden and the use of coercion is unethical.
The second underlying assumption is that the mere desire to obtain a benefit for oneself is not among the morally valuable ends that can justify the use of coercion. Individuals and organizations can surely benefit by using force to get others to do what they cannot persuade them to do or to reap a reward at the others’ expense. But this is precisely the type of involuntary trade off that the moral prohibition on the use of coercion is designed to prevent. In this essay, I make no effort to provide a detailed account of the important moral ends that can override the presumption against coercion. For purposes of my argument, all that is required is to note that whatever these ends are, the desire to advance one’s own interests at the expense of others is not among them.

The third underlying assumption is that government action is coercive action. Legislation and regulations are not optional. They are not suggestions that private parties may decide to obey or not as they see fit. They are mandatory prescriptions backed by the government’s threat to use force to achieve compliance.

The purpose of legislation and regulations is to override individual choice. Legislation and regulations are used only where persuasion is insufficient to achieve a politically desired end. In a perfectly ethical government, legislation and regulations would consist exclusively of the morally justified use of coercion. But the moral justification for coercion does not change its character. Whether morally justified or not, unless designed to repeal previously legislated restrictions, government action is inherently coercive action.

IV. THE ARGUMENT

In Part I, I identified the purpose of this essay to be determining when it is ethical to engage in lobbying. The pieces are now in place for me to attempt such an answer. I propose to do so on the basis of a two-step argument. The first step will be to utilize the definition of lobbying and the underlying assumptions identified above to determine circumstances in which lobbying would be unethical. The second step will be to determine what an ethical response to such unethical lobbying would be.

A. Step 1

In Part II, lobbying was defined as the effort to influence the decisions of government officials empowered to make policy—or more concisely, the effort to influence government policy. One engages in lobbying in order to obtain particular legislative or regulatory outcomes. Hence, lobbying is the effort to motivate government action.

Given that government action (other than efforts at repeal) is coercive action,15 this implies that lobbying is the effort to either employ or resist coercion. For now, we may ignore those who lobby against government action.

15. This follows from the third assumption identified in Part II above.
By attempting to prevent government action, they are resisting the application of coercion, and do not run afoul of the liberal presumption against the abridgement of individual autonomy. In contrast, those who lobby for government action are attempting to achieve their ends by mobilizing the coercive mechanism of state power. Hence, their conduct requires a moral justification.16

Many such justifications are available. One could argue that government coercion is necessary to combat more pernicious forms of private coercion—e.g., extortion of payments for “protection” by organized crime—or to achieve the common good whether in the form of a more prosperous or more just society, or to protect individuals against their own irrational tendencies or foolishness. There may be other adequate justifications. However, the desire to obtain a benefit for oneself that one cannot otherwise obtain on the market is not among them.17

The liberal presumption against coercion is designed to prevent individuals from indulging their desires to get others to do what they cannot persuade them to do or to reap a reward at their expense. But if the desire to get others to do what one cannot persuade them to do or to reap a reward at another’s expense cannot serve as a moral justification for the use of force by individuals, it similarly cannot serve as moral justification for the use of force by government. One cannot elude the ethical limitations on one’s actions by employing or persuading an agent to do what one is not permitted to do oneself. Similarly, one who cannot ethically employ coercion to obtain a benefit for himself or herself cannot ethically lobby the government to employ coercion for the same illegitimate end.

This argument allows us to identify at least one category of unethical lobbying. It is unethical to lobby for government action solely to force others to do what one cannot persuade them to do or to reap a reward at another’s expense.

Although this conclusion may seem obvious, it is far from trivial. For it implies that all efforts to induce the government to give a person or organization a competitive advantage that he, she, or it cannot obtain on the market—that is, to provide a benefit to the petitioning party at the expense of others—are unethical. But this type of lobbying—often referred to as “rent-seeking” by economists—comprises a large percentage of the lobbying that actually occurs. Hence, the implication of this argument is that a large amount of the lobbying that currently takes place is unethical.

In the parable that began this essay, the large companies that manufactured the PCB oil and oil-cooled transformers—Monsanto and General Electric—and the waste disposal companies lobbied the EPA for regulations that were favorable to their economic interests. They were not lobbying for government action to protect the public from pernicious private coercion, to advance the common

---

16. This follows from the first assumption identified in Part II above.
17. This follows from the second assumption identified in Part II above.
good, or for paternalistic protections for the members of society. They were certainly not merely trying to provide the EPA with information that it might not have the time, staff, or expertise to obtain for itself and that is necessary "to produce equitable government policies." They were lobbying for regulations that would provide economic benefits to themselves by shifting the cost of the regulations onto others. As such, the lobbying in the parable is a good illustration of what the argument identifies as a fairly common but nevertheless unethical form of lobbying.

B. Step 2

With this as an interim conclusion, let us proceed to the second step in the argument and ask what an ethical response to such unethical lobbying would be. Note that unethical lobbying is the effort to get the government to employ coercion where there is no moral justification for doing so. Thus, unethical lobbying is a morally unjustified attempt to use force or the threat of force against others. This suggests that unethical lobbying is morally equivalent to an unjustified attack upon others. How may one ethically respond to such an attack?

1. The Doctrines of Self-Defense and Defense of Others

I intend to offer the legal doctrines of self-defense and defense of others as an answer to this question. In doing so, I am not relying on the authority of the law. It is a classic fallacy to move from premises about what is legal to conclusions about what is ethical. The fact that a prescription has been embodied in the law is no guarantee that it correctly captures one’s ethical obligations. I appeal to these doctrines not because they are law, but because in this instance the law embodies the underlying ethical truth.

The doctrines of self-defense and defense of others are not instances of legislation that was consciously created by politically motivated agents. Rather, they are doctrines that developed through the common law process and that embody centuries of experience regarding how best to discourage violence and resolve violent disputes. These doctrines, which reside in virtually identical form in the law of both tort and crime, represent what generations of juries and judges believed to be a fair and proper response to an unlawful attack. As such, there is good reason to believe that they contain a close approximation of what constitutes ethical conduct in this situation.

The doctrine of self-defense holds that "[o]ne who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger." The doctrine authorizes one to employ only a reasonable

18. See supra text accompanying notes 9–11.
amount of force. Thus, the doctrine does not give one who is attached a blank check to respond with as much violence as he or she likes. “The privilege is limited to the use of force which is, or reasonably appears to be, necessary for protection against the threatened injury . . . . There is no privilege to use violence after the assailant is disarmed or helpless, or all danger is clearly past. Revenge is not a defense.”\(^{20}\) Further, the doctrine allows the use of force only where the victim’s belief that he or she is in danger is a reasonable one. And finally, the doctrine requires a reasonable belief that the use of force is necessary to avoid the threatened harm—that is, that the victim have good reason to believe that no non-coercive means of repelling the attack are available.\(^{21}\)

The doctrine of defense of others holds that “one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.”\(^{22}\) The doctrine of defense of others is subject to the same restrictions placed on the doctrine of self-defense. Thus, “[a]s with self-defense, . . . one is not justified in using force to protect another unless he reasonably believes that the other is in immediate danger of unlawful bodily harm and that force is necessary to prevent that harm, and even when he entertains these reasonable beliefs, he may not use more force than he reasonably believes necessary to relieve the risk of harm.”\(^{23}\)

Technically, the doctrines of self-defense and defense of others do not apply to lobbying. The doctrines identify legally permissible responses to threats of unlawful bodily harm. Lobbying is not unlawful and does not threaten bodily harm, only harm to one’s economic interests or a restraint on one’s liberty. However, the doctrines are not being offered for their authority as law, but because they embody a more general ethical truth—one whose application extends beyond mere threats of bodily harm.

The doctrines of self-defense and defense of others are tempered, nuanced doctrines that permit the use of coercion under carefully circumscribed conditions. They authorize the use of private coercion, but only the minimum amount necessary to effectively discourage private coercion by others. Thus, they are designed to reduce the overall level of coercion in society. This suggests that to the extent that non-violent, peaceful interaction is a genuine ethical value, the doctrines are ethically well-grounded. And there is every reason to believe that this grounding applies to unethical threats to one’s economic interests and liberty just as much as it does to unlawful threats to one’s bodily integrity.


\(^{21}\) Much of the controversy concerning the doctrine of self-defense concerns the circumstances in which it justifies the use of deadly force—force capable causing death of serious bodily harm. However, the use of deadly force is not an issue in the context of lobbying. Hence, I omit discussion of this aspect of the doctrine.

\(^{22}\) LaFave, supra note 19, at 550.

\(^{23}\) Id. at 551.
V. APPLICATION TO LOBBYING

The doctrines of self-defense and defense of others can be applied to the threat posed by unethical lobbying in a fairly straightforward manner. All that is required is to replace the references to “unlawful bodily harm” with “unethical lobbying” in the statement of the doctrines. Hence, in the context of lobbying, the doctrine of self-defense would hold that individuals or business organizations who are not themselves engaging in unethical lobbying and who reasonably believe 1) that another party is engaging in unethical lobbying that creates the danger that they will suffer harm to their economic interests or an unjustified restraint on their liberty and 2) that it is necessary for them to engage in lobbying to avoid this danger, are ethically justified in engaging in a reasonable amount of lobbying for this purpose.

Just as in the ordinary case of self-defense in which the doctrine is not available to one who is the aggressor, so in the context of lobbying, the doctrine would not be available to parties who are themselves engaging in unethical lobbying. Further, parties invoking the doctrine to justify their lobbying activities must reasonably believe both that another party is unethically lobbying for governmental action that would harm their economic interests or restrain their liberty and that counter-lobbying is necessary for them to avoid the harm or restraint. Unfounded or paranoid speculation that malevolent parties are manipulating the government of the “black helicopter” variety will not justify defensive lobbying, nor will such lobbying be justified if merely calling the public’s attention to the unethical lobbying activity would be sufficient to end it. Finally, the extent to which one may engage in defensive lobbying is limited to what reasonably appears to be necessary for protection against the threatened unethical lobbying. The doctrine does not justify efforts to harm the interests of others in revenge for their unethical lobbying efforts.

The doctrine of defense of others can be adapted to the context of lobbying in the same manner. It would hold that individuals or business organizations who are not themselves engaging in unethical lobbying are justified in lobbying to protect the economic interests or liberty of others when they reasonably believe that those interests are endangered by unethical lobbying and that defensive lobbying is necessary to avoid this danger. This doctrine would allow parties to engage in lobbying to protect the economic interests and liberty of others against the consequences of unethical lobbying within the same set of restrictions that apply to lobbying in self-defense.

The doctrine of defense of others has an interesting implication, which becomes particularly relevant when it is applied to lobbying. Ordinarily, the doctrine is used to justify the use of force by one who is coming to the aid of specific individuals under physical attack. The image that most readily comes to mind is that of a good Samaritan intervening to stop a beating or mugging on the street. But the doctrine is not limited to cases in which there is such an easily identified victim. The doctrine would also justify the use of force against terrorists such as the Boston Marathon bombers who are seeking to cause
widespread, indiscriminate injury to numerous parties. In other words, the doctrine can justify the use of force to protect not only identifiable individuals, but also the general public from unlawful coercion.

The same will be true when the doctrine of defense of others is applied to lobbying. The doctrine will, of course, justify lobbying to protect specific individuals and business organizations against unethical lobbying efforts designed to impair their economic interests or liberty. However, it also justifies lobbying designed to protect against less targeted, more widespread economic harm produced by unethical lobbying—for example, the harm imposed on the entire class of small businesses that distributed PCB oil-cooled transformers by the lobbying activity of the large manufacturers and waste disposal companies. Indeed, the doctrine can have even more global implications. For if a party is engaged in unethical lobbying that can damage the economic or liberty interests of the public at large, the doctrine implies that one may ethically engage in lobbying to protect the entire market against such harm. Thus, the doctrine of defense of others could justify the creation of lobbying organizations dedicated to combating unethical rent-seeking or crony capitalism in general.

In sum, the second step of the argument allows us to draw the following conclusion. One may ethically engage in lobbying activities when those activities are a response to unethical lobbying by others as long as those activities conform to the restrictions of the doctrines of self-defense and defense of others—i.e., that the activities involve only a reasonable amount of lobbying, and that they are employed only when one reasonably believes that the unethical lobbying of others poses a danger to the economic or liberty interests of themselves or others and that the proposed counter-lobbying is necessary to avoid this danger.

VI. IMPLICATIONS

The argument presented in Part IV leads to three potentially significant implications: 1) it is ethically permissible to engage in aggressive lobbying that targets parties that are themselves engaged in unethical lobbying, 2) it is ethically permissible to engage in prophylactic lobbying to protect the market as a whole from harm due to unethical lobbying, and 3) lobbyists engaged in ethical lobbying should not be required to disclose their principals or those who fund their activities.

A. Aggressive Defensive Lobbying

At first glance, the conclusion that one may ethically engage in lobbying to avoid harm from the unethical lobbying of others may seem facile. Who would doubt that parties may ethically lobby the government not to deliver unjustified benefits to others at their expense? But recall that our present enquiry is concerned with more than merely resisting the lobbying efforts of
others. As noted previously, efforts to convince the government not to act do not need justification. Such lobbying is not an effort to harness the coercive power of the state, and so does not run afoul of the liberal presumption against coercion. The lobbying presently under consideration is that which involves efforts to induce the government to take some positive action, i.e., to employ coercion.

What needs justification is the use of a sword, not a shield. One who possesses a shield that renders him or her invulnerable to attack needs no special dispensation to employ it when attacked. In such a case, no harm would be imposed on the aggressor, and the question of self-defense would not arise. In the real world, however, such shields rarely exist. Usually, the only way to protect oneself against an attack is to employ the sword to incapacitate the aggressor before the attack is completed. But this way of protecting oneself involves the use of coercion, and so needs the justification provided by the doctrine of self-defense.

What does this observation mean in the context of lobbying? Consider the parable that began this essay. The small businesses acting as distributors of PCB transformers have no magic shield to protect them against the large manufacturers and waste disposal companies who are lobbying for rules that impose the costs of disposing of the transformers upon them. The only way for them to protect their economic interests against the unethical lobbying of the larger companies is to lobby for rules that require the manufacturers to recall and dispose of the PCB transformers and oil or for the waste disposal companies to subsidize the cost of disposal. In other words, the small businesses have a reasonable belief that it is necessary to lobby the government to employ its coercive power against the large manufacturers and/or the waste disposal companies in order to protect themselves from the effects of unethical lobbying by these companies. Hence, the doctrine of self-defense justifies the small businesses in engaging in such lobbying.

Of course, any such lobbying is subject to the limitations inherent in the doctrine. That means that the small businesses can lobby only for measures that are necessary to protect their interests, not to wreak revenge on their adversaries. Thus, they can lobby for rules requiring the manufacturers to internalize the cost of their harmful products, but not for measures debarring the manufacturers from future government contracting or requiring them to make extortionate payments to retrieve their products from the distributors currently holding them.

Note, however, that the doctrine of self-defense does not require the small businesses to be certain that the large manufacturers or waste disposal companies are engaging in unethical lobbying to be justified in taking defensive action. They need only have a reasonable belief that such unethical lobbying is occurring. Thus, the small distributors would not be required to undertake

---

24. See supra text accompanying notes 15–16.
expensive investigations to prove that the larger companies are engaging in unethical lobbying; the mere fact that lobbyists for Monsanto or General Electric are meeting with the EPA would probably be sufficient to justify the small distributors in engaging in defensive lobbying.

Thus, the first implication of our analysis of the ethics of lobbying is that individuals and business organizations may ethically lobby the government not only not to take action that would damage their economic interests or curtail their liberty, but also to take action that would damage the economic interests or curtail the liberty of other individuals or business organizations as long as they reasonably believe that 1) the individuals or business organizations who are the targets of their lobbying are engaged in unethical lobbying and 2) the proposed lobbying is necessary to prevent the harm that could result from the unethical lobbying, and the proposed lobbying is limited to actions designed to prevent the harm.

B. Prophylactic Lobbying

A second implication of the analysis is that it is ethically permissible to engage in prophylactic lobbying—lobbying designed to prevent others from engaging in unethical lobbying. This implication follows from the doctrine of defense of others.

As noted above, that doctrine has wider application than merely permitting one to come to the aid of specific parties who are the targets of a focused attack. It also authorizes one to use coercion to protect others against attacks that would cause widespread, indiscriminate injury to numerous parties or to the public at large. For example, the doctrine of defense of others would authorize the use of force to prevent the harm that results from terrorist attacks.

A similar chain of reasoning applies to lobbying. There, the doctrine of defense of others would justify one in lobbying for measures that would disable not only those who are unethically lobbying the government to provide them with benefits at the expense of specifically identified parties, but also those who are unethically lobbying for benefits that would come at the expense of a large number of indeterminate parties or even the public at large. And in the context of lobbying, the latter type of unethical lobbying is the type most frequently employed.

Sophisticated lobbyists are well versed in the logic of concentrated benefits and dispersed costs—of how to reap large rewards for themselves by imposing almost invisibly small costs on large numbers of people. Thus, a small number of sugar growers can obtain enormous financial benefits by lobbying for tariffs that increase the price of products containing sugar by only pennies for each consumer. But lobbying the government to use its coercive power to provide

25. See supra p. 18.
one with benefits at the expense of a multitude of others is just as unethical as lobbying it to provide one with benefits at the expense of one or two others. The difference is that there is no effective way to protect the multitude of victims of the former type of lobbying on an individual basis. The only way to protect those targeted to bear the dispersed costs of unethical lobbying is to act prophylactically to prevent the lobbyists from engaging in unethical lobbying in the first place.

There are only two strategies for preventing individuals and business organizations from profiting from unethical lobbying. The first is to change the incentive structure within which the individuals and organizations function so that there is less opportunity to profit from unethical lobbying. The second is to retain the current incentive structure, but erect barriers that make it more difficult for those who would engage in unethical lobbying to succeed.

An example of the first approach would be to lobby for a greatly reduced role for the government in the economy. Reducing the ability of the government to take actions that confer economic advantages on some parties at the expense of others reduces the incentive to engage in unethical lobbying. If the government is not providing economic rents, there is no reason for private parties to engage in rent-seeking. Thus, lobbying for greater levels of economic freedom is one form of prophylactic lobbying.

Technically, this form of prophylactic lobbying does not need to rely on the doctrine of defense of others for justification because it is not ethically problematic in the first place. To the extent that one is lobbying against government intervention in the economy, one is attempting to convince the government not to act. As previously noted, such lobbying is not an effort to employ the coercive power of the state, and so does not require special ethical justification.27

It is worth noting that in reducing the opportunities for unethical lobbying, this approach also reduces the opportunities for ethical lobbying. Limiting the government's ability to intervene in the economy certainly limits its ability to provide undeserved benefits to some at the expense of others, but it also limits its ability to temper market forces in an effort to achieve the common good or to protect individuals against their own foolishness or weakness of will. This approach is an effective way to prevent an evil, but it comes at the cost of making it more difficult to do good. Those who consider this a drawback may prefer the second form of prophylactic lobbying.

The second approach retains the current incentive structure in which the government wields a great deal of power to intervene in the economy, but lobbies for legislation and/or regulations that make it more difficult for individu-

27. Of course, this type of lobbying could be challenged on other grounds than the liberal presumption against coercion. If one believed that free market capitalism was inconsistent with social justice, one could raise substantive ethical objections against lobbying for greater economic freedom. However, it is clearly beyond the scope of the present essay to attempt to address such substantive ethical disputes.
als or business organizations to persuade the government to exercise this power in an ethically unjustified manner. Because this form of prophylactic lobbying seeks to use the coercive power of government to place restrictions on the liberty of others, it requires ethical justification. This justification is supplied by the doctrine of defense of others. Thus, when one has a reasonable belief 1) that another party is about to engage in unethical lobbying that poses a risk of harm to the economic or liberty interests of a large number of others or to the public at large and 2) that government action is necessary to prevent that harm, one may ethically lobby for governmental action that one reasonably believes to be necessary to avoid that harm.  

In the United States, of course, there are limitations on the types of legislation one may lobby for. Even if one is engaging in ethical prophylactic lobbying, the First Amendment to the United States Constitution prevents one from lobbying for measures that would deprive those engaged in unethical lobbying of their right to freedom of speech. But within federal and state constitutional restraints, one may ethically lobbying for restrictive legislation that makes it more difficult or expensive for individuals or business organizations to profit from unethical lobbying.

For example, if one has a reasonable belief that large agricultural conglomerates are lobbying for an environmentally unjustified mandate requiring ethanol to be added to gasoline, one may prophylactically lobby for a ban on all fuel additives unless they are supported by a scientifically valid environmental impact study paid for by the manufacturers. Similarly, one can lobby for any form of legislation that would increase the cost or otherwise reduce the profitability of political rent-seeking such as measures that ban the use of eminent domain for private development projects or require a Congressional Budget Office cost-benefit analysis of all proposed protectionist legislation. A good example of an innovative form of prophylactic lobbying is supplied by Heidi Li Feldman’s contribution to this symposium, Toward an Ethics of Being Lobbied: Affirmative Obligations to Listen. In her essay, Feldman proposes measures that require government officials to receive input not only from parties with the financial resources to hire professional lobbyists, but from the broadest possible range of those who may be affected by proposed legislation or regulation. Such measures would be designed to reduce the effectiveness of unethical lobbying not by restricting it, but by diluting it in a sea of counter-lobbying.

Thus, the second implication of our analysis of the ethics of lobbying is that it is ethical for individuals and business organizations to lobby for prophylactic measures designed to protect the market generally against the type of unethical

28. Note that this doctrine does not apply to cases in which others are engaging in ethical lobbying—lobbying for measures on the ground that they promote the common good or provide paternalistic protections for individuals. The doctrine of defense of others can be invoked to justify lobbying to prevent unethical lobbying only.

lobbying that would impose even small harms on large numbers of individuals or the public as a whole. This is the case whether the lobbying is designed to promote economic freedom generally or merely to make it more difficult for parties to profit from unethical lobbying. Further, it is not necessary for one to be personally threatened with the harm arising from the unethical lobbying for one to ethically engage in such prophylactic lobbying. The doctrine of defense of others provides an ethical grounding for lobbying to protect the interests of others even when the lobbyists’ interests are not in danger. Finally, individuals engaged in prophylactic lobbying may band together with others to accomplish their goals. There is no requirement that those acting to protect the interests of others act alone. They are entitled to pool resources and divide labor in the effort to more effectively prevent unethical lobbying. Thus, those who wish to form what are now commonly called “social welfare organizations” to facilitate prophylactic lobbying are ethically justified in doing so.

C. Disclosure

A third implication of the analysis is that those engaged in ethical lobbying should not be legally required to disclose the identity of their principals or donors.

By hypothesis, those engaged in ethical lobbying are not doing anything wrong. To the extent that they are lobbying for general economic freedom, they are attempting to restrain rather than employ the coercive power of government. To the extent that they are lobbying to protect themselves or others from unjustified harm within the limits of the doctrines of self-defense and defense of others, they are acting within their rights, and in the case of those acting in defense of others, are actually providing a public good. Generally speaking, those acting ethically are entitled to keep their affairs private. To mandate that they disclose their activities to the public—to employ coercion—requires justification.

What could justify this use of coercion? A properly functioning democracy must permit its citizens to express their political viewpoints and attempt to persuade others to share them, but there is nothing in the theory of democracy that requires citizens to make their political beliefs public. As long as they are not acting illegally or corruptly, citizens of a liberal society are usually permitted to pursue their religious, cultural, and political interests in private.

Perhaps advocates of mandatory disclosure could offer their own version of a prophylactic argument—one claiming that the only way to reduce the harm caused by unethical lobbying is to require all those engaged in lobbying to disclose their principals and donors. Such an argument would rest on the underlying premises that 1) there is no practicable way to distinguish between ethical and unethical lobbying and 2) requiring the disclosure of the identity of

30. This infelicitous name derives from provisions of the United States Internal Revenue Code.
31. This is another iteration of the first underlying assumption discussed above. See supra p. 9.
lobbyists’ principals and donors is an effective way to reduce unethical lobbying. The first premise is necessary because otherwise the disclosure mandate could be applied exclusively to unethical lobbying and there would be no reason to force disclosure upon those engaged in ethical lobbying. The second is necessary because otherwise the disclosure mandate would be pointless.

Both of these assumptions are questionable. Although public choice scholarship teaches us that it is difficult to prevent effective rent-seeking, the reason for this is not difficulty distinguishing rent-seekers from good government groups or those merely defending themselves. There is little difficulty distinguishing oil industry lobbyists from the ACLU or the Teamsters union from Common Cause. Investigative journalists have no problem identifying the nature of the lobbying activities various groups engage in and delight in ferreting out anything that smacks of rent-seeking. It strains credibility to assert that the only way to determine who is engaging in unethical lobbying is to force all parties engaged in lobbying to disclose their principals and donors.

Further, if disclosure were an effective means of reducing unethical lobbying, there would be no unethical lobbying. The news media are in the business of identifying those who engage in political rent-seeking. For example, National Public Radio has its own “Power, Money, and Influence Correspondent,” Peter Overby, who regularly reports on the most nefarious examples of corporate efforts to influence government policy. Those engaged in rent-seeking are rarely embarrassed by their activity. They are legally pursuing their economic interests under an incentive structure in which the potential benefits from government-confferred competitive advantages dwarf the potential costs of any negative publicity. Disclosure can discourage lobbying only by those who would be harmed by publicity. But such parties are usually small businesses or individuals who support unpopular causes.

This brings us to the crux of the argument against mandatory disclosure. For, even if I am wrong and disclosure is an effective way of reducing unethical lobbying, any such gains would come at a cost to innocent parties that cannot be tolerated by a liberal society.

History teaches that disclosure is a powerful weapon for the oppression of the minority by the majority and the suppression of unpopular viewpoints. By forcing those who support unpopular positions into the limelight, disclosure makes them targets for reprisal by the most malign adherents of the socially dominant ideology. Further, the prospect of such reprisals is sufficient to cause many to withhold their support for unpopular causes in the first place. This is the iconic “chilling effect.”

When the federal government of the United States wanted to suppress communist ideology in 1951, it did not have to ban its advocacy—something that the First Amendment would have rendered problematic. Instead, the House of Representatives simply published a pamphlet entitled “Guide to Subversive
Organizations and Publications,” and left it up to members of the public to boycott, harass, and in some cases, violently attack those who worked for or with the identified organizations.

Similarly, when the government of the state of Alabama wanted to suppress the advocacy of civil rights for African-Americans in 1956, it attempted to do so by requiring the disclosure of the NAACP’s membership list. In declaring this attempt unconstitutional, the Supreme Court of the United States recognized that the revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

In explaining why mandatory disclosure is antithetical to the preservation of a liberal society, the Court observed that

\[
\text{[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order [as a requirement that adherents of particular religious faiths or political parties wear identifying arm-bands]. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.}
\]

Furthermore, the danger disclosure presents to individuals who espouse unpopular causes is not some outmoded artifact of the middle of the 20th century. In the last Presidential election cycle, the Obama campaign published a list of contributors to the Romney campaign that accused them of having “less than reputable records,” being “on the wrong side of the law,” and making “profits at the expense of so many Americans.” The implication that Romney contributors were disreputable people coupled with the implicit threat to hold other contributors up to similar public opprobrium served to discourage those sensitive about their reputations from contributing to the Romney campaign.

32. COMM. ON UN-AMERICAN ACTIVITIES, GUIDE TO SUBVERSIVE ORGANIZATIONS AND PUBLICATIONS, H.R. Doc. No. 82-137, (1st Sess. 1951).
34. Id. at 462.
Even today, unwanted disclosure can be an effective mechanism for suppressing a disfavored position.

To see how this applies in the context of lobbying, consider the parable with which this essay began. Imagine that the owners of the small businesses that acted as distributors of the oil-cooled transformers wanted to lobby in self-defense. Our previous analysis shows that such lobbying is ethically unobjectionable. In fact, they would have good reason to believe that such defensive lobbying was necessary for the survival of their businesses, something that was borne out by events. Yet, many of them might be willing to engage in such lobbying only if they could do so in secret. For many of these companies, a large proportion of their income was derived from their distributorship contracts with large manufacturers like General Electric. These contracts were not limited to oil-cooled transformers, but usually encompassed the manufacturer’s entire line of heavy electrical equipment including motors, generators, and air-cooled transformers. Given this level of dependence, the small businesses would rationally fear retaliation in the form of cancelled contracts or reduced supply if they were seen to be lobbying against their suppliers’ interests. Unless they could lobby anonymously, they would be unable to lobby at all. In this way, disclosure actually facilitates unethical lobbying by making it dangerous to engage in ethical lobbying in self-defense.

Disclosure is even more threatening to those who want to lobby in defense of the public at large. The reason why unethical lobbying is so effective is the lobbyists’ ability to exploit the relationship between concentrated benefits and dispersed costs. When a small number of individuals or firms can reap large gains by imposing minuscule costs on large numbers of people, each of them has a strong incentive to expend resources to capture those gains. In contrast, the costs imposed on the members of the public are too small to make it worthwhile for any of them acting alone to oppose the efforts of the rent-seekers. The only way to counter this perverse incentive structure is for those opposed to rent-seeking to pool their resources to create organizations to lobby in defense of the general public. This will involve attracting either a large number of small donations or a smaller number of large donations from wealthy individuals. Mandatory disclosure requirements can undermine efforts to attract both types of donations.

Many individuals of moderate means will support the causes they believe in only if they can do so anonymously. Members of a farming community or employees of Archer Daniels Midland may not be willing to donate to an organization lobbying to end the ethanol mandate if they know that their actions will get back to their neighbors or employer. Members of military families may not want their relatives to know that they are contributing to an organization lobbying for reduced military spending and an end to the use of drones. Those working in a unionized plant may not contribute to organizations lobbying for

---

36. See supra p. 20.
free trade if they know that their co-workers will learn of it. Members of certain conservative churches will be unwilling to support organizations lobbying for the legalization of same sex marriage if they know that their donations will be disclosed to the other members of the congregation.

But the inhibiting effect of disclosure can be even more pronounced when applied to the wealthy. A successful entrepreneur who had to overcome politically protected corporate interests to build his or her business may want to combat what he or she sees as crony capitalism by contributing to organizations that lobby for less government intervention into the economy. A wealthy conservative who believes that it is immoral for the federal government to expend the wealth of the next generation to ensure the comfort of the baby boomers may want to contribute to an organization that lobbies for severe reductions in federal spending and a balanced budget amendment. The CEO of a successful private corporation who believes that the economic growth produced by the free market is the best way to combat poverty may want to contribute to organizations that lobby against federal economic regulations and for economic freedom generally. Yet each one may be willing to donate only if he or she can do so without publicity. In the current political climate, each may reasonably fear that openly making such a donation would expose him or her to the risk of character assassination—to public excoriation as a corporate fat cat or a rapacious member of the 1% who cares nothing for the poor, or to being added to the administration’s list of disreputable persons who “profit[] at the expense of so many Americans.” Especially if their continued business success or the maintenance of their desired social standing depends in any way on their reputations or the public’s perception of their character, mandatory disclosure could dissuade all but the most committed from making a donation.

Thus, the third implication of our analysis of the ethics of lobbying is that those engaged in ethical lobbying should not be legally required to disclose the identity of their principals or donors. Such disclosure is neither a necessary nor an effective means of suppressing unethical lobbying, and thus is an unjustified coercive invasion of innocent citizens’ privacy. Further, by inhibiting citizens from participating in ethical prophylactic and defensive lobbying, mandatory disclosure actually facilitates the unethical lobbying of those engaged in political rent-seeking.

VII. CONCLUSION

The conclusion my father drew from his experience with the regulation of PCBs was that to do business successfully in the United States required one to have a representative in Washington, DC. Unfortunately, there is good reason to believe that he was correct. The current structure of the United States marketplace is one in which it is perfectly legal and economically advantageous to engage in unethical lobbying—lobbying the government to employ its coercive power to provide benefits to oneself at the expense of others. Further, the political and bureaucratic incentive structure under which legislators and regula-
tors currently function ensures that such unethical lobbying will frequently succeed if it is not actively opposed. In these circumstances, business persons both large and small would be well advised to have someone on call to represent their interests before the relevant legislative and regulatory bodies.

The fact that it is essential to engage in lobbying to function successfully in the contemporary marketplace highlights the need for a careful analysis of the ethics of lobbying. In this essay, I offer merely the first steps toward such an analysis. I do not attempt to provide a general account of what constitutes ethical lobbying. Instead, I identify one form of unethical lobbying—lobbying designed to reap a reward at expense of others that is not justified as a means to combat pernicious private coercion, achieve the common good, or protect individuals against their own irrationality or weakness of will—and suggest how those who would be harmed by such unethical lobbying may ethically respond. I argue that when confronted by unethical lobbying, it is ethical to lobby in self-defense or in defense of others. This means that one can ethically lobby for measures that would undermine others’ capacity to engage in unethical lobbying, and for general measures that would make it more difficult for anyone to engage in unethical lobbying. Finally, I argue that those who wish to support prophylactic ethical lobbying are entitled to do so anonymously. In a liberal society, citizens engaged in ethical activities have a prima facie right to do so free from the glare of unwanted publicity. Especially when they hold a politically unpopular position that may subject them to public opprobrium and reprisal—as those who advocate for reduced regulation of the market as the cure for unethical lobbying do—an adequate justification is needed for using the coercive power of the government to publicize their activities. Since disclosing the names of those who contribute to organizations that ethically lobby against government action—that is, against the exercise of the government’s coercive power—can do nothing to inhibit the actions of those who are unethically lobbying for government action to benefit themselves at the expense of others, no such justification is in evidence.