

FRED FRIENDLY SEMINARS PRESENTS

**ETHICS**



**IN AMERICA II**

# **Discussion Guide**

for the series *Ethics in America II*

## **Author**

Lisa H. Newton, Ph.D.

## **Editors**

Ruth Friendly  
Ann Yoo

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## INTRODUCTION

Welcome to *Ethics in America II*. As with the original *Ethics in America*—brilliantly conceived and launched by the late Fred Friendly, Edward R. Murrow Professor at Columbia University's School of Journalism—this six-part series of programs and accompanying materials covers diverse topics of public, private, and professional ethics. It will be broadcast on public television, available as DVDs, and can be found on the Annenberg Media Web site, [learner.org](http://learner.org). The Discussion Guide starts with an introduction to the terms and reasoning of ethics ("Doing Good and Avoiding Evil"), moves on to a swift career through ethical theories ("The Theory Behind the Practice"), and then follows up with six chapters that trace the six programs in the series, introducing them, placing them in ethical context, and reflecting on possible solutions for the dilemmas presented. The Ethics Reader is a selection of historically important writings on ethics, which are cited explicitly in the Discussion Guide chapters and implicitly in the vigorous dialogue captured in the video programs.

Up to now you have probably been doing ethics without benefit of any kind of academic recognition. Why bother to have courses in stuff we all do naturally? Because too often we don't do it very well. Ethical presuppositions are built into all of our moral judgments, but they are not all defensible. The political party official who ensures, for the sake of the comfort of his colleagues, that the minority applicant does not get the district appointment probably does not think of himself as "prejudiced"—he probably makes no connection at all between what he has just done and his ready affirmation that "all men are created equal." We need practice to put our present actions in the context of our genuine beliefs. Similarly, the congressional leader who quietly covers up the evidence of a colleague's improper fondness for teenage pages working in the Congress, no doubt thinks of himself as doing what is best for the institution of the Congress, not as possibly endangering young pages in the future. Much the same thoughts may have gone through the heads of the Catholic bishops who quietly transferred the priests who had been molesting children. Ethics requires that we place our actions out for the public to view, to be judged against the ethical standards we profess.

Is it all a matter of figuring out who's "right" and who's "wrong"? Absolutely not. There are matters where good and thoughtful people should not be ashamed to disagree. The agreement is not important, but the thoughtfulness is. There are reasons why we will not always ultimately agree, for ethical principles may ultimately conflict; but we should be clear on why we disagree, and learn enough of the terminology, modes of reasoning and traditional principles of ethics to carry on an intelligent discussion about the ethical disputes of the day.

The Discussion Guide has eight chapters. The first begins by introducing you to the forms of moral discourse and provides an introduction to some of the technical terms that are used throughout the book. Chapter 2 acquaints you with the ethical traditions of the Western world, an extended conversation on the nature of right and wrong, good and evil, that spans the centuries and now includes you.

Chapters 3 through 8 correspond to the video presentations that serve as a core for this series. These chapters follow the same basic outline, incorporating the following sections: introductory questions, an essay on the concepts covered in the chapter, a summary of the video program dialogue, a synthesis and discussion of the issues, questions for further reflection, and finally, suggested further readings.

This Discussion Guide and the accompanying Ethics Reader offer materials that can broaden and deepen your understandings of the ethical issues presented in the video programs. With the first two chapters as background in thinking about these ethical dilemmas, you can move through the other six chapters in any order that suits you. Enjoy the journey.

## CHAPTER 1

### DOING GOOD AND AVOIDING EVIL Fundamentals of Philosophical Ethics

#### Part I: Principles and Reasoning

##### 1. Philosophical Discourse: Defending Judgments

Ethics, in its origins and in its current location in the curriculum, is a branch of philosophy. Philosophy is primarily the study of discourse—a particularly thorough examination of the ways that we talk about things, the judgments we make, and the categories and conceptual orders we put upon our experience. It helps us to interpret that experience for ourselves and to find the handles that will let us operate effectively in the world as we experience it. Ethics is a systematic study of morality and human conduct that attempts to extract from our moral codes and traditions our most basic beliefs, the concepts on which all morality ultimately rests. Doing ethics, then, is first of all talking *about* talking about morality—figuring out how we state moral judgments, how we justify them if we are challenged, what kinds of reasons weigh significantly in the discussion, and how we shall know, if ever we will, when we have reached a demonstrably true conclusion.

There turn out to be three kinds of sentences distinguished by the way we verify them, that is, by the way we find out whether they are true.

1. *Logical, or formal, statements* are definitions or statements derivable from definitions, including the entirety of mathematical discourse (e.g.,  $2+2=4$  or "A square has four equal sides"). Such statements can be verified by a formal procedure derived from the same definitions that control the rest of the terms of the field in question (i.e., the same axioms define 2, 4, and the procedure of addition; the four equal sides and right angles define the square). True formal statements are *analytic*: they are true logically, necessarily, or by the definitions of the terms. False statements in this category are *self-contradictory*. (If you say,  $2+2=5$ , or start talking about round squares, you contradict yourself, for you assert that which cannot possibly be so—you conjoin ideas that are incompatible.) A logically true, or logically valid, statement can never be false or disproved by any discovery of facts; it will never be the case that some particular pairs of 2 do not add up to 4, or some particular squares turn out to be circular—and if you think you've found such a case, you're wrong!  $2+2=4$  is true, and squares are equilateral rectangles, as philosophers like to say, in all possible

worlds. For this reason we say that these statements are true *a priori*: we can know them to be correct *prior* to any examination of the facts of the world, without having to count up lots of pairs of pairs, just to make sure that  $2+2$  *really* equals 4.

2. *Factual, or empirical, statements* are assertions about the world out there, the physical environment of our existence, including the entirety of scientific discourse, from theoretical physics to sociology. Such statements are verifiable by controlled observation of that world, by experiment, or just by careful looking, listening, touching, smelling, or tasting. This is the world of our senses, the world of space, objects, time, and causation. These empirical statements are called *synthetic*, for they put together in a new combination two ideas that do not initially include or entail each other. As a result they cannot be known *a priori*, but can be determined only *a posteriori*, that is, *after* investigation of the world. When they are true, they are true only contingently, or dependently, as opposed to necessarily; their truth is contingent upon, or depends on, the situation in which they are uttered. (As I write this, the statement "It is raining out" is true and has been all day. The weatherman tells me that tomorrow that statement will be false. The statement  $2+2=4$ , like the rectangularity of squares, does not flick in and out of truth like that.)

3. *Normative statements* are assertions about what is right, what is good, or what should be done. We know these statements as *value judgments*, prescriptions and proscriptions, commands and exhortations to do or forbear. There is no easy way of assigning truth value to these statements. The criteria of truth that apply to formal and factual statements do not apply to normative statements. We can certainly say of such judgments (formally) that they conform or fail to conform with other moral judgments or with more general and widely accepted moral principles. We can also say (empirically) that they receive or fail to receive our assent as a society, as compatible or incompatible with our basic intuitions of what is just or right (as determined by a poll or survey). We may also say that a judgment succeeds or fails as a policy recommendation on some accepted pattern of moral reasoning, like adducing consequences of that judgment and estimating how human wants will be affected should it become law (see the section "Moral Reasoning," below). But the certainties of math and science are forever beyond the grasp of any normative system, which is, possibly, as it should be.

One limit on normative reasoning is important enough to get clear at the outset. You can't get an *ought* from an *is*; you cannot derive any normative statement from any collection of facts, no matter how emotionally compelling, without a previously accepted normative statement as premise. From the fact that a certain product line is unprofitable, it does not follow automatically that the company should abandon it;

from the fact that the new medical technology can prolong the patient's life for another six months, it does not follow automatically that the patient should elect to use it; from the fact, verifiable by poll, that the nation overwhelmingly does not want to pay any more taxes, or approves of abortion, it does not follow that taxes are wrong or abortion is right. Other things being equal, we may very easily accede to the *ought* premise—that a company should do whatever will improve the bottom line, that medical science ought to prolong human life, that in a democracy, what the people prefer is or ought to be, law. But cases test these rules all the time, and we want to be free to examine them when the situation seems not to fit the intent of the rule. At these times we must be very clear on what is factual conclusion—verifiable by survey, experiment, or observation—and what is normative.

These distinctions, universally valid, are part of every introduction to philosophy. But why are they necessary to understand ethics? The most important reason to be familiar with these distinctions is that occasionally disputes that seem to be about values or moral principles are actually about facts or about the meanings of words. Such disputes are resolvable, at least in principle, and they should be disposed of before the discussion continues.

As Thomas Hobbes pointed out, words have no value in themselves. They are but tokens, and wise men do but reckon with them. There is no point in arguing about the meaning of a word. Simply define your terms to begin with, doing your best to place your definition within range of the normal discourse of the field, and carry on your discussion from there. Only one thing is essential: that you know when a dispute is about the meanings of words and when it is about something more substantive, and that you agree at the outset that whatever you decide to let the words mean, you will not let that agreement influence the final decision.

## **2. The Vocabulary of Ethics**

Any text on ethical theory has to open with the observation that of all matters in ethics, the meanings of the terms have caused the most acrimony and dispute. Since the earliest of the Socratic dialogues, we have argued about the meaning of key terms like *morals*, *ethics*, *virtue*, *piety*, *justice*, and the others, all the others. Given the limited purposes of this text, I will simply stipulate at this point how I intend to use the key terms of ethics, observing only that my usage is not bizarre. More than that will no philosopher claim. In what follows you may expect the following words to be used in general in these ways:

**Morals or Morality:** the rules and prima facie duties that govern our behavior as persons to persons. Examples:

Don't hurt people. (gentleness, compassion)

Don't tell lies. (veracity, fidelity)

Don't take more than your fair share. (fairness)

A note on morals: all you really need to know you probably learned in kindergarten. The rules and duties are easy to know and to remember—but very hard to follow consistently.

**Values:** States of affairs that are desired by and for people and that we want to increase; ends, goals. Examples:

Health (vs. sickness)

Wealth (vs. poverty)

Happiness in general

Freedom, justice, respect for human rights

**Virtues:** Conditions of people that are desirable both for the people themselves and for the good functioning of the society. Examples:

Wisdom (vs. ignorance, irrationality)

Courage (vs. weakness, unreliability)

Self-control (vs. greed, violence, indulgence)

Justice (vs. egoism, favoritism, deviousness)

**Ethics:** Properly speaking, the study of morals, duties, values, and virtues, to find:

Their theoretical links and relationships

How they work together (or do not) in practice

Other understandings of the term *ethics*:

1. More generally, the whole field of morals, moral rules, duties, values and virtues—the whole study of our attempts to order human conduct toward the right and the good.



2. More specifically, a professional ethic is a particular code of rules and understandings worked out by the members of a profession to govern their own practice.

**Ethical Principles:** Very general concepts that sum up a range of morals, values and virtues, from which moral imperatives can be derived.

### 3. Moral Commitments and the Discipline of Ethics

In ordinary daily conversation we make no distinction between the notions of morality and ethics, moral obligations and ethical duties, moral codes and codes of ethics. But in philosophy we may distinguish morals from ethics according to the level of analysis intended. Morality governs conduct, tells us to follow the rules, and calls our attention to the fundamental commitments with which we order our lives. Morality tells us not to steal; one tempted to steal is morally bound not to steal, and one who habitually succumbs to that temptation is an immoral person. Ethics is primarily an academic discipline; it has to do with forms of reasoning rather than conduct; it reflects on, compares, and analyzes rules, and it traces the logical connections between fundamental principles and the moral commitments that guide us. Ethics derives the principle of respect for the property of others from which we further derive the rule, that we should not take the property of others without authorization; ethics describes the conditions under which the principle fails to apply or can be overridden. We can live moral lives without knowing ethics, but we cannot discuss the morality of our lives, defend it, put it into historical context, without the intellectual tools to do so. Ethics provides those tools.

Morality is a precondition for ethics, in two ways. First, morality, as a shorthand way of referring to all our transactions with each other, is the subject matter of ethics, just as our transactions with the physical world form the subject matter of science. Second, ethics is an activity, and any activity requires certain moral commitments of those who take part in it. We cannot do anything well without moral commitments to excellence, or anything for any length of time without the moral virtue of perseverance. The doing of ethics also has moral commitments appropriate to it. These commitments, to reason and to impartiality, or to the moral point of view, can rightly be demanded of any person who would take ethics seriously.

In any troubling case, we have first of all an obligation to think about it, to examine all the options available to us. We must not simply act on prejudice, or impulsively, just because we have the power to do so. We call this obligation the *commitment to reason*. The commitment to reason entails a willingness to subject one's moral judgments to critical scrutiny oneself, and to submit them for public scrutiny by others; further, to change those judgments and modify the commitments that led

to them, if they turn out (upon reflection) not to be the best available. This commitment rules out several approaches to moral decision making, including several versions of intuitionism and dogmatism.

*Intuitionism* is a refusal to engage in reasoning about moral judgment at all, on grounds that apprehension of moral truth is a simple perception, not open to critical analysis. *Dogmatism* is an insistence that all moral disagreements are resolved by some preferred set of rules or doctrines; that inside that set there is nothing that can be questioned, and that outside that set there is nothing of any moral worth. Second, we have an obligation to examine the options from an objective standpoint, a standpoint that everyone can adopt, without partiality. We want to take everyone who has a stake in the outcome (*stakeholders*, we will call them) into account. Since this consideration for other persons is the foundation of morality, we call this perspective *impartiality*, or as Kurt Baier called it in a book of that name, *the moral point of view*. The commitment to the moral point of view entails a willingness to give equal consideration to the rights, interests, and choices of all parties to the situation in question. This commitment to impartial judgment has one essential role in the study of ethics: once we have decided that all persons are to count equally in the calculations, that each is to count as one and as no more than one, we have the unit we need to evaluate the expected benefit and harm to come from the choices before us, to weigh the burdens placed and the rights honored. We also know that if anyone's wants, needs, votes, or choices are to be taken seriously and weighed in the final balance, then everyone's wants, etc., of that type must be weighed in equally; that is, if anyone is to be accorded respect and moral consideration, then all must be. We can derive most of the moral imperatives that we will be using from this single commitment.

By way of example, the familiar Golden Rule, that we ought to treat others as we would have them treat us, is a fine preliminary statement of those commitments. With regard to anything we plan to do that will affect others, we ought not just to go ahead without reflection; we ought to ask, How would we like it if someone did this to us? That consideration is perfectly adequate as a satisfaction of the moral commitments that precede ethics. In general it may be said, that if we will not agree to submit our decisions to reason, and to attempt to see the situation from the point of view of all who are caught up in it, it will be impossible for us to do ethics.

#### **4. Subjective Relativism as a Challenge to Ethics**

A superficially popular approach to ethics in America today is known as *subjective relativism*, as it happens, it violates both of those commitments, and has the effect of making ethics impossible. To make the commitments clearer, it may be worthwhile examining the errors of this simple dogma.

*Relativism* denotes any approach to ethics which holds that there are no absolute or unchanging moral principles, but that the rules that govern each situation are to be determined by their relation to something else: the customs or culture of the country, for instance, or the desires of the participants. *Subjectivism* insists that the sole source of knowledge or authority is in the perception of the individual. *Subjective relativism*, then, as a philosophical position, declares that each person is his own authority on the moral life and source of his own moral principles at any given time. (There is no obligation to stick with principles you may have adopted at another time.) On this reasoning, each person has the right to decide at any time on all matters of right and wrong. According to subjective relativism, what's right for you may *not* be right for me (and vice versa) because no one has any right to "impose morality" on anyone else. So there is really no point to arguing about decisions on matters of morals, or learning all about "justifying" moral judgments according to "reason," because there is no need to justify them any way at all. And that is why, subjective relativism concludes, there is no need to study ethics. Note that the position is both anti-reason (there is no need or way to subject moral judgment to reasonable criticism) and dogmatic (on the areas of morality that affect me, my opinions constitute an absolute and final authority, not to be questioned by others.) We will get nowhere with ethics as long as this view is taken seriously. But it *is* taken seriously in the world that lies outside our classrooms, and it is instructive to see why.

The usual justification of subjective relativism seems to follow this line of reasoning. First, we live under constitutional government—protected by a firm bill of rights. Freedom of speech is one of our fundamental beliefs. Freedom of speech entails freedom of conscience: each person has the right, indeed the obligation, to think out ethical and political issues and to come to reasoned conclusions on ethical and political matters. Further, each person has the right (within certain obvious limits) to express that opinion without anyone else having the right to object to, or anyway interfere with, such speech. Further, we live in a pluralistic democracy. We are a collection of very different cultures, but we are agreed on two basic principles: first, the innate dignity of each individual, and second, the right of each cultural community to maintain its identity, including its characteristic beliefs and teachings (as long as these are within the law). That means that we have a duty to treat all citizens with respect; we also have the duty to promote tolerance, or, a better word, acceptance, of all our citizens, for what they are and for the culture from which they come. Meanwhile, we consider it very bad manners to go around telling people that we think they are wrong, especially morally wrong. But if we have many different cultures, we are bound to have disagreements, including serious disagreements, about matters of morality.

All these points add up to respectful disagreement. In America, it is one of our proudest boasts that citizens can very seriously disagree with each other on matters of policy and moral right, and yet each will treat the other with respect, and no instrument or agent of the state will attempt to suppress either of them. So far, so good.

But it is psychologically a very short step, and a very wrong step, from respectful disagreement to *indifferentism* or subjective relativism. We make a very large mistake when we confuse a constitutionally guaranteed *right* with the moral category of *rightness*. There is no logical connection between what you have a right to do, and the right thing to do; but there is a psychological temptation to move from one to the other. Let's say that again: In logic, there is no connection between "You have the right to think what you like" and "Anything you happen to like to think is right." You have the right, after all, to contradict yourself; you have all the right in the world to think that  $2+2=5$ . That doesn't make it correct. But psychologically, once you have told me that no one has the right to correct me when I claim certain sorts of opinions, you certainly *seem* to have told me that any such opinions are right, or at least as right as opinions can be.

In mathematics, of course, there is one right answer. In ethics there may not be, since ethical concepts are logically independent (more on that presently), and the question of what weight to assign to them must often be decided on the configurations of a particular case. That is why there can be honest, and possibly irreconcilable, disagreement on matters of ethics. But there are always better and worse answers, answers more or less in conformity with those concepts. There are real moral values. Several of these real values, by the way, are evident in the argument in defense of subjective relativism, given above: the integrity of the human conscience, the sanctity of individual rights, the autonomy and dignity of the human person, the appreciation of cultural variety, and general good manners.

Subjective relativism is not self-contradictory as a position; it makes perfectly good sense to posit the individual as a moral authority in his own case in all instances. But the thesis is self-annihilating, for two reasons. First, it is impossible to defend it without ceasing to be a relativist (since it requires a defender to argue from a basis of absolute values like democracy and freedom). Second, it is impossible to maintain a consistently subjective-relativist position without admitting the legitimacy of the attempts to impose moral beliefs—especially successful attempts by the powerful to impose moral beliefs on the powerless—that the proponents of subjective relativism aimed particularly to oppose.

Suppose I claim to be a subjective relativist, with every right to have my own opinion respected on all matters of morality. Now, should you challenge me to defend subjective relativism, I would find that probably the only way (and certainly the most persuasive way) to do it would be to appeal to the right of every individual to freedom of thought. I might say, "Each person has a right to reflect on moral matters and reach his or her own conclusions" or "Human dignity requires respect for individual moral conclusions," summed up as "No one has any right to impose his or her values on me." Now, as it happens, respect for the individual and for individual liberty, along with cultural diversity, are values that you (as a non-relativist) are probably perfectly content to accept as almost absolute and certainly permanent. Suppose you point that out to me, and ask me, having used such values from the outset, if I am now willing to grant their validity. If I say I am, then we have reached

agreement, agreement on everlasting principles, and I am no relativist. If I choose to be a consistent relativist, of course, then I have to renounce those and all other permanent moral principles. But then I have no right to object to your attempts, or the Moral Majority's, or Hitler's, to impose values on me. If imposing values is one of the things you like to do, just because it really feels good and right to you to impose values on others, then, according to subjective relativism, it's obviously right, for you, to impose values on me, and I have no grounds for protest. So this relativism, morality relativized to the individual, fails on either count. If I try to defend it on account of the values it defends, I cease to be a relativist, and if I try to be a consistent relativist, I lose all purchase on the field of ethics, including the right to resist the tyrant's imposition of values, which was the purpose for which I first advanced subjective relativism. To defend the individualism that the position sets out to exemplify, we must recover the commitments to reason, and to impartial consideration, with which we started.

With those commitments in place, the discipline of ethics is possible; the next section covers the principles and the decision procedures that give substance to the field.

## **Part II: Decision Procedures for Ethics**

Prefatory note: We will be dealing in this section with three decision procedures, checklists summarized by acronyms, for tangled cases of ethical decision making. We should point out that in addition to ethical dilemmas of varying degrees of complexity, there are moral dilemmas properly so called, cases where we know perfectly well what is right but for various reasons we do not want to do it. Consider the following case:

### **The Impaired Driver**

You have stayed about an hour longer than you intended to at a very pleasant party with your old college friends. While you were getting your law degree and starting practice, one of them made it big on Wall Street. He hosted the party in his huge Riverside Drive apartment. All the old college ties were there—great memories, beer, booze, marijuana . . . hadn't seen *that* in awhile. Good stuff, too. Realizing you're late, you race to the parking garage, elevator to the third floor, hop in your SUV, and tear around the turn toward the exit. Smash! Car parked in just the wrong place. You hit it dead center. You back up, get out, note that there is extensive damage to the other car—both doors on the driver's side badly dented—but none to yours. What should you do?

You know damn well what to do. There's clearly damage, lots of it, so you have to take out your cell phone, call the police, and wait there till they come. Watching you propping yourself up against your SUV, they'll insist on the inconvenience of a breathalyzer test. When they get the results of that, they'll give you a chauffeured ride to the precinct station and insist further on a urine test. When they get the results of *that*, you may get to know the folks in the precinct very well before you see the sky again. You may very well—probably will—lose your license to operate a motor vehicle. The fines will be substantial; you may lose your SUV. You may even go to jail. The damage to your reputation and to your position in your law practice will probably be irreparable; depending on the state, they may yank your license to practice law. That's a lot to think about. Meanwhile, you are the only occupant of this parking garage at this hour.

What to do, indeed. The standard ethicist's injunction, "Do the right thing," may entail a terrible cost, and it is the agent, not the ethicist, who has to absorb it. But this is not an ethical dilemma. (

It might become so if it were not you, but one of your children, involved in the accident.) Throughout the consideration of ethics, below, we will keep this in mind as the kind of dilemma we are *not* talking about.

## **1. ADAPT: An Approach to Moral Decision Making**

People naturally want to do good and avoid evil. For the most part, we limit our attention to morality to the observance of certain interpersonal rules—of courtesy, helpfulness, and respect for privacy, for instance—that make daily life more livable. But sometimes a condition comes to light that interrupts, imposes itself upon, daily life. Consider the following case:

### **Starving Children**

Stranded in Ethiopia during a protracted civil war, a French camera crew began filming the events and conditions in a nearby refugee camp. Its inhabitants had fled from the fighting between the Ethiopian central government and the province of Eritrea, where the war had disrupted all agriculture and commerce, and cut off the food supply. There was no food for them in the camps. They were dying, starving to death. The crew filmed babies with the thinned reddish hair, dull eyes, and distended bellies of starvation; filmed parents, helpless, trying to comfort their dying children; filmed the burial parties consigning their bodies to the earth. Then they sent the film back to Europe, and excerpts started to show up on late night television.

World reaction was immediate. Whatever we thought of Ethiopia, Africa, or foreign affairs in general, we knew that those children had to be fed, immediately.

How did we know? We knew that human life is precious and that death therefore is wrong, especially for children; that human pain is bad, and that starvation hurts. We recognize, therefore, imperatives to save lives that are threatened and relieve human pain wherever it occurs. These imperatives are qualified where the sufferers seem to have brought the suffering on themselves, for then they are seen somehow to deserve to suffer; where a person is faced with death following conviction for a capital crime, we may suspend completely our intuitive imperative to save life. But children cannot have committed crimes or be in any way responsible for that war and the conditions that follow from it. They are innocent sufferers and therefore deserve all the help we can give them.

Accordingly, we looked for ways to feed the children. In addition to the usual routes of charitable aid, churches, etc., many of the world's popular music stars were brought together by an enterprising producer to hold a huge fundraiser, called Live Aid, for the benefit of the starving children. An enormous amount of money was raised and directed toward famine-ridden Africa. The strength of the world's reaction to that famine, incidentally, was a major factor in the later United Nations' decision to send troops into neighboring Somalia to protect food-distribution channels, and the United States' decision to join that effort.

Was it a good idea? Not long after the big concert, questions were raised about the effectiveness of that and all such efforts. Was the money well spent? When food and supplies were bought, were they transported to the famine-stricken area as efficiently as possible? Were they distributed successfully to hungry people? In war-torn, gang-ridden countries, where no central government can maintain order, was all that food actually getting to the people who needed it? Especially after the warlord battles in Somalia started going sour, there was a strong reaction against such humanitarian efforts in the absence of strong local support.

The case of the starving children, as we may call the above, and all similar cases, is typical of the kind of moral adaptation that punctuates the normal routine of moral life. The sequence is characteristic:

1. Some condition is brought to light, some situation or array of facts. This condition captures our attention, alerts us to something requiring our concern that stands out from the background noise of our lives.
2. That condition is discussed, the information is disseminated through the community, a community dialogue is conducted where public opinion is actually formed. That "community," incidentally, may be as small as a family or as large, as in this case, as the whole world.
3. The discussion incorporates the ordinary moral assumptions that we use to guide our lives, without conscious thinking about them. We do not have to reason out what we ought to do in most situations; most of the moral work is already done.
4. Proposals for action are put forward and policies adopted. Decisions are made, implementing the imperatives in a way appropriate to the situation that caught our attention.
5. The results of the action are tested against the results expected. The test results are fed back into the data from the initial situation: Was the action taken in fact appropriate? Were the imperatives successfully implemented? Or should we go back to the drawing board and introduce new proposals for action or policy?

Note: the decision process, on review, does not return to the starting point, but only asks after the effectiveness of the policy for action—we have agreed about the ends of the proposed action, and now we seek the most effective means.

From the above, we can put together a normal moral reasoning procedure, easily remembered in the acronym ADAPT:

**A**ttention

**D**ialogue

**A**ssumptions

**P**roposals

**T**est



(Note: allow me to apologize right now for this and subsequent acronymic tricks of this sort. They give the appearance of slickness, I know, but they really do help us to remember.) These normal procedures are used whenever changes in our world require new policies in order to continue normal life in accordance with our ordinary commitments.

Now consider the following two cases:

### **The Physician's Dilemma**

You are a physician called in to confer with the family of a terminally ill man in a nursing home. He is conscious, in some discomfort, and confused much of the time. He will not get much better, but his heart is strong, and he is not expected to die soon. His children (his wife is dead) are distressed at the length of time it will take him to die. They would like you to inject a fatal dose of morphine to hasten death on the grounds that his estate is being eaten up by the medical and nursing-home costs.

### **The Production Manager's Dilemma**

You are the production manager of a pharmaceutical company under a lot of competitive pressure. Your boss suggests that you could double productivity if you filled half the penicillin ampules with saline solution instead of penicillin. To be sure, the patients wouldn't get the penicillin prescribed, but most penicillin prescriptions are unnecessary anyway, so probably it wouldn't do anyone any harm.

In practice, these two dilemmas would probably not call forth any high-level moral reasoning. They are for you, we may suppose, new cases; but the assumptions that have always worked for you will work here. They don't quite resolve to the easy moral dilemma of the "Impaired Driver" category, but they're not far away. Physicians do not kill their patients; children do not kill their parents to accelerate the inheritance; you do not deliberately adulterate product runs or market trash under a product's label. The answer is no; if asked for reasons, the normal ADAPT-level reasons will do. Try, for instance, "That simply is not done or is not acceptable." More personally, you might say, "I couldn't sleep nights" or "I couldn't look at myself in the mirror when I shave tomorrow, if I did anything like that." More spiritually, you might try "My religion forbids me even to consider anything like that" or more ominously "I don't look good in an orange jump suit." The moral rules

that back these up are clear to all: practice medicine only for the benefit of the patient; never tell lies, especially to customers.

Principles and reasoning based on consensus morality are not always in such good shape. Recall the Third Reich and the fact that in Germany in Hitler's time, it was accepted practice, and in accord with the religious intuitions of the leaders of the country, and definitely in accordance with law, to kill Jews wherever you found them (in an orderly manner, of course). That is why we have to know ethics—to know when the principles and reasoning that we ordinarily use need to be reexamined, criticized, and maybe changed, to know, in short, when ADAPT is not sufficient.

## **2. ORDER: From Morals to Ethics**

A problem of moral or only fundamental ethical concern—like the impaired driver's desire not to confront the cops, the heirs' desire to dispatch their rich father, the boss's desire to make a quick profit, or the starvation of the African children—is not the same as an ethical dilemma. In a *moral* problem, we know what is right, but we may be puzzled about the right way to say no or the best means to obtain the best outcome. (Additionally, we may be tempted to preserve our level of comfort by doing nothing at all!) In an *ethical* dilemma, we really do not know what is the right thing to do. Consider the following case:

### **What to Do with Mother?**

Peter and Dora Vlasovic, 51 and 43 years old, respectively, are at a loss as to what to do about Dora's 67-year-old mother, who lives with them. She is suffering from Alzheimer's disease, and while her periods of confusion are not yet continual, she is becoming too unreliable to be left alone. Both husband and wife work outside the house, and cannot stay with mother during the day. They started looking into appropriate nursing homes, but Mother, who was a schoolteacher and fiercely independent all her life, has put her foot down: no homes. "Look, you know how valuable my mind and my dignity have been to me," she finally said to them. "I simply cannot endure the thought of ending my days tied in a chair drooling on my lap. See that pillow on my bed? When I can't function any more, my life is over, as far as I'm concerned, and I want you just to put that pillow over my face and sit on it for about twenty minutes. Just call the doctor in the morning and say I died in my sleep. I won't contradict you. No homes."

Meanwhile, the couple has found out that the cost of these homes is well beyond their means, and that Mother would be left on Medicaid after her assets were gone. Their own assets are not large, and they would be totally responsible for the costs if they hired nurses to come to the house to take care of her. They also have to think about their teenage children, who will need money for college and probably financial help as young adults after their education is finished.

"How did people used to handle this type of situation before there were nursing homes?" Dora had once asked her doctor. "Easy," he had replied. "People didn't used to live this long. And when they did, in this state, with no other choice in the matter, people simply left them home alone, tied down or roaming wherever they wanted to roam." That did sound easy to Dora, but on balance, worse than the other alternatives. They have the house to think of, too, and leaving mother alone all day sounds like playing Russian roulette with house and Mother both.

But their first concern is for Mother. The life projected for her does not really seem to be worth living, the more they think about it. Putting a pillow over her face is a dreadful thought, of course, but it is what Mother wants, and if they can't face the pillow, the Hemlock Society advertises many more humane ways to bring life to an end. Should they go the pillow route? Should they explore the "rational suicide" alternatives with Mother? Or should they insist on the home (or put her there anyway after she is no longer organized enough to resist)? Or should they devastate their own financial resources with hired nurses? Are there other alternatives?

In our attempts to reach the good or just solution in this case, what approach do we take? Typically, if we are (personally) in the middle of cases like this, we are strongly tempted to grasp at whatever "solution" appeals to us at the moment: that is, whatever solution accords with our previous prejudices and tendencies. But one of the major objectives of the teaching of ethics is to draw us beyond that subjective stance to one where all rational persons could agree that *the* right course or *a* right course is being pursued. That means that we must reach a course of action that is objectively right, or at least open for public scrutiny.

What would constitute an orderly approach to such problems? First, as participants and decision makers, we should organize our options in the situation—what alternatives are really open to us? And note the probable outcomes of each. What, in this situation, is possible and reasonable for us to do? And what will be the likely results of each of those choices? Which of the outcomes on the list are totally unacceptable? They should be eliminated and the rest left for further consideration at a

later stage. In this step, we are reasoning *teleologically* or *consequentially* (more on these terms below), looking to the means that will produce the most desirable ends.

The Vlasovics, in this case, have these options:

1. Leaving Mother alone—and risking her and the house. That's not acceptable, save for very short periods of time.
2. Bringing in nurses by the day. That will turn out to be very expensive.
3. Peter or Dora quitting whatever else they're doing and just taking care of Mother. That would lower the family income, for all purposes, substantially, and no one wants either the burdensome task or the loss of income.
4. Putting that pillow over her face. The thought makes everyone queasy, and they really don't want to go to jail.
5. Putting Mother in a home. She will complain, but she will be safe, and the rest of the family can continue their own lives. This may also be very expensive, until they can establish Mother's eligibility for Medicaid.

Before they act, however, they must review the rights of the various participants, because legally protected rights, in our system, trump or override considerations of right outcome. We must also respect moral (usually legally enforced) rules that are held to be valid regardless of the consequences. That is an important point: in this step we are reasoning *deontologically* or *non-consequentially*; that which violates a rule is prohibited by that rule no matter what consequences flow from doing or omitting the act.

Two of the most powerful rights and rules confront us in this situation:

1. The right of the individual to refuse the well-meaning ministrations for his or her health and safety imposed by others without consent. Mother does not want to go into a home, and that should settle that. Medicaid has nothing to do with it.
2. The option preferred by Mother herself, the pillow placed over her face, violates a stringent rule against voluntary homicide, "Thou shalt do no murder." It is not our purpose at this point to enter the emotional debate about the permissibility of assisted suicide or euthanasia, as requested by a competent patient. At the time that the pillow route would have to be followed, Mother would not be competent to request anything of the sort, and placing pillows over faces does not qualify as physician-assisted euthanasia. The act would be homicide, in fact, murder in the first degree, and there are very good reasons why our society forbids it. If Pete and Dora take this option, they will have violated that rule.

Meanwhile, there are other rights to be taken into account. The minor children have an absolute right to their parents' support, for maintenance (food and shelter), affection (yes, that's a right), and provision of education. To what extent will care for Mother have an impact on them?

When we understand our options, and our rights and the rules are factored in, we should be able to reach a decision, and alleviate the problem for them moment. The situation will not wait, after all; an initial decision must be taken immediately. For the moment, Mother is rational, and peaceable enough to be kept at home with her family; also, during her periods of lucidity, she enjoys being with them and they enjoy her. Perhaps a local day-care program can take her during school hours, and the teenagers can switch off afternoons to be with her before Pete and Dora come home from work. Nurses can be hired in occasionally to give everyone a break. The solution can't last forever. Will it work at all? Note that the family *must* act, with very incomplete information. That imperative is typical of such dilemmas. Pete and Dora decide to try it. And then, in a few days, weeks, or months, they will have to evaluate the effects of the decision. The decision and the action do not, as Macbeth pointed out, trammel up the consequences. The world continues. We need to follow up, to find out what results our decisions have had. The Vlasovics, in this situation, will not be able to avoid the results; Mother is still in the house with them. How much are the teenagers losing from their sacrifice of their afternoons? The answer to that will depend very much on the peculiarities of this family's situation. How is Mother responding to the new program? That depends very much on the peculiarities of Mother. The trouble with ethical dilemmas, as opposed to ethics as a discipline, is that the real solution is empirical, day to day, trial and error.

Finally, we have to review the situation, reconsider the decision, with an eye toward revision. Nothing in human affairs is ever set in stone. We make our decisions, usually, for today, knowing

that the decision will probably produce a new situation with its own new dilemmas, and we will have to take on the whole problem again. The Vlasovics' decision to keep Mother home without round-the-clock nurses, bringing her to day care as often as they can, has saved them money, but after awhile it will not work any more: most day-care programs cut off when the disease renders the patient violent or incontinent, and new arrangements will have to be made. But by then, there will be a new situation, with a different set of options, and possibly, a revised set of rights. The children, for instance, will eventually leave home and confront their parents with a completely different set of demands. The federal government, for another instance, changes its mind about what programs to fund for the elderly; these will have to be taken into account in future deliberations.

This decision procedure, like many others in the field of ethics, covers all necessary bases for rational decisions. I prefer it to the others only because it builds in, as others do not, the recognition that nothing is ever decided—not once for all. The temptation to come to resolution, to solve something forever, is enormous. Resist it. Situations change, and the more flexible our decision procedure, the better suited it is to the messy world of human conduct. Like ADAPT, this decision procedure for ethical dilemmas can be remembered easily by its acronym, ORDER:

**O**ptions and outcomes

**R**ights and rules

**D**etermination, decision

**E**valuation of effects

**R**evue, reconsideration

While we're at getting down procedures that are easy to remember, we may take note of three preliminary steps that have to be taken before we can put things in ORDER:

1. We have to define the dilemma that we are facing. What conflicts make the situation difficult to deal with? In the Vlasovics' case, the dilemma is painfully evident: how to ensure Mother's and the family's welfare while respecting Mother's choices and the most serious rules of our society, while allocating the family's not abundant resources justly among the generations that call upon them.
2. We have to conduct empirical inquiries as appropriate, discover the facts, get as much information as we can. What day-care programs are available? What about support groups,

for patients and caregivers alike, at the local hospital? Can we get her church involved? How fast is Mother's disease progressing? What should we know about advance directives, living wills, therapies? Our options, once the decision procedure is engaged, will depend upon what is available.

3. We have to sort out the stakeholders. We mentioned above that it is important to know whose interests are to be taken into account in making any decision. Part of the work of sorting out the stakeholders is to make sure that all whose interests are really affected are taken into account. Another part of the work is to see that *non*-stakeholders who seek to attach themselves to a decision—the nosy neighbors, for instance, who don't like the cars of the visiting nurses parked (legally) on the street—are excluded from influence on the decision. Of course, that means that we may not take *their* happiness—the satisfaction they derive from running other peoples' lives—into account. The rights of the family take precedence over the preferences of their neighbors: rights trump likes and dislikes. This is why mere appeals to "the greatest happiness of the greatest number" are not always sufficient to decide ethical dilemmas. On the same principle, more commonly, we do not allow neighborhoods to exclude persons of an ethnic background different from that of the current residents, even though it would make all the neighbors overwhelmingly happy to be able to do that. The right of the minority family to live where they choose trumps the preferences of the neighbors not to let minorities live there. Of course, the neighbors *are* stakeholders to some extent—they certainly have a right to be protected from Mother's wandering, should it come to that. The Anglo-Saxon common law, of which we are the inheritors, has spent centuries working out the details of the rights that people have vis-à-vis the neighbors, and we must be conscious of the whole corpus of that tradition.

So our first three determinations, in any ethical decision process, are of the definition, the factual information, and the stakeholders. If it makes it any easier to remember, think of these steps as a *DIS* preface to the *ORDER* decision procedure:

**D**efinition of the dilemma

**I**nquiry to obtain all necessary information

**S**orting out the stakeholders

This leaves us with a procedure whose steps are easy to remember, but leaves the field of ethics in *DISORDER*! Insofar as this *DISORDER*-ed formula helps us to remember the essential messiness and anguish of ethical dilemmas, that serves our purposes very well.

Let's revisit the two dilemmas from the last section, and add some complications:

### **The Physician's Dilemma (redux)**

But Dad is unconscious, and expected to remain so. He apparently has no sense or feeling, is unable to think or communicate. He may be in some pain sometimes, however, and the children, backed up by the court-appointed conservator, request that he be put on a morphine drip "to make sure he doesn't suffer at all."

### **The Production Manager's Dilemma (redux)**

But your boss suggests only that you speed up the process from penicillin culture to filling the ampules, raising a 2 percent probability that the drug dispensed will not be up to strength. That doesn't sound good; but there is no evidence that such a change will hurt anyone at all. Meanwhile, the extra income generated will pay off some serious short-term debt and put the company in a better position to carry on its research. The quality-control manager, who would prohibit this change on general principles, has just retired, and the company is "searching" for another, so you have a probable three-week window during which you can get the new standard drug on the market.

In these cases, the need for higher-level reasoning is evident. Terminally ill patients should certainly be kept comfortable; there is nothing to be gained from prolonging this man's life, but a heavy dose of morphine? A balancing act begins, weighing the legitimate, if distasteful, interests of the heirs against the duties associated with the practice of medicine, especially the duty to protect one's patients, especially against this sort of proposal. Ultimately the principle that prevails will be an intermediate one, grounded in the practice of the profession: drugs are there to heal, not to kill, and the patient, probably unable to feel anything and certainly defenseless, may not be subjected to the needs and desires of others.

In the case of the production manager, the harm caused by the acceleration of the manufacturing process is not at all certain—even if penicillin was never prescribed unless it was needed, the mix of batches would ensure that no patient actually got perceptibly less than the proper dose. Here an appeal to a middle-level principle is necessary. The manager must ask himself not "What are the consequences of this action?" but "What would happen if everyone did this?" What would be the



general consequences of a rule that permitted or required this action? (That formulation of a middle-level principle is found, by the way, in the major works on ethics of Immanuel Kant, John Stuart Mill, and John Rawls. See the Mill excerpt in the Ethics Reader.) The Golden Rule "Do unto others as you would have them do unto you" is a similar principle. Research is important, and debt-retiring is surely good, but for now they may have to wait for alternative sources of funding.

### **3. DEAL: Carrying on Without Resolution**

We may note that we have been presupposing throughout that the parties to the dilemmas agree on what the problem is and that it must be solved. In the messy real world of human life, these presuppositions do not always hold. Sometimes problems resist solutions because the interests or moral or religious commitments of the stakeholders are resolutely opposed, because the parties simply cannot understand each other, or for some other reason. Consider the following case:

#### **Abortion Clinic**

Michael and Maureen O'Connell are college-educated young professionals. Mike is a physician with a practice in Brooklyn and Maureen teaches in the nearby elementary school. They live with their five children (ages 4 to 13) on a quiet block in Queens where Maureen was brought up, just two blocks from St. Luke's Roman Catholic Church, which they all attend. They are staunch Catholics, as is most of the neighborhood, and they uphold all the public teachings of the church—including the prohibition of the use of contraceptives, the strict rules regarding any sexual relationship outside of marriage, and, of course, the absolute prohibition of induced abortion.

The neighborhood is mixed residential and commercial, so they are not surprised to find that a storefront three doors from their house is being renovated for use by a new tenant. *Surprise* does not describe their reaction, however, when finally the medical equipment is moved in and the sign is hung in the window: "Pregnancy Termination: Clean, Quiet, and Confidential." They're living virtually next door to an abortion clinic!

The neighbors want the clinic *out*: they all—men, women, and children—picket, obstruct patients and their companions, shout "Abortion is Murder!" sing hymns, pray loudly, threaten individual doctors and nurses, court the press, and plan a lawsuit. The clinic operators, on the other hand, led by two gynecologists, Dr. Alan Bennett and Dr. Rita

Holmes, want the clinic to stay where it is and run successfully. They know that there is a good market for this service, they know that the women, pregnant against their will, will often resort to coat hangers and back-alley butchers to get abortions if safe abortions are not available legally, and they know they have the law on their side. They too spend time explaining their side to the media, and they demand better police protection.

The neighbors bring the lawsuit. They lose. The clinic is entirely within its rights. The police are ordered to protect the clinic and its workers from violence, a job that they detest. Many of them are from the Queens neighborhoods that produced Mike and Maureen, and attend St. Luke's or some church of similar persuasions.

At this point the mayor becomes involved. The common wisdom has it that the elected officials lose three ways in these conflicts. First, they lose the votes of that and all similar neighborhoods, for "allowing the murder of infants a few yards from where our children play." Second, they lose the votes of liberals for not putting a more forceful stop to the demonstrations. Third, they lose the respect of the police department and those interested in law enforcement for diverting resources away from drugs and violent crime. Meanwhile the controversy itself, playing out through the newspapers, presents a very unfavorable view of the present administration. So the mayor wants peace among the parties, peace so quiet that the subject will disappear from the papers, but more importantly, since this is an ongoing issue, peace that will last. How can he, and the city, obtain this peace?

First, can he persuade the neighbors that the business will do them no harm, or the clinic managers to quietly move their clinic elsewhere? We do not usually honor neighborhood objections to a new business in their backyards; as above, not many neighborhood preferences are given enough weight to override the individual's strong interest and *prima facie* right to live where he wants and work wherever the zoning laws will permit his business establishment. The neighbors should be used to that. But there may be many reasons, some of them trivial, for locating a business one place rather than another. Maybe the clinic won't mind moving; the mayor's office could help with the moving expenses. Like any good politician, his first thought is to make a deal.

The mayor chooses Mike and Maureen, as knowledgeable citizens and leaders of the demonstrations, and the physicians, Alan and Rita, as principals in the clinic, to engage in discussions of the issue. There are two reasons for this move. First, they may be able to come to some accommodation that will satisfy both sides permanently (that would have been the purpose of discussion in the last section). But the politician also knows that dialogue is good for its own sake: as Winston Churchill put it, "As long as you 'jaw, jaw' you

can't 'war, war.'" In the process of talking, the parties become less hostile and hateful with each other.

No significant accommodation or compromise will work, as it turns out. It doesn't take the mayor long to learn the following:

1. Mike and Maureen and all their neighbors strongly believe that the human life of a baby begins at conception, and their belief is informed by medical and scientific knowledge (regarding the implantation of the genetic code, for instance) and firmly and rationally held, and that consequently, and quite logically, they really feel that each and every induced abortion is the murder of an infant. They feel that they are living next door to a Nazi death camp and slave market rolled into one, and that they are bound by religious and moral obligations to speak up and protest the slaughter. They are especially horrified at the prospect of raising their children with this clinic next door, having to tell them what it is about, effectually rubbing their noses not only in state-approved slaughter but in the daily consequences of promiscuous sexual activity.
2. Alan and Rita of the physicians' group, the Women's Health Cooperative, that bought the building and set up the clinic, know very well what they are doing and plan to do. They are very much aware of the sexual behavior (if not the sexual ideals) of Mike and Maureen's neighborhood. One half of their first two months' practice were young, unmarried, white, terrified, Roman Catholic girls, mostly from the neighborhood. They feel very strongly not only that they are providing a desired service, but also that they are saving the futures of these girls, permitting them to finish their education, sparing their parents the shame, and the taxpayers the expense, of dealing with the illegitimate offspring, and most likely saving the child from abuse. In the remainder of their practice, mostly older working women of all ethnic backgrounds, they see themselves as permitting adults to carry on their work lives, plan their families and ensure proper provision and education for their children. In both cases, they are an available alternative to the astronomical rates of the offshore clinics, the back-alley incompetents, and the terribly dangerous self-induced abortion. Their rates are low; they are not in this for the money, but for the public service, and they belong right where they are.

When pushed to the wall, the mayor notices, the two sides argue very differently, apparently reflecting a difference in the way they see the world. Mike and Maureen cite moral rules and rights—the natural law, the Ten Commandments, the right to life, which hold regardless of situation or consequence. In short, they are reasoning deontologically or non-consequentially. Alan and Rita, on the other hand, call attention to the pain felt by the women contemplating unwanted pregnancy, the

negative effects on employment, education and general life prospects of the woman, from bearing unwanted children, and the welfare costs and other negative outcomes from denying abortions. In short, they are reasoning teleologically or consequentially. While there are also deontological pro-choice arguments and teleological pro-life arguments, in general Alan and Rita are focused on the problems they are solving, while Mike and Maureen are focused on the nature of the act itself, and there is not likely to be any resolution between the two sides.

So the mayor proposes an experiment in peacemaking. One of the features of the clinic that troubles the neighborhood most is the mingling of the clinic patients and the children as they depart for or return from school. Could the clinic open at 9:30, a bit later than the morning rush, and take a late lunch break at 2:45, when the children are returning home? In return, the demonstrators will not picket weekdays between opening and that break.

That concession—given that each side views the other's work as fundamentally criminal—is strictly speaking unethical for both sides: any concession is incompatible with the moral beliefs that they have set forth and clearly defended.

After a week or so the mayor's office does an assessment of how the experiment is working. The neighborhood seems quieter, and the newspapers have backed off. Good.

So two of his best mediators bring the four principals back together to attempt further progress. Will the clinic accede to even shorter hours in return for complete removal of the pickets? A few more grudging concessions are obtained; since the prospects for further progress are not good, and the situation seems stable as it is, the mediators back away and let the two parties live with the agreements reached so far.

By continuing the dialogue, even more than joining it to begin with—when each party could have claimed a genuine hope of converting the other—the two sides have acknowledged each other's legitimacy. While there is no possibility of coming to agree with the other's moral stand, there is no hope of destroying the other. Neither one is going away. Distasteful as it is, each must live with the other in peace, even while retaining the conviction that what the other is doing is fundamentally wrong, immoral. This stage of the moral life, a necessity only in pluralistic societies like our own, could be called, possibly, *live and let live*, or *leave people alone*.

Change in the neighborhood, or the practice, could upset the unhappy peace that has descended; others must be prepared to step in, should violence break out again, to restart the dialogue. The peace process that we have just set forth is called *DEAL*:

**D**ialogue

**E**xperiment

**A**ssessment

**L**egitimacy

Like ORDER above, DEAL is fundamentally an iterative process, continually restarting in slightly different conditions.

Let's conclude the cases we started above:

### **The Physician's Dilemma (conclusion)**

Dad is unconscious as before, not expected to wake in this life and occasionally in some discomfort. But this time the children (two of them, twins) do not agree as to what to do about him. One of the twins wants everything done, including surgery if necessary, to "save Daddy's life," and threatens to sue if treatment is "negligently" withheld. The other wants that morphine drip to "ease the pain" and incidentally to shorten Dad's life, and has brought in a lawyer to argue against any "futile" interventions. No document signals which of the twins is to have the power to decide.

## The Production Manager's Dilemma (conclusion)

Modified as above, the pressures are worse: the company will have to close the plant, ending 10,000 jobs and the region's only source of antibiotics, unless productivity takes a marked turn for the better in the next quarter. It is possible that the weakened antibiotic could cause some harm, at least in some extended sickness, but it is not likely to cause death. On the other hand, it is entirely predictable that if the layoff takes place, dysfunction, sickness and death—divorce, alcoholism, mental illness, diffuse chronic illnesses, suicide—will claim a solid percentage of those unemployed 10,000. An undetermined number of patients *might* suffer if they cannot get their antibiotics on time. The solution to the manager's dilemma is not immediately clear, and intermediate principles do not really solve the problem (for a thought experiment, try applying the Golden Rule to the case, letting first the workers and then the customers fill the role of others). Here the balance must be struck between the obligations to shareholders, workers, local community, and others with a stake in the continuation of the business enterprise, and obligations to customers, reputation, society at large, and others with a stake in the integrity of the procedures of that enterprise. (For instance, the public surely must be notified about the change in standard—but how?) The principles of concern for the welfare of those affected by a decision—primarily the employees, in this case—and of justice, in following the rules applicable to all no matter what the consequences, are logically independent, and there is no safe formula for deciding which shall take priority in a given case.

Given the nature of the situations to which it is applied, DEAL does not really yield a conclusion that we can all accept as ethical. (For another real-life application of this "unethical" reasoning, try the dispute between Israelis and the Palestinian Arabs.) But DEAL has much to recommend it from the ethical point of view. Without further elaboration at this point, we can point out that it accomplishes three tasks, all of which are required by general ethical imperatives:

1. It promotes the maximum social welfare obtainable, by preserving the peace and preventing violence. Whatever may divide the physicians, the antiabortion activists, and the uninvolved neighbors—and there is much that divides them—they share a common interest in the preservation of life, limb, and property, and the grudging accommodation reached serves to protect those shared interests.
2. It enforces justice, by promoting an even-handed compromise. Both sides find the state of peace with the other, especially with regard to the concessions they had to make to obtain it, really repugnant. But the fact that they both had to make concessions, and that they are

required to stick to the deal they made, makes it fair, even though the fairness may be much more evident to a dispassionate outsider than it is to the parties.

3. It insists on the dignity, worth, and conscience of every individual, worthy of respect even from those who are utterly convinced he or she is wrong. Neither group has the right to destroy the other, keep it from the public space or public attention, or relegate it to a slavish state or second-class citizenship. It affirms, therefore, freedom of conscience and the right and duty of every human being to develop and inform that conscience and to discern, articulate, and defend a moral position on serious matters, especially matters of life and death.

Those are not small accomplishments. Nor are those principles arbitrary. But in this world where evil cannot always be redeemed, we must keep open the possibility that there may be conditions so evil that the principles must be set aside to confront the evil. Presumably, the death camps in the Third Reich presented such conditions.

In the next section, we turn our attention to the fundamental principles that govern ethics.

### **Part III: The Principles of Ethics**

Ethics is about human beings. The values that we have appealed to quite uncritically in the preceding stories—values of food for the hungry, of fair treatment, of neighborhood peace and respect for rights—are not arbitrary or merely conventional. We can discover their foundations in the life of the human being, and derive them from fundamental aspects of human nature. The human being and human nature are endlessly complex, of course; yet the human being is universally recognizable to others of the species, and their preferences are very generally predictable. So if we avoid the complexities of the outer limits of human potentiality, it should be possible to say enough about the fundamentals of human morality just from the easily discoverable truths about the human being. In the course of the discussion, we will make some initial attempts to foreshadow the major ethical orientations which philosophers have, through our history, adopted, as reflective of these most basic moral principles.

Then what are human beings about? Given the normative premise, that moral principles must be appropriate to human life if they are to govern human life, three basic, simple, readily observable facts about human beings determine the structure of our moral obligations:

## **1. People Are Embodied**

People are animals. They have bodies. They are matter; they exist in time and space and are subject to physical laws. These bodies are organic processes, requiring regular sustenance internally and suffering all manner of slings and arrows of violent change externally. They experience pain, deprivation, and danger. They are prone to periodic failure unpredictably and to ultimate failure inevitably; they are mortal.

Then people have needs that must be satisfied if they are to survive. They need at least food, water, and protection from the elements and natural enemies. That means that they must control the physical environment to make from it the means to those ends. Failure to do so will lead quickly to pain and suffering. These are inevitable in any case; in this way we are reminded of our mortality.

The first and immediate implication for ethics is that if we have any reason to care about human beings, then the relief of that suffering and the satisfaction of those needs should be our first concern. In philosophical terms, human need and vulnerability to harm give rise to duties of compassion (for suffering), non-maleficence (avoiding harm), and more generally, beneficence (working to satisfy human need, maximize human happiness, optimize human interests in all respects).

In general, the moral reasoning that takes help and harm to human beings as the primary determinant of the rightness of action is called *utilitarianism*, following John Stuart Mill's description of that reasoning (see Mill, *Utilitarianism*, 1859).

## **2. People Are Social**

Social animals regularly live in large groups of their own kind (i.e., in groups containing a population of adult males that ranges from a few to a lot). Individuals raised apart from such groups exhibit behavior that is abnormal for the individual and the species. Whatever problems, therefore, that people have with their physical environment, they will have to solve in groups. They will soon



discover that this necessity produces a new set of problems; they must cope with a social environment as well as the physical one. That social environment produces two further needs: for a social structure to coordinate social efforts and for a means of communication adequate to the complex task of such coordination. The need for communication is fulfilled by the evolution of language.

The implication for ethics is that, given that there are so many of us, we must take account of each other in all our actions. We come saddled by nature with obligations, to the group in general and to other members of the group in particular, that we cannot escape or evade. Normal people (not psychopaths) seem to know this without being told. By nature human beings try, most of the time, to do good and avoid evil, in advance of knowing just what counts as good or evil. The attempt to do good, to others as to oneself, involves the adoption of a moral point of view, or a stance of impartiality with regard to the distribution of benefits and burdens. Fairness or justice demands that we subject our actions to rule, and that the rule be the same for all who are similarly situated. What will make an act right, ultimately, is not just that it serves individual happiness but that it serves the whole community; people are equal, and since equality is itself a value (derived from "equal dignity") the society must deal with them equally unless good reason is given for differential treatment.

A philosopher who has made justice central to his theory of society is John Rawls. Rawls points out that the duty of justice may require us to favor just those persons who would *not* succeed in getting their claims recognized if personal power, or even majority benefit, were to determine the distribution (see Rawls, *A Theory of Justice*, 1970).

### 3. People Are Rational

Normal adult human beings are able to consider abstract concepts, use language, and think in terms of categories, classes, and rules. Since Immanuel Kant, we have recognized three categories of thought that characterize the way human beings deal with the objects and events of the world. These are *time* (When did something happen? How long did it take?); *space* (Where is an object? How far away is it? location, bulk, distance); and *causation* (How did something happen? What brought it about? antecedents, agencies, powers, consequences). *Rationality* in our ordinary discourse means a good deal more than the basic ability to think in terms of when, where, and how. Ordinarily we use the word to distinguish calm and dispassionate decision making from emotional or disorganized decision making; we use it to distinguish people capable of making good decisions from people who are not. But for our purposes here, we need go no further with the word. The creature that is rational will think, on occasion, in *general* terms about classes and laws, extending over time, space, and possibility, while the creature that is not rational will think, if at all, only about *particular* (individual) objects or events.

Since people are rational, they can make rational choices. When people think about action they think in terms of classes of acts as well as individual acts. For instance, if my neighbor has a particularly attractive knife, and I desire to take it from him and am currently making plans to do so, I shall make my plans based on what I already know about all cases of people taking things from other people. And I can contemplate not only those past acts of taking and the present plan to take that knife, but all cases that will ever be of taking, especially of knives—future acts as well as past and present acts. But in that case I am thinking of action not yet taken, of action therefore undetermined, for which real alternatives exist. Since people can conceive of alternatives, they can choose among them—having thought over the circumstances, and deliberated on the outcomes, they can decide what to do. Put another way: I do not *have* to take that knife if I have not yet done it. People are *free*, as we say, or *autonomous moral agents*. But then they can also realize that they could have done differently—I did not have to take the knife, and given my neighbor's understandable grief and anger at its loss, maybe I *should* not have. That is, I can feel guilt and remorse and assume responsibility for having chosen as I did.

As far as we know, we are alone among the animals in possession of this ability. Since people can conceive of classes of acts for which alternatives exist, they can make laws to govern acts in the future, specifying that the citizens (or whoever may be bound by the law) *ought* to act one way rather than another. No one, for instance, ought to take things that do not belong to them, and such takings, henceforth to be called *theft*, shall be collectively punished. General obligations can be formulated and articulated for a whole society. Collectively (acting in their groups), people make collective choices, especially choices of rules, rather than relying on instinct; and they are then collectively responsible for those choices and individually responsible for abiding by them.

Rationality's implication for ethics is that, as freedom of choice is the characteristic that sets humans apart from the other animals, if we have any duty to respect human beings at all, it is this choice that we must respect. Persons are categorically different from the things of the physical world. They have dignity, inherent worth, rather than mere price or dollar value; they are bearers of rights and subjects of duties rather than mere means to our ends or obstacles to our purposes. Our duty of respect for persons, or respect for persons as autonomous beings, requires that we allow others to be free, to make their own choices and live their own lives; especially, we are required not to do anything to them without their consent.

Just as utilitarianism makes human happiness central to ethics and the Rawlsian account of fairness makes justice central, a complete theoretical account of ethics can follow from the value of human autonomy. The philosopher most identified with the centrality of autonomy and moral agency to ethical theory is Immanuel Kant, especially in his *Groundwork for the Metaphysics of Morals* (1785).

#### **4. The Human Condition**

Let me sum up the argument so far. I argued in section 3 that humans have minds, or as the philosophers call it, a rational nature. And in section 1, I showed that humans have an apparently limitless capacity for physical and psychological suffering. Rationality and suffering are not found together anywhere else. Possibly the angels have the first, and surely all beasts possess the second, but only human beings appear to be able to reflect upon their own suffering and contemplate the suffering of others of their kind, and that sets them apart from all creation. By virtue of rationality, human persons possess dignity and command respect. Ultimately, that respect entails the willingness to let other people make their own choices, develop their own moral nature, and live their lives in freedom. By virtue of that abysmal capacity for suffering, the human condition cries out for compassion and compels attention to human well-being and the relief of pain. And as shown in section 2, this condition is shared. We are enjoined not only to serve human need and respect human rights, but to establish justice by constructing a political and legal structure that will distribute fairly the burdens and benefits of life on this earth in the society of humans. These most general concepts: human welfare, human justice, and human dignity—are the source and criteria for evaluation of every moral system authored by human beings.

The same concepts are the source of every moral dilemma. Attention to human welfare requires us to use the maximization of human happiness (for the greatest number of individuals) as our criterion of right action. Attention to the needs of groups and of social living requires us to set fairness for all above benefit for some as our criterion. Yet duty can require that we set aside both the feelings of the groups and the happiness of the individual in the name of respect for human dignity. To protect the welfare of many, it is often necessary to limit the liberty of the individual (the liberty to operate dangerous or noisy vehicles without a license, for instance). On the small scale as well as the large, to respect the liberty of persons is not always to further their best interests when they choose against those interests (for instance, by taking addictive drugs or by spending themselves into debt). To maintain a rough equality among persons, it is often necessary to put unequal demands on the interests of some of them (by progressive taxation, for example). To preserve the community, it is sometimes necessary to sacrifice the interests of the few—but that course seems to discount the worth of the few, and so to violate justice.

#### **5. The Basic Imperatives**

Such conflict is fundamental to ethics and is the major reason why ethics is famous as the discipline that has no clear answers. The human being is a complex creature, and when we extract human

values from that complexity we find them, at the least, logically independent and often in opposition. There are, by tradition, two ways to formulate the opposition (see "Vocabulary of Ethics," above):

1. As a conflict of *values*. A value is a desired state, which we try, in our dealings, to advance or enhance or promote. The concepts so far discussed can be treated as values that are difficult to pursue simultaneously—the happiest society, the fairest or most equal society, the most free society or the lifestyle incorporating the most freedom.

2. As a conflict of *imperatives*. An imperative prescribes a duty to do or to forbear. It is occasionally more useful to see ethical conflict as a conflict of injunctions or prescriptions telling us what to do in any given situation. We are told—by the law and the prophets, by our religion, by our parents, by our employers, by the civil law—that we must respect the rights of others, be fair to everyone, and serve each other's needs. Sometimes it is not possible to do everything at once.

Over against every clear value, there is another value, which sometimes conflicts. Over against every clear imperative, there is a contrary imperative, equally clear, which sometimes applies. Ethics is the discipline that derives these values and imperatives, works out the consequences of our efforts to protect them, and musters what light it can to show us the possible reconciliations and the necessary compromises that attend their application in practice.

The terms *principle*, *imperative*, and *value* are sometimes used interchangeably. We will attempt, in the course of this book, to use *concept* to mean the principle in the form of a definition, as above; *value* as a desired end-state, to be achieved or enhanced; *imperative* as a prescription of duty. Morality is sometimes best understood as a system of imperatives, and generally imperatives are cited as the basis for the conclusions of applied ethics. The three concepts described above—welfare, justice, and dignity—correspond to three imperatives for human conduct.

1. Centering on welfare: Do no harm, and where possible do good. Because we must live, and because we can suffer, we must value life and happiness: safety, protection from harm, absence of pain, hunger or suffering of any kind; enjoyment, pleasure. That is, we have an obligation to help and protect each other, to relieve suffering, to choose each action, or rule of action, according to the amount of pain it will relieve or happiness it will provide. This general duty we may call beneficence, or concern for welfare.

This imperative is often broken down into four logically related but different prescriptions:

- a. Do no harm (the duty of non-maleficence). In the pattern of duties to do good and to avoid harm, this duty is the negative, individual, and immediate part. (For instance, no matter how much fun it would be, do not blow up the bridge.)
- b. Prevent harm wherever possible (the duty of prudence, or stewardship). This duty generalizes the one before, enjoining us to attempt to keep agencies besides ourselves from doing harm. (If the bridge is near collapse, act to shore it up and keep people off it until it is fixed.)
- c. Remedy harm wherever possible (the duty of compassion or charity). This duty is the proactive equivalent of the two before, enjoining concern for suffering and positive efforts to relieve it. (If the bridge has collapsed, pull the people out of the water, even if you don't know them and have no other obligations to them.)
- d. Do good, provide benefit, wherever possible. (Build better bridges.)

Note that in this pattern of duties, the duty of non-maleficence takes moral priority (i.e., if you can provide benefit to many people only at the cost of doing harm to a few, there is a presumption *against* doing whatever would result in the benefit and harm). The second two follow from the same presumption, and the last comes into play only when the others are taken care of. The priority of non-maleficence can, of course, be overridden, as when the state takes my property to build a road, doing harm to me in order to do good for many; but it can only do so on proper authority, with at least an attempt to provide compensation, and on presentation of compelling reasons.

2. Centering on justice: Observe the requirements of fair dealing. Because we must live together, we must adhere to rules of equal treatment, justice, fairness, and rule of law (equality before the law) as well as trust and trustworthiness, honesty in word and deed. Then we have an obligation to acknowledge our membership in, and dependence on, the human community and the community in which we live—to contribute to its life, obey its laws, customs and policies, to be honest in all our dealings with our fellows and above all to hold ourselves accountable to them for our actions, especially as they affect others. This duty we may call the duty of justice.

This duty also has recognizable sub-imperatives:

- a. Obey the law and the codes of your profession. All are equally bound by these general prescriptions, and it is not fair to make an exception of yourself. Also, as much as possible, take responsibility for enforcement.
- b. Treat all groups alike. Do not condition treatment of persons on their membership in a favored group. This is the duty of non-discrimination or provision of equal opportunity.
- c. Act affirmatively to remedy the results of past injustices. Wherever possible, seek out the least advantaged and the previously excluded for occupation of preferred posts.
- d. Recognize merit. Treat people as they deserve to be treated based on what they have done or merited. Included in this general duty is the more personal duty of gratitude.

3. Centering on dignity: Respect persons (as autonomous beings). Because we aspire to the full potential of humanity, we must value freedom. We take liberty, autonomy, rationality to be ideals, and value them in others as much as we prize our own. The human enterprise is an endless quest to become better, wiser, more loving people, and we must cultivate people and institutions that will protect that quest. We have an obligation to respect the choices of others, to allow them the space to live their lives, to the end, the way they see fit. For ourselves, we have the obligation to realize our own potential, not only to discern for ourselves the moral course of action and to take responsibility for the moral choices we make, but to extend our knowledge and the scope of our reason to become as fully as possible the autonomous persons we are capable of being. This duty we may call the duty of respect for persons.

Again, more specific duties can be derived from respect:

a. Tell the truth. The duty of veracity or truth telling is primarily derived from the duty to enhance autonomy by making rational decision possible. No person can act rationally if denied the truth. From this duty we derive the requirement of informed consent in the health-care professions and the duty of full disclosure in law and business.

b. Celebrate differences, whether individual or cultural. Create a positive atmosphere for the developing of idiosyncratic lifestyles that fulfill individual needs and preferences—as long as they violate no one else's rights.

Clearly none of these imperatives is optional. We cannot choose not to have bodies. We cannot choose not to need each other, and, although we may sometimes wish we could, we cannot choose not to choose, not to be free. And these imperatives are logically independent one from another. They can conflict. All ethical dilemmas follow from that fact.

## **Part IV: The Forms of Moral Reasoning**

Contrasting forms of moral reasoning, or reasoning to conclusions on the problems of ethics, were mentioned in passing in the expositions of our decision procedures, above, and may be derived from the discussion so far. The first we may call *consequentialist* (or utilitarian or teleological) reasoning, in which ends are identified as good and means are selected that will lead to those ends. The second is generally called *nonconsequentialist* (or deontological) reasoning, in which rules are accepted as good and acts are judged right or otherwise according to their conformity to those rules. A third, complementary to those two but not yet included in the decision processes, is called *virtue-based* (or ontological) reasoning, in which the type of person one is, and the type of moral community one belongs to, determine the obligations to act. In consequentialism, the rightness of an act is linked with the goodness of the state of affairs that it brings about; in non-consequentialism, it is linked with its derivability from a rule; in virtue ethics, it is linked with the character of the agent.

## 1. Reasoning from Rule: Deontological Reasoning

We suggested above that moral principles usually take the form of an imperative, setting a duty sufficient in itself to justify action. An imperative serves as the major premise for a line of deontological, or nonconsequentialist, reasoning. Deontological reasoning states a duty, observes that the present instance, real or hypothetical, falls under that duty, and proceeds to derive the obligation to carry out that duty in this instance. For example, presented with a particularly nice necklace left unguarded on a patient's bedside table or on the jewelry counter at the department store, I might be very tempted to snatch it and run. But my duty not to do that is very clear:

(Major premise) Thou shalt not steal.

(Minor premise) To take this necklace would be stealing.

(Conclusion) Thou (in this case, *I*) may not take the necklace.

Or if I take it anyway, and am confronted at the door by my supervisor asking if the removal were authorized, or by the store owner asking if I paid for that necklace, and I want very much to say, "Oh, this is my necklace—I wore it in but the clasp broke which is why it's in my hand," again my duty is clear:

(Major premise) Lying is wrong.

(Minor premise) To say it's my necklace would be lying.

(Conclusion) I may not say it's mine.

Connoisseurs of logical form will note a certain falling short of the strict subject-predicate form demanded by Aristotelian logic, but the point should be clear enough. In deontological reasoning (literally, reasoning from duty), we assume that we are obligated to do what is *right*, that there are *moral laws* which correctly demarcate what is right and what is wrong, and that we can deduce the moral status of a contemplated action by finding what moral laws apply to it. By those laws, an act may have one of three moral statuses: it may be *prescribed* (obligatory), *proscribed* (forbidden), or *permitted* (neither prescribed nor proscribed).



There are problems with this approach. What, for instance, is the grounding of the major premises? Deontological reasoning starts with the assertion of duties, but those duties must be justified externally. In this case, we can go back to our basic principles and derive the prohibitions of stealing and lying without too much difficulty. Occasionally, however, in order to justify a premise, we are forced to fall back on consequentialist reasoning—the reason why we mustn't trade shares of stock on the basis of inside information cannot be traced directly from the original principles, but involves quite some understanding of the stock market and, ultimately, the assertion that (a very small minority of economists dissenting) insider trading is harmful to the market and thus to the free-enterprise system. (Insider trading is usually represented as a violation of justice. But of course it would not be unjust to deal as an insider if the rules permitted it. It would just be conducive to bad consequences, or so the general belief goes.)

## 2. Reasoning from Consequences: Teleological Reasoning

Note, however, that we could often just as easily couch the same moral argument in goal-oriented or consequentialist terms. In such an argument we treat the principles as values rather than as imperatives, and as ends to be achieved in society, rather than laws governing action directly. Moral argument then becomes an exercise in evaluating the means to the end of the best possible society. The *good*, as opposed to the *right* of right action, becomes the benchmark of moral prescription; that good is generally understood as the greatest happiness of the greatest number of persons in the society in the long run. Action is right insofar as it brings about good results. The most familiar form of consequentialist reasoning is the cost-benefit analysis familiar from the business world: To find the right thing to do, you add up the benefits of each of the options, divide the benefits of each course of action by its costs, and select that option with the highest ratio of benefits to costs.

Can we deduce the same conclusions as above using consequentialist reasoning? Yes, somewhat more elaborately:

(Major premise) If everyone took objects that don't belong to them, all trust in institutions would break down and the economy would collapse; therefore, the practice of unauthorized taking of objects is contrary to the greatest good of the society.

(Minor premise) Taking this necklace in these circumstances would therefore be contrary to the greatest good of the society.

(Conclusion) This act is not right and I should not do it.

We don't have to go through this procedure every time we find a necklace lying around within reach, of course. The experience of the whole human race is that respect for property, however property may be defined in different cultures, is essential for the stability of society. Therefore, on those grounds, such taking of property without payment or authorization is appropriately forbidden everywhere (as is lying on matters of personal, social, or commercial interest). Once the act is prohibited, the reasoning proceeds exactly as it did in the nonconsequentialist framework. Most of us find *rule* utilitarianism (consequentialism that establishes rules and then reasons from them) easier to work with on a day-to-day basis than *act* utilitarianism (consequentialism that evaluates every individual act on the basis of its consequences). But any consequentialist will insist on the point that every legitimate major premise for such a moral syllogism is based on consequentialist reasoning; we need no divine commands, unverifiable intuitions, or arbitrary pronouncements to give us the principles from which we derive the moral status of the act in question.

### **3. Reasoning from Virtue: Ontological Reasoning**

A third form of reasoning is customarily couched in the terms of virtue or character. In such an argument, we appeal to the principles as character traits rather than as goals or as rules, as virtues inherent in the moral agent rather than as characteristics of the act. Every time we act, we simultaneously define ourselves (as the type of person who acts that way) and change ourselves (toward that type of person), whether for better or for worse. Our objective in moral action, by this reasoning, is not only to adhere to rule (a minimal prescription), and achieve good ends (chancy at best), but also, and primarily, to become a good person, especially the kind of person who performs right actions by habit and by desire. We go beyond cost-benefit and rule-adherence to aim at ideals of conduct and personhood.

Virtue ethics does not define, initially, just which virtues are worth pursuing most and by whom. In this lack of specificity, it is no worse off than utilitarianism, which wavers among definitions of happiness (welfare objectively determined? felt pleasure? preference as expressed in the market?) or deontology, which is indifferent among several sources of rules (natural law? human law? the form of moral reasoning itself?) By tradition, humans should seek to become temperate, courageous, wise (prudent), and just; additionally, in our religious traditions, they should try to acquire humility, faith, hope, and charity—not to mention honesty, kindness, patience, equanimity, magnanimity, modesty and a sense of humor. For moral action, it is essential to acquire just those virtues, that is, become just the sort of person who will make immoral conduct impossible; for professional ethical conduct, it is essential to acquire the virtues appropriate to the profession. These should differ depending on the function of the profession in the community. Presumably, the physician will seek to acquire compassion (professional beneficence) before justice; the judge will seek justice first. The businessman will value prudence (professional wisdom) most highly, the military officer will cultivate courage. The Greeks always linked virtue to function—you are the right person for what you do

when you have the character traits that permit you to do it well—and that link continues to make sense.

Can we put the same examples in virtue ethics? Yes, even more easily:

(Major premise) I aspire to be an honest person, I hate the idea of being a thief.

(Minor premise) Taking this necklace makes me a thief.

(Conclusion) Therefore I may not take this necklace.

Whatever its theoretical merits, it is worth observing that virtue ethics is probably the most effective ethic for practice. Faced with moral temptation—unguarded necklaces and the like—very few of us go through teleological and deontological reasoning processes, deducing the wrongness of stealing the necklace and therefore abstaining from theft. Rather, we avoid criminal acts because we hold ideals (images) for ourselves that are incompatible with petty crime, not to mention its punishments. The appeal to those ideals, aspirations, and images are by far the most effective appeal to keep people from doing wrong.

## **Part V: Conclusion—The Need For Clarity**

No single form of reasoning is inherently superior to the other. We may use them all, and usually, in the course of a discussion involving ethics, we do. But it is important to note the differences among them, for if we do not, we condemn ourselves to talk past each other and frustrate our dialogue. For example, at a dinner party some years ago, I came across a heated debate on the problem of educating inner-city black teenagers. One side of the debate was arguing that the blacks had been treated so badly in the past and had been denied such basic amenities and encouragement, that it was unjust to expect them to measure up to middle-class educational expectations. The other side, made up of schoolteachers, was arguing that education provided the only decent prospects for the future, and indeed, the only way out of the ghetto, for these youngsters. And unless the next generation got its act together and got motivated somehow to finish school, the it would be just as disadvantaged and ill-treated as the present one.

Were these two groups really arguing against each other? No. Each could easily have conceded the other's point (and sometimes did) while maintaining its own. Rather, they were arguing *past* each other, one arguing consequentially (toward the future, bleak or somewhat brighter, depending on the

means, especially educational means, adopted now), and the other deontologically (from justice). Both, by the way, were making excellent points. You might want to warm up your minds at this point by joining that debate; but please, do a better job than they did at keeping straight what kind of argument you are using.

## CHAPTER 2

### **THE THEORY BEHIND THE PRACTICE** **Why We Choose the Right and Refuse the Wrong**

Everyone knows the subject matter of ethics. We've been making right choices (and occasional wrong ones) since we were children. Ethics, the academic subject, simply gives us a vocabulary to talk about those choices and some insight into the reasoning that we ordinarily use to reach the decisions we reach. The problem is that the reasoning process is almost always unconscious, using thought patterns we were taught as young children, with no suggestion that there might be a theory behind our practice. There is, in fact, theory. In this chapter we shall try to bring some order out of the confusion of our ethical traditions, in the hope of showing that the conflicts with which our panelists are dealing are subject to discussion and analysis in terms which have long been part of the vocabulary of philosophy.

We have been making choices, subject to moral rules, since early childhood. Let's start there. Everything I need to know about morality, about the way I ought to behave, I learned in kindergarten. What was I taught?

1. Be a good boy (or girl).
2. Obey the rules.
3. Don't hit.
4. Be helpful.
5. Share your toys.
6. Keep your hands to yourself.
7. Keep your promises.

Will these directives serve as the basis of enough ethical theory to explain our hypotheticals? Almost. We will have to add to them as we go along, but we have enough here to get us most of the way through.

Our way of proceeding will be to sketch out the theory found in the "Ethics Readings" assembled for you on the Web site, which contains the following texts:

## **The Greek Philosophers**

Thucydides (death 401 B.C.E.)  
From *History of the Peloponnesian War*

Plato (427 B.C.E.–347 B.C.E.?)  
From *Apology*  
From *Crito*  
From *Republic*

Aristotle (382 B.C.E.–322 B.C.E.?)  
From *Nicomachean Ethics*  
From *Politics*

Oath Attributed to Hippocrates

## **Religious Traditions**

Bible

From Genesis  
From Exodus  
From Deuteronomy  
From Amos  
From Gospel According to Matthew  
From Gospel According to Luke

## **Moral Law**

Epictetus (c.55–c.135)  
From *Encheiridion, or Handbook*

Thomas Aquinas (1225–74)  
From *Summa Theologica*

Thomas Hobbes (1588–1679)  
From *Leviathan*

John Locke (1632–1704)  
From *Treatise of Government*

Thomas Jefferson (1743–1826)  
From Declaration of Independence  
From Letter to Edward Carrington

## Utilitarianism

Adam Smith (1723–90)  
From *An Inquiry Into the Nature and Causes of the Wealth of Nations*

Jeremy Bentham (1748–1832)  
From *Principles of Morals and Legislation*

John Stuart Mill (1806–73)  
From *Utilitarianism*  
From *On Liberty*

Karl Marx and Frederick Engels  
From *Communist Manifesto*

A Note on Fiduciary Duty

Belmont Report

These are the classic sources of the principles that we use in our reasoning on matters of right and wrong. We will refer to them, explicitly and implicitly, as we go along.

In addition to these classic sources, we have added some contemporary documents that are often more to the point of what is being discussed. The first is the *Belmont Report* (1974–77) on the deliberations and conclusions of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. In the report, the commission's scholars sorted out the theoretical foundations of their deliberations. The second document is a short legal document on fiduciary duty, explaining this financial relationship in moral terms. The duty of the agent to the principal goes back to Roman times, but, for most of our working lives, we assume its force without explaining it. All professional obligations—the physician's obligation to the patient, the lawyer's to the client, etc.—work as an analogy with fiduciary obligation.

## Ethics: Tracking the Imperatives

We can get an entirely usable history of Western ethics from the kindergarten commandments listed above. Let's take them one at a time.

## 1. Character, Integrity, Virtue: The Greeks

"Be a good boy (or girl)." (For brevity's sake, he'll be a boy from now on.) When we were very young, we divided the human world into good people (those who can be trusted) and bad people (those who cannot). When we become more sophisticated, the distinction does too, but remains one of our basic tools for knowledge of the human world. We come to know the good boys, or men, as those who can be relied on to do what is best for themselves, for others, and for the society at large. They are the ones who maintain a healthy balance between the protection of their interests and respect for the interests of others, to consider justice and the public good in all that they do, and to strive for excellence in everything that they endeavor. They are intelligent, rational, just, careful, compassionate, and foresighted, and above all they are consistent. We know we can expect nothing but good from them all the time. We call them men of character, men of integrity, responsible men, and we trust them with any authority we have to offer, at any level.

For Plato (c. 428–348 B.C.E.), such a man was a "just" man; Plato dedicated *The Republic*, his most important work on politics and ethics, to an exploration of the ways that humans might be "just," and the implications of justice for their lives in society. He had a clear example before his eyes—his friend and mentor Socrates, who had taught philosophy in the streets of Athens, going about the marketplace and asking people difficult and inconvenient questions about the way they were living their lives. Socrates had been brought up on charges of disrespecting the gods and corrupting the youth, and had been condemned to death and executed (see Plato, *Apology*). In *The Republic*, Plato asked a disarmingly simple question: is it to my advantage (in all the usual senses of the word "advantage"; i.e. will it give me happiness) to live a just life, a life of moral virtue, harming no one, keeping promises, never taking more than my fair share? (It's amazing how many people don't think so.) Plato proves that it is indeed advantageous to live a just life, in three demonstrations aimed at different segments of his audience: the businessman, the soldier, and the philosopher. The work is worth reading in its entirety, just for his proofs that being a "good boy" does not make you a loser in life.

Aristotle (384 B.C.E.–322 B.C.E.) took this basic recognition of goodness in people as the foundation of his ethical perspective, and set out to discover what kind of life might be the best for humans (see Aristotle, *Nicomachean Ethics*). He easily concluded that the life of rational activity, reasoning, was the best for us. After all, what else do we have but our reason to separate us from the beasts? We can take that further: the way a man should live his life is by deliberation and choice—



understanding the circumstances, pondering courses of action, and making a responsible choice for himself among the alternatives.

In *Politics*, Aristotle's conclusion is generalized to others; the best way for us to live in society is by collective deliberation and choice. To reach this conclusion, he tracks an abbreviated history of human society, from the family, to the tribe, to the polis (the city-state), showing that only in the polis can we live by law, i.e. by reason. His reasoning in reaching this conclusion is maddeningly condensed, but he distinguishes nicely among the governance appropriate to a family (subjection to the monarch, or father, but with a firm commitment by all to take care of whoever needs care, to the extent of the need); to a tribe (protection of the tradition, the tribal way, identified by its unique culture, the narrative that defines its birth and purpose, of one blood, protective of all members yet prepared to sacrifice an individual to preserve the traditions); and to a polis, an arms-length bargaining process of collective deliberation under a firm constitution and rule of law that protects the weaker parties from the strong. Only in the polis, where we have no single tradition to govern us, are we forced to govern ourselves by reason. For that reason the polis is the particular form of organization suited for men (as hives are for bees and herds for cows)—or as it is generally translated, "Man is a political animal" (see Aristotle, *Politics*).

Plato and Aristotle spoke from the perspective of the polis, a self-contained city-state with a single constitution, girdled by the walls that protected it from enemies, large enough to be self-sufficient but small enough to be comprehensible. By the time Epictetus (c. 50–138) came along, the polis had sprawled into a cosmopolis, a city of the world, part of a larger empire, no longer self-sufficient or able to govern itself. Epictetus therefore concentrated on the individual life: how shall we live lives of integrity when the world is collapsing around us, and the old social sanctions that used to keep us in line are no longer there? His solution was neat, and meshed well with the early forms of Christianity, then emerging upon the scene (see Epictetus, *Handbook*). He taught that there was one universal reason, which he sometimes referred to as necessity or God or the author of the play. Reason has preordained all things. All things happen as they must. The only freedom is in the human will: we may accept the world as it happens, or we can refuse to accept it. It is the better part of common sense to accept it; if we don't, we will spend our lives whining and raging, and the world will go on anyway, just as if we weren't there. If we accept it, then we gain a certain amount of new freedom, in the way that we comport ourselves in the course of our life, be it long or short. The author has written the play, and given us our part to play; play it well. The point is always to live "conformably to nature," in the world as it happens, accepting it without complaint. If that becomes impossible (in unbearable disaster, or severe pain in incurable disease), there is always suicide as an honorable way out.

The perspective from which Epictetus wrote makes his works more interesting. Plato and Aristotle were well-raised sons of the nobility who praised leisure as necessary for the good life. Epictetus was a slave, lame from beatings he had sustained as a boy, a Greek brought to Rome to be a tutor. It was

clearer to him than to his predecessors, perhaps, that we really have little control over our lives. And the theory of virtue that he derived has that much more meaning, for knowing that his counsel of patient enduring of troubles came very much from his own life.

## 2. Obey the Rules: Natural Law and the Social Contract Theorists

In the *Politics* and the *Nicomachean Ethics* (book 5, chapter 6), Aristotle derived the necessity of just rules and the rule of law in human life. In the *Politics*, he showed that the polis, the city-state, is uniquely suited for human life just because it required *isonomia*, the equality of all citizens before the law. The ancient and medieval Christian thinkers, notably Augustine (354–430) and Thomas Aquinas (1225–74), seized upon this notion of law, especially as found in the Stoic tradition, as a universal lawgiving reason that ordained all things for good. They called that reason *God*, identified him with the Christian God, and elaborated a rational, universal system governing all of creation. As presented by Thomas Aquinas, the primary law, the eternal law, was simply the mind of God, conceiving, creating, and encompassing all things. The laws that governed the various orders of creation, from angels to stones, derived from that law. The natural law that governed rational human beings was just the participation of rational nature in the eternal law: open to all human reason, it was "written on the human heart," and contained in it all matters that were necessary for people to lead fulfilled lives in the world. The natural law, natural justice, governed all humans. It was the foundation of all law. Since it was open to all reason, those who disobeyed it were without excuse. Human law had to conform to natural law or be void—"a law that is not just," said Augustine, "is not a law at all" (see Augustine, *Of Free Choice of the Will*). The natural law, while sufficient for life on this earth, was not sufficient to guide Christians to heaven; for that, a supplementary law, the divine law, had been set forth in Scripture (see Aquinas, QQ 90–96 of the *Summa Theologiae*).

The Christian writers distinguished carefully between God's law, the law of love, that governed heaven and the church on the earth, and the secular law, human law, made by princes in this world to keep people from each other's throats. Yet both laws had divine sanction; in the book of Romans, St. Paul had insisted that all power is instituted by God, even unjust power, so we are properly subject to secular powers on earth, even when they are not just.

Not until modern times—the sixteenth and seventeenth century on—did the Western tradition start wondering *why* we have rules, and out of this wonder came the notion of the social contract.

What were people like before there was government and law? In *Leviathan*, Thomas Hobbes (1588–1679) speculated that the human condition must have amounted, in the "state of nature," to a "war of all against all," in which nothing could get done—there would be no farms or industries, no

bridges or roads, no trade, no great public institutions, libraries, orchestras, or museums—"and the life of man, solitary, poor, nasty, brutish and short" (see Hobbes, *Leviathan*). For, consider, all those things require trust in others to do their part in some multi-person enterprise, or at least the knowledge that no one will interfere with an enterprise started and growing. Recall that the reason we must send famine relief to countries in wartime is that war and the accompanying chaos makes it impossible for farmers to plant their crops and know that they will be there to reap what they have sown. Even the simplest farming takes patience and trust in the future; it requires investment in expectation of a return. Almost all human enterprise is like that. Human flourishing is simply not compatible with the chaos of constant war. So Hobbes posited that there had to have been a compact, or contract, in which the people gave up most of their liberty, their "natural rights" in a state of nature, in return for a strong government that would protect their lives. So important is this contract, this promise of protection and order, that the people retain no rights whatsoever to protest against or overturn that government, as long as their very lives are not threatened. No other "human-rights violations" provide any justification for political rebellion.

John Locke (1632–1704) gives us a kinder, gentler state of nature, a natural condition in which our lives are not threatened because we generally acknowledge a "natural law" that forbids violence and theft. We still need a government and law, contracted to by everyone and generally obeyed, simply because no long-term investments in matters of commerce and property are safe as long as we lack a settled law (primarily to establish and seal the ownership of property). We also need an indifferent (objective and impartial) judge, and some enforcement mechanism so that people don't take the law into their own hands every time they think their rights have been violated (see Locke, *Second Treatise*). But since, by Locke's reckoning, our persons are safe enough without that authority in place, we have a little more room to ask, Just what kind of authority are we willing to accept? Since we already have natural rights—rights to life, to liberty, and to the secure ownership of property (even if we'll have to have a government in place to settle the boundaries and rules of exchange)—we don't need government to give us these, and any government that takes them away is not a legitimate government. The people therefore have the right to rise up against such illegitimate government and put in a better one, governed by majority rule and protective of human rights, although Locke strongly warned against resorting to this "appeal to heaven," since the results are unpredictable. There are contrary opinions on the subject, but most commentators draw a direct line from John Locke to Thomas Jefferson's formulation of the rights of all men in the Declaration of Independence (see Jefferson, *Declaration of Independence*).

In the third quarter of the twentieth century, philosopher John Rawls of Harvard University (1921–2002) proposed a new version of social-contract theory. He incorporated the provisions of Hobbes and Locke and added new ones. In addition to protecting life and limb and securing property with democratically determined laws and judges to enforce them, the governing authority would have the responsibility of making sure that the resources of the society were equally distributed, or, if not equally, then unequally on grounds agreed upon by everyone. No institutionalized inequality (difference in income, appointment to office, and the like), would be permitted unless it worked to

everyone's advantage—not just the majority's. The way to determine the justice of any inequality was to calculate its effect on the least advantaged of the society—the poorest, the least educated, the most vulnerable, those least able to protect themselves. Rawls drew these provisions out of social-contract theory by asking what set of rules would emerge from a constitutional convention assembled before anyone was born: if you are a rational, self-interested member of such a convention, *not having any idea of what place in society you would be born into*, what rules would you adopt to run the society?

Rawls was willing to bet that most rational persons would opt for a society that would protect them from pauperism and homelessness if they happened to be born into a disadvantaged position, rather than for one that would reward them handsomely if they were born into one of the better ones. This was not just because losing feels worse than winning feels better (a point made by Plato in *The Republic*, book 2), but because the limitations imposed by extreme poverty keep people from the enjoyment of anything else that might be valuable in human life. Furthermore, the excess riches of the very rich buy them nothing that is really instrumental to human fulfillment. Realizing this, the citizens around the table, yet to be born, will opt for equality.

Note that in these three thinkers, we have three different versions of the "state of nature," and three very different versions of the society that will result if a rational social contract is adopted by the citizens. Why? Again, a page of history may be useful. Thomas Hobbes had just seen his entire society destroyed by revolution, his beloved monarchy thrown out in favor of a Protestant protectorate, and was appalled by the disruption of every social institution. It seemed to him that, if the government kept order and protected your life, it should be enough for you. Spouting high ideals and invoking the will of God—while tearing up the countryside and slaughtering innocent people—seemed to him to be the height of foolishness and hypocrisy, and so he argued in *Leviathan*. Locke, on the other hand, lived during the Glorious Revolution, so called because after the restoration of the monarchy that Hobbes had seen overthrown, Parliament had rallied to assert its supremacy over the king's dictatorial powers, and had produced a balanced (if unwritten) constitution that in effect divided the powers of government and protected the rights of the people. He knew that majority rule and occasional rebellion were compatible with rule of law, and that's what he defended in the *Second Treatise*. John Rawls, raised in the middle of the twentieth century in America, shared the aspirations to full economic equality that had come to seem possible in the nation's postwar prosperity. With the examples of successful socialist democracies prospering in Europe, he saw no reason why historic economic inequalities should be tolerated, especially since those at the bottom of the socioeconomic ladder really had no access to the amenities that Aristotle had insisted were essential to human life—nourishment, shelter, education, adequate income, and enough leisure to participate in public life. For Rawls, then, the contract was incomplete if it ensured only equality before the law and did not provide for social and economic equality as well. The theory of social contract is the same, but historical circumstances dictated the terms of the contract.

Social-contract theory established a single universally valid answer to the question, "Why should I obey the rules?" You should obey the rules because (in a functioning democracy) you made them; or, in the original form of the social contract, you at least agreed to them; or, failing that, you at least agreed that there should be a government that would make rules and that if you wanted to stay here, you would obey the rules. It's a simple quid pro quo: the rules may restrain you from things you want to do, but they also protect you from undesirable action perpetrated by others, and if you want the protection you have to pay the price in obedience. Note that the social-contract formula says absolutely nothing about the justice of the rules themselves or whether or not the greater good is served by obedience to them: you should obey the rules because (implicitly) you said you would. There may be other reasons too: they may be really good rules that deserve your support or you may want to avoid the punishments attached to breach of the rule; social-contract theory does not go into those.

### **3. Don't Hit (or Cause Pain); Be Helpful (and Cause Happiness): The Utilitarians**

Jeremy Bentham (1748–1832) was not saying anything that people did not know when he announced that people enjoy (and seek) pleasure and dislike (and avoid) pain. What was unique about Bentham's approach to ethics was that he figured that that information was enough to ground a system of ethics. Once we know that there are ways to increase happiness and ways to avoid decreasing it, we don't need to know any more to know what is right and wrong. His system was simple: the point of moral action is to increase the amount of happiness for all concerned (see *Principles of Morals and Legislation*). On Bentham's formulation, the system would work for any sized group. The easiest way to apply it is to consider, in any situation calling for a choice, what action will lead to the greatest happiness for the greatest number of those affected by the decision, in the long run.

Bentham was able to work out a calculus, the "felicific calculus," to reach mathematically accurate conclusions on the relative morality of the options before the decision maker. Take a unit of happiness (say, one minute of pleasure for one person) and of unhappiness (say, one minute of pain for one person), figure out what people will be affected in what way by each option, and then start adding and subtracting and multiplying and dividing. Multiply each such minute by its intensity (admittedly subjectively determined), its duration, its propinquity (how soon will these moments occur?) and its certainty (given that we cannot foretell the future exactly, how likely are these moments?). Then figure out the consequences of the original pain-or-pleasure-producing option. What is its fertility (its tendency to be followed by more of the same experience, be it pleasure or pain) and its purity (its tendency *not* to be followed by experiences of the opposite sort)? The pleasure of reading a good book, for instance, is a pure and fertile pleasure, for while causing no pain at all as its consequence; it stretches your mind and opens you up to new and delightful pleasures later on. An evening drinking rum in the bar, however, is neither pure nor fertile; pleasurable in itself, it causes no further pleasures, and leaves you with an empty wallet and a

headache. When you have assigned numbers to all these measures and multiplied it out for all persons affected by the choice, you have your conclusion. If the choice is a simple one—whether or not to extend water service to a new subdivision, for instance—the multiplication becomes simpler. You can figure out what the happiness would be for one household and then multiply by the "extent" of the effect, the number of households affected.

John Stuart Mill (1806–73), son of one of Bentham's best friends, James Mill, took Bentham's system to a considerably higher level of sophistication, allowing qualities of pleasure to count as well as quantity. The pleasure of watching an opera, for example, may be less intense than the pleasure of trying to catch a greased pig (or of watching young men try to catch it), but in the end we may say that it is a superior pleasure. How may we know that? We must ask people who have experienced both, in order to find out which is superior. The person who knows only one is in no position to say. Hence his famous comment that "It is better to be Socrates dissatisfied than a fool satisfied; better to be a man dissatisfied than a pig satisfied; and if the fool, or the pig, are of a different opinion, it is because they know only one side of the matter" (*Utilitarianism*). Mill also included considerations of character, harking back to Aristotle, in order to handle the first dilemma posed to any utilitarian: Suppose I figure out a way to cheat on a test, and I'm not crowding anyone else out of the competition, I always get away with it, and no evil effects follow from my cheating at all. I am the only one affected, and I am made more happy by the result of my cheating. What's wrong with that? Mill's answer was that you aren't really "getting away with it": every time you cheat successfully you damage your character a little more, and become a worse person. No one wants to be a bad person. Therefore don't cheat.

Mill was able to subsume other philosophical claims into utilitarianism without much difficulty. "Rights," which were supposed by others to stand against "utility" in establishing appropriate courses of action, he simply characterized as interests, desires to gain happiness and avoid unhappiness, that the state has decided to protect. Hopefully there were good utilitarian reasons, in terms of the greatest happiness principle, to choose just those interests and not others to protect. Once the state has decided to protect them, of course, there are good utilitarian reasons to respect them, that is, to avoid violating them. Justice, equality before the law, is easily justified by utilitarianism. Everybody would probably like the law to bend in his or her favor, but everybody is absolutely furious when the law bends (or appears to bend) in favor of their rivals. The balance of happiness, clearly, is on the side of equal justice for all.

Mill systematized this insight into a distinct form of utilitarianism, "rule-utilitarianism," and used it to solve one of the major difficulties with the theory as put forth by Bentham. The trouble with Bentham's utilitarianism, as Mill and others saw it, was that it countenanced every act in violation of law or moral principle if you could show that better consequences (for everyone) came rather from the violation than from the obedience. The classic case is the midnight stop sign: there isn't another car for 40 miles, do you have to stop? Unfortunately for Bentham's version of the theory (which Mill

called "act utilitarianism"), cases rapidly become much more complex than the stop sign. Mill argued that in any case, probably including the stop sign, many more bad consequences followed from the violation of the rule than the agent is likely to foresee—there may be immediate unforeseen consequences even in the simplest case (the police motorcycle hidden in the bushes for careless people who do not stop at stop signs at midnight), and in any more complex case the hidden consequences may be enormous. Unfortunately, the only person in a position to evaluate the consequences of a given violation of a rule is the prospective rule-breaker, and he is unlikely to be objective, or correct. Repeated undetected violations lead easily to a sense of invincibility, as recent corporate scandals have demonstrated all too well, and eventually to catastrophe for all concerned. Even in the absence of eventual detection, there is no calculating, again, the effect on the agent's character. With rule-utilitarianism, the greatest happiness principle becomes two-tiered: if an act is not covered by any rule, do that which will bring the greatest happiness to the greatest number (as far as you can discern); if it is covered by a rule, obey the rule.

Utilitarianism, incidentally, is the philosophy underlying the free market. Adam Smith (1723–90), a Scottish moral philosopher, had calculated that if every person, everyone who wished to buy or sell in the market, tried to maximize only his own best interests, the natural workings of the market would inevitably reward the most efficient producer, who could offer his goods for sale in better quality or at lower price than his competitors and still stay in business. In the end everyone would be much better off than if some benevolent monarch tried to arrange things for the common good. In Smith's economic universe, only self-interest counted; altruism was unnecessary and probably hurt the efficiency of the market (see Smith, *Wealth of Nations*). His argument will appear more fully in the "Business Ethics" chapter of the *Discussion Guide*. On the whole, Americans believe that Smith's analysis is correct; for some, it is absolute doctrine, not to be questioned.

Utilitarianism notoriously cannot answer the main question of ethics: Why should I be good? It can tell me that in general terms, human-felt pleasure will be increased by certain acts, and that people enjoy increases in their felt pleasure. But there is no number of facts that can lead to a normative conclusion (see chapter 1, "Doing Good and Avoiding Evil: Fundamentals of Philosophical Ethics"). Mill's claim, in chapter 4 of *Utilitarianism*, that just as the only evidence we have that something is visible is that it is seen, so the only evidence we have that something is desirable, or good, is that it is desired. This mixes the forms of discourse impermissibly. But the question of the ultimate justification, or "sanction," of any ethical theory belongs not to applied ethics, which we pursue here, but to meta-ethics, a topic for your further study and enjoyment.

#### 4. Share Your Toys: Philanthropists and Socialists

Why did they ever tell us as children to share our toys? The command is counterintuitive, if you stop to think about it. Adults certainly don't share *their* toys. We own great houses, and there are homeless in nearby cities, but they do not tell us to share our houses with the homeless. We drive cars, all alone, and do not share them with anyone. We eat steaks and throw away the leftovers, but even within this country there are those who would feast on the leftovers, and they never tell us to share with them. The limits of grown-up sharing are reached when we have cleaned out our closets in the spring and given well-used stuff to the church clothing drive, put our dollar in the collection plate, and maybe tossed some coins in the Christmas kettle. (As I write, Warren Buffett has just given 31 billion dollars of his hard-earned coin to Bill Gates to give it away to sick children around the world, but Warren Buffett and Bill Gates are very unusual. We'll get back to them below.) Yet we still teach our children to share. Why?

The roots of the imperative to share go very deep in our culture, and show us, when we stop to look at it, just how divided our ethical heritage is between the incompatible commitments of individualistic striving for personal success and altruistic obligation to care for those who need care. The altruistic imperative comes from our tribal heritage. A tribal village is small, becoming smaller the further back we go in our Middle Eastern Indo-European heritage, totally dependent on the day's catch in the hunt or the fishery and the harvest of the gardens or wild fields. All the men must hunt or fish, all the women must work in the garden and nurse the children or the whole tribe will die. There is no place, in this setting, for any sense of entitlement—no place for "I worked hard for my piece, he did not work as hard as I, so if he starves, let him starve." We need his work. Whatever he needs to get back in action, we must give him, or we will starve, too. The tribes that followed this imperative survived to put their customs into the world's understanding of ethics; the tribes that did not share, did not survive. We are the children, and the cultural and genetic heirs, of the survivors. Never forget that.

This is one of the most puzzling bifurcations of our ethical heritage (there are others). When we talked, above, about the Greeks and their individualistic ethic of personal virtue, reinforced and tempered by the obligations to serve the polis as a good citizen and to help it reach collectively rational conclusions, we were talking about a civilization that remembered its tribal roots only to transcend them in the intertribal polis. The Greeks, in their political theory, recognized no obligation to help the poor, or indeed any economic obligations of social justice or charity at all. But the Jews, our second intellectual parents, were always a tribe, a nation, not a multicultural polis, and never forgot the duty to seek out the poor, to give them what they needed, that they might rejoin the community as full members. Strongly evident in our society is our Greek heritage of equal justice before the law. But never absent for long is the overwhelmingly important force of the Biblical heritage, where "justice" always means care for the poor. When the prophet Amos (see Bible, book of Amos) says, "Let Justice roll down as a mighty stream!" he means in part that laws should be



good and judges should be impartial, but he also means that the poor must be cared for, and that the righteous man should make sure to take care of the poor. The entire Mosaic Law, backed up by the prophets, urges us to be generous in lending and giving alms to relieve the poor of their burdens (see Bible, book of Deuteronomy).

Christianity is in this respect just an extension of Judaism. The ethic that the Christians wholeheartedly adopted was the Jewish ethic of care for the neighbor. Jesus was so convinced of the centrality of this imperative that he joined Moses in advancing it as the summary of the law—"You shall love the Lord your God with all your heart and soul and mind and strength, and your neighbor as yourself" (see Bible, Gospel according to Luke, chapter 10). When asked by a rich young man how to get to heaven, Jesus replied, well, first, obey the commandments. When the young man assured him that he always did, Jesus continued: "There is one thing you lack. Sell all your goods, and give the money to the poor, and follow me" (see Bible, Gospel according to Luke, chapter 18). When in our experience has anyone asked us to do that? Is it a reasonable request? Yet we accept this as gospel (literally), and read it in our churches. Do we believe it? In one of Jesus' parables, a rich man ends up in hell just because he did not feed and otherwise care for the poor man outside his gates. There is no suggestion that the riches were ill-gotten or that the poor man was especially deserving. But the rich man did not give the beggar food or care for his sores, so he went to hell (see Bible, Gospel according to Luke, chapter 16). Sharing with the poor is made specific: if you have two shirts, give one to the person who has none; two cloaks, give one away; two pairs of sandals, give one away (see Bible, Gospel according to Luke, chapter 3). How should we think about using our twenty-first-century riches?

Jesus elaborated that simple message with an attack on the institutions that create or solidify inequality. The attack is threefold: woe to the rich (especially the rich businessmen) who will not take care of the poor! Woe to the government that will not insist on justice for the poor! And woe to the church, or religious hierarchy of any kind, if it will not ensure that the poor receive justice! (Churches generally prefer to pander to the rich.) (See Bible, Gospel according to Matthew, chapter 23.) Christianity had inherited the duty to support the poor from the tribal background of Judaism; Islam, emerging some six centuries after Christianity, is also a direct descendant from Judaism, and equally maintains the duty to give alms to the poor as one of its five pillars. All religions of the book, now generally referred to as the *Abrahamic* religions, have this duty built into them; ever since Abraham was required to give a tenth of his income to the priest Melchizadek (see Bible, Genesis), the tradition of donating a "tithe" to your religious denomination, for the support of the poor, has continued.

A very large part of our ethical heritage, then, requires us to give away the goods we have earned, in order to help those who are not as fortunate as we are. The churches have continued to preach this message quietly but generally ineffectively, from Jesus' time to our own. At one point this duty emerged as the centerpiece of a political theory, which deserves some mention. The mid-nineteenth

century was the time of the rise of capitalism, the formation of the factory system, and the emergence of a new class—unskilled factory workers, who thanks to the arrival of automation and the assembly line, were individually dispensable, easily replaced, in the new economy.

As the economic theorist Karl Marx (1818–83) observed, however, they were collectively the heart of the new production. Everyone else was just riding herd on them; they did the work. Marx's condemnation of nineteenth-century economic life sounds just like Jesus: Woe to the capitalists, who have seized the means of production; you are about to be run over by history in the form of a revolution by your workers, the proletariat; woe to you, liberal democracies, parading the ideology of "liberty," "inalienable rights," and "free elections" as the source of your authority, when only the rich get to choose the candidates, buy the printing presses, and generally exercise all those rights. And while we're at it, woe to you, religion, "opiate of the people," telling people to look for rewards after life instead of fighting for what is truly theirs in this one (see Marx and Engels, *Communist Manifesto*). Marx preached his philosophy not as a new moral imperative, but as a new historical thesis, such that without our help at all these new forces, the proletariat and its allies among the intelligentsia, will rise up and create a new communist society, differing in many ways from the previous liberal society.

Marx has been refuted, more or less. He pegged his credibility on at least some movement of worldwide revolution, which has not come to pass. Yet his name lingers, not so much as an economic politician, but as a clear observer of the nineteenth-century scene. He, more than any others of our Greek-derived Western tradition, embodies the Biblical cry for justice, justice to the poor. In many ways, he is the most recent of the prophets, carrying on the message of Amos and Jesus.

Below, in the summary of this chapter, we will attempt to set out several of the most common conflicts of ethics in the Western tradition of the field—the places where right conflicts with right, and hard choices have to be made. For the moment, let us note that a profound schism exists within that tradition, between the command, stemming from our tribal origins and lost in the cosmopolitan societies we now inhabit, to love our neighbor, to give him, or lend him, what he needs to live and to flourish, and the command, derived from the utilitarians, to seek our own fortune in competition with that very neighbor, on the assurance that everything will work out for the best that way. Underlying the two approaches to ethics are two totally different worldviews, one of which takes the individual as primary, property as earned, and wealth as a kind of entitlement. The individual works out his limited duties to others according to law, and for the rest, is free of obligations. The other of these worldviews takes the community as primary, property as given in large part by the luck of birth and rearing, and wealth as a capability that must be employed for the benefit of others, or it will turn and devour its owner and his children. (That's where Warren Buffett and Bill Gates come in: they knew that wealth is for giving away, and they certainly knew better than to leave all that money to their children.) We have no method to decide, certainly, which of the worldviews is right. We know

people, outliers in our society, who have opted 100 percent for one or the other; for most of us, both perspectives coexist very uneasily. Within ourselves, we may feel the moral conflict as we inconsistently choose one or the other.

## **5. Keep Your Hands to Yourself: Respect for Persons**

Our earliest consciousness that other people had rights, interests, minds, and personalities like our own came from the command to stay away from them, to stop bothering them: to let them alone to make their own choices, to honor their requests for privacy, not to touch them without their permission. In kindergarten, we experienced this learning as an assignment of space—the space surrounding my neighbor on the floor is *his* space, not to be confused with *my* space. I have to stay out of his space and he has to stay out of mine. The same goes for my siblings in the car, especially on a long car trip. It is a difficult command to obey, at least when you're young and fidgety.

Yet from this recognition of the duty to respect privacy, to allow my neighbor the physical and moral space that he needs to live his life as he sees fit, not as I see fit, we derive the single most important moral imperative that we have, the imperative to respect the humanity of my neighbor as an end in itself, not as a means to other people's ends (like mine). On this rests the most important fact about humans, that they have dignity, worth, value, passing any assignment of price based on their usefulness to society. Human moral agency is the central object of respect in ethics. Aristotle noted that we, of all creatures, are rational. Immanuel Kant (1724–1804) completed the thought by pointing out that only humans have a rational free will, are able to deliberate, choose, and take responsibility for their choices. He dismissed utilitarianism as a grounding of ethics; whether our acts turn out, in the very long run, to go well or badly is probably not within our control and certainly has little to do with the moral quality of the act. What makes an act a moral act is my decision to act according to the moral law, which is not my own creation but discovered by reason, a law to which I am willing to subject others as well as myself.

This is why I need liberty. J. S. Mill was willing to bet that I could obtain more happiness for myself (in terms of pleasurable moments, recall) if I were free to make my own choices; he also took note that I enjoy making choices for myself, and from both of those he concluded that my happiness, and the happiness of each human, will be maximized if we are left free to make all our own choices in matters that affect only ourselves (see Mill, *On Liberty*). For Kant, this is a trivial liberty, simply an economical way of reaching unimportant pleasures. The truly important reason for freedom is human moral agency and human responsibility, which can only be exercised when freedom obtains.

For the same reason, I need privacy, space to myself in which I can discern my choices, lay them out, weigh them, come to a conclusion that I can call my own, act on that conclusion and take responsibility for it. This is the only process in which I become uniquely human, and as such it is uniquely valuable, to me and to all in my community. In the three versions of Kant's categorical imperative, he gives us the three criteria for moral judgment: the decision you make must be universalizable to all similar cases; you must respect the humanity of any person as an end rather than just as a means; and you must be prepared to work out your moral conclusions in a legislating community of citizens like yourself (at this point he rejoins Aristotle and the polis).

## **6. Keep Your Promises: Faithfulness and Commitments**

Beyond the general obligations taught to every kindergartener, we also recognize special obligations stemming from commitments you have undertaken—not only implicitly or in the distant past, as in social-contract theory, but explicitly and by present participation, as in promising. The notion of promise can be extended to cover a wide range of special obligations—the obligation to care for your wife (explicit in the ceremony in which you were married), to care for your children (in your decision to have them, understanding the obligations), and to show appropriate gratitude to those who provide you with benefits ("you will sit down right now and write those thank-you notes!"). This is why it is permissible to favor your family and friends before others in your use of the resources under your control.

You also have the duty to tell the truth in most circumstances, to pay your debts, to honor any individual promises you may have made, and to serve faithfully in any capacity that you have chosen—especially as a professional. The physician, for instance, ordinarily takes a specific oath, the Hippocratic oath (which has nothing to do with Hippocrates, but seems to be of Pythagorean origin), pledging that he will heal his patients to the best of his ability and will not take advantage of them. Any professional has an obligation to serve his or her clients, roughly equivalent to the "fiduciary" relationship recognized in financial trusts, and the same relationship obtains between any corporate officer and the corporation that employs him (see note on fiduciary duty). This relationship requires any professional to serve only the interests of his client, not himself or any third party, and requires the corporate managers to act only in the interests of the investors, whether the shareholders be a few individuals or number in the millions.

## **7. How Do We Sort This Out in Practice?**

As many a kindergartener has pointed out, and many a philosopher sadly acknowledged, all these directives conflict with each other and sometimes within themselves. Learn them as well as you can

(there are only seven, six if you combine those focused on pleasure and pain), and notice how they conflict in practice in your own life and in the discussions you will be watching. The conflicts are too numerous to list here, but let's take a few of the most common ones (not necessarily those that show up in the video conversations).

How, for example, can I help people who need help if I have to keep my hands to myself and they won't let me touch them? The question is not hypothetical. One of my friends is a geriatrician, a physician specializing in the care of the elderly. She cares terribly about her patients, and wants very deeply to protect them from the injuries to which feeble, elderly people are prone, with their failing limbs, memory and sight. When they insist on living alone, although they have already fallen and injured themselves, when their houses are fire hazards, and when their ability to comprehend their situation is in doubt, it causes her terrible distress—why can't we make them go into assisted living or nursing homes, where they'll be warmer, safer, and better nourished? The directives to which she is responding are not only her natural compassion, blessed by the directive to "be helpful," but also by the promise she made as a doctor, to serve the interests of her patients and "to protect them from injury" (see Oath of Hippocrates). But the law comes down on the side of liberty, and the right of the competent elderly to make their own choices, on their own responsibility, for their own lives: the geriatrician is right on all counts, but in America, she has to keep her hands to herself. (There is the option of conservatorship if the patient is clearly incompetent, but as my friend points out, it is nearly impossible to force a patient into conservatorship if he doesn't want it.)

Promises and debts can conflict with almost any other directive, for they require that we perform specific duties to particular people, while the major directives spell out behavior that is appropriate for the whole human race. Justice requires us to "treat like cases alike," but the obligations of friendship require us to favor friends. If I have to hire someone for my department, and there are two equally qualified applicants, and one of them is my friend, what's wrong with taking the friend? Judges have to recuse themselves when the plaintiff is a friend or a member of his family. Do they have to recuse themselves when the plaintiff made a major contribution to the election campaign? Which is more important, gratitude or impartiality? Corporations are asked for donations to charitable causes every day, but do the managers have the right to give such donations using what would otherwise be the shareholders' money? These are decisions that have to be made every day, and those in particular have to be made in the hypotheticals in this series. None of them are easy.

"Work out your own salvation," St. Paul tells us, "in fear and trembling." The mark of a true ethical dilemma is that whatever decision you make, you will be acutely conscious of the directive set aside, the value lost, when you decide one way rather than another. You will not know for certain that you have made the right decision. Fifty years later, you may *still* not know whether or not you made the right decision. You will hope that it all turned out for the best, and sometimes that hope is all we have to reassure us.



## CHAPTER 3

### CHOOSING JUSTICE Elections and Judicial Independence

#### QUESTIONS TO KEEP IN MIND AS YOU READ THE CHAPTER

1. What are the obvious advantages to having our judges elected by popular vote, as they are in many jurisdictions? What are the obvious disadvantages?
2. Could we write an election campaign law that would keep all the advantages and lose all the disadvantages? Consider the competing values of informing the electorate and ensuring the independence of the judges.
3. What do we mean—what do *you* mean—by justice? How can you tell if a judicial decision, a decision made by a judge, is "just"? Consider: If you had decided—just from looking at a case decided by a court, reading the decision, and examining the reasoning behind the decision as presented by the judge—that the decision was clearly just, would it change your mind to find out afterwards that the judge had received large contributions from the party that won the case?

#### 1. THE PHILOSOPHICAL BACKGROUND FOR THE COURTS OF LAW

##### A. The Rule of Law, as Ideal and Fact

Aristotle was the first philosopher to insist that "it is better to be ruled by laws than by men" (see *Nicomachean Ethics*) on grounds that laws appealed to reason, and the rule of law permitted men to be ruled by their own reason—to live life by deliberation and choice, the highest level of life available to the human species. Ideally, the rulership of humans should be a collective reasoning process by which the exchange of ideas among rational public-minded citizens leads to the best policy decisions, with which all will comply. In fact, the rule of law never worked quite that way; human nature does not work that way. Individually and as groups, people vie with each other for the right to seize the resources of the land, and turn the power of the state, to the aid of their particular interests.

Before there was a state, the groups would simply have to fight those opposing their interests, with the strongest taking power and whatever spoils there might be. After a state has been created and rule of law established, the initial contest for resources and power does not stop; but a process for working out the distribution of these social goods ensues, and all parties agree to abide by that

procedure. What are the advantages of such a procedure? Normally three advantages are cited for adopting orderly procedures of distribution of social goods instead of continued unlimited violence<sup>1</sup>:

1. We have to have rules for the game, rules generally accepted and obeyed or there will be no game at all. The social goods we compete for—the product of the fields and factories, access to water (or oil), shelter from the elements—are available only if people can work together, over a long period of time, investing resources for long-term projects, reliably, responsibly, and to the extent necessary, trusting each other. If we devolve into chaos, Hobbes's "war of all against all" (see *Leviathan*), there will really be nothing to fight for.

2. In the fight, supposing that everything worth fighting for is not destroyed, the strong always win. Prior to the introduction of institutions of morality, we're supposed to approve of that result. But in self-interest, we don't really want the strong to take everything because we have good reason to think that we may be among the weak, and we want some for ourselves. Even if we would really prefer a world where the strong do what they like and the weak suffer what they must, as Thucydides put it (see Thucydides, *Peloponnesian Wars*), but only on condition that we might be among the strong, we find it in our best interests to accept rule of law as a "second-best" option, since it promises that at the least, we will not be destroyed by those stronger than we are (see Plato, *Republic*, book II)

3. Once we have a "social contract" that will stop us from fighting one another, we have not solved all of our problems. If we intend to engage in long-term enterprises, we will need government and legal institutions: property boundaries and an authority to fix them, authorities with power to declare the law and define violations, to ascertain whether a violation has occurred, and to enforce the law with appropriate sanctions. Therefore we must agree on a way to agree (Locke suggests "majority rule"), on a legislature and a procedure for choosing who shall be a legislator, on the forms and limits of coercion available to the state, and on a mechanism to bring alleged violations before the government to determine what shall be done about them.

The courts and the judges find their place in that last imperative. Locke identified, as one of the chief obstacles to successful and prosperous living in the state of nature, the lack of "an indifferent judge," a judge whom both parties to a dispute could trust to hand down a fair decision, even if it were not the decision that they wanted when they entered the court. The trust is everything and there must also be the settled willingness to abide by whatever decision comes down from the court. For in the self-interested striving of the rest of the society, advantage will often go to the party that comes closest to breaking the law (since the law was set to restrict the excesses of that particular form of striving). Often there will be violations, rousing the anger of all other competitors; just as often the competitors will perceive violations in each other, whether or not they are there; the anger is roused, again, in either case. Since Biblical times, we have recognized that the anger and thirst for revenge that is stirred by an offense is more dangerous to the society than the offense itself; a feud among the offended parties can bring the society to chaos much more quickly than a single crime.

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<sup>1</sup> These analyses are not original to me. They have been paraphrased from the following sources: Plato's *Republic*, book II; Hobbes's *Leviathan*; and in the second of John Locke's *Two Treatises of Civil Government*.



Current lethal animosities—Arab and Jew, Sunni and Shiite, Tutsi and Hutu, Muslim and Christian—all of which defy reason and the best interests of both parties, stem from ancient injuries and revenges, now too deeply set in their consciousness to be resolved by the hugs and handshakes of well-meaning third parties. At no point did the combatants accept a simple rule for the non-violent resolution of disputes, or if they did, they did not adhere to it, and that is all that is needed for chaos to reign, and destroy the lives of the innocents.

## **B. Deontological and Teleological Imperatives**

Recall the terminology set out in the opening chapter. The ethically correct decision can be determined in one of several ways, which sometimes conflict. We have, for instance, a structure of moral law and duty similar to the structure of legal law and duty: if the law requires something, then you have a duty to do it. Your aging mother needs care; you must provide it. The cash in the wallet belongs to someone else; you may not take it. You promised to help your father build the deck, or meet your brother at the airport, or take the child to the circus? Then you must do it. That's part of the notion of "promising." Moral reasoning that proceeds from duty, from obligations, that stem from moral rules (the Ten Commandments are good examples of these) or from contracts or promises, is called *deontological* reasoning, reasoning from duty (see Bible, Exodus: Ten Commandments). When such a duty is present, there is no reason to ask "whether the consequences might be better if we ignored the duty." Duties hold no matter what the consequences.

Yet consequences certainly matter. Do we have any right to do something that will harm others? Ordinarily not; one of our strongest moral imperatives is "Do no harm." (Or, "Do no evil," on occasion.) We are supposed to care for each other, to help each other, above all to prevent harm to each other and remedy harm when it happens. Reasoning from consequences is *teleological*, or consequentialist, reasoning, of which the most common example is utilitarian reasoning (see Mill, *Utilitarianism*); it teaches us to look down the road and see what the long-term outcomes of our actions are likely to be, so that we can avoid actions that will do more harm than good. But what if the performance of a duty seems to cause more harm than good? The dilemma is not easy to solve—every soldier in wartime is confronted with it on a daily basis. In the public life of the country as a whole, however, we have a means to avoid the regular conflict between adherence to law and the search for the greatest good for the greatest number, by assigning these two forms of deliberation to two different branches of government.

In the structure of the government established by our Constitution, we have separated the right to make consequentialist decisions from the duty to make non-consequentialist ones. The legislative branch of government makes the laws according to their perception (or the perception of their constituents) of the greater good to be achieved by general adherence to such law. There are certain

duties that pertain to the legislature—to show up, to be responsible, to read the legislation before voting on it (often an impossibility!), and to adhere to the Constitutional limits of lawmaking. (When the Constitution says, "Congress shall make no law" about certain subjects, it means just what it says.) But even that last determination—whether or not a law is constitutional—is made not by the legislature but by that branch of government charged with making decisions based on duty and duty alone, the judicial branch. The judges decide according to the law and only the law; they are to be acutely conscious of the fact that the decision that they make sets precedent for all future judges in their court, but the non-judicial consequences of their decisions are not relevant to their decisions.

Some of the tension underlying the issue of the election of judges stems from the disjunction of these two systems of governmental thinking. Elections for our legislatures are open contests of interests, with the interest groups that stand to profit from the election proudly and openly standing behind (and contributing to the election funds of) the candidate who they think has promised to look after their interest if elected. That is what representative government is all about. But judges are not supposed to promote the interests of the groups that elected them. They are supposed to apply the law without fear or favor, and that means in total disregard of who, if anyone, contributed to the campaign. That is what blind justice is all about. Then why do we elect our judges, with campaign fundraisers, attack ads, and all the usual appurtenances of the people's democracy? How can justice even appear to be blind, when we've just finished cleaning up the tinsel from the judge's exuberant victory party?

### **C. The Ethical Structure of the Democratic Election**

The question has an answer. The democratic election is possibly the most ethical solution we have happened upon to the ancient question, whom shall we find to govern us? Plato argued that anyone who truly sought public office ought to be disqualified for that reason alone, and the suggestion is worth thinking about. But the United States has a proud tradition, when it remembers it, of citizens who chose to spend their lives in public service, and who did it honestly, competently, and in a sense Plato would understand, virtuously. It is no mean thing to serve the nation, and to make a lifelong vocation of it. The question arose early on, of how we might as a people choose those who claim they wish to serve us, and the popular election ended up being the best method. All others are, ultimately, more corrupt; we are reminded that, as Winston Churchill put it, democracy is the worst form of government there is, except for all the others that have been tried.

History had thumpingly disproved earlier claims that descent from royalty, "having royal blood running in the veins," qualified people to govern wisely and well. In a system where office was inherited or appointed by those who inherited, corruption and incompetence had driven the citizens (or subjects, better so called) to despair, rebellion, or exile. Better than all of these, is to let the

people decide for themselves; then at least they had no one to blame but themselves when things went badly. Yet direct democracy, the practice of having all citizens assembled to decide every issue, was clearly impractical. When Athens had tried it, the citizens turned into a mob every time they got annoyed. They confiscated property, rewrote all regulations, disrupted business, placed all investments at hazard, and occasionally lynched, or at least ostracized, public officials that they did not favor at the moment. Chaos ruled. Watching appalled, Aristotle had sketched out another, better, government for his city of Athens, one in which a citizenry, recruited only from the propertied, ruled in rotation according to a constitution which limited the kinds of laws (or edicts) that could be passed (see Aristotle, *Politics*).

The sketch was not forgotten, although its authorship may have been, for the American colonists, working from an English common-law model, came up with roughly the same pattern for their government. A constitution spelled out the strictly limited powers of the federal government restrained essentially, as Jefferson had insisted, to the single task of protecting the rights of the citizens (see Declaration of Independence); the states governed themselves according to their traditional congresses and parliaments; independent judges were selected also by several means, governed by state traditions. Under the federal government the President appointed federal judges and ambassadors and made treaties, all with the advice and consent of the Senate. Powers were carefully separated according to the principles advanced by Montesquieu in *The Spirit of the Laws*, which he in turn had abstracted from the operations of the English government as he understood it. Direct democracy, direct election by the citizens (propertied white males) happened really only at the local level. Towns selected their state representatives; states selected their federal representatives; presidents were elected by an electoral college of experienced lawmakers. The system was representative; it had beautiful checks on corruption and incompetence, since each level of government was chosen out of the next level down, where the persons chosen had been tested and observed by their peers. It wasn't very democratic, though; once a certain group was in power, it tended to hang on to it. So the system was reformed, over and over, with respect to every office there was. First (under President Jackson), the property qualification was done away with; then African American men received the franchise, then women. Direct elections were begun for all offices, finally including the President; and in some states, the system of governor-appointed judges gave way to direct election of judges, as the electorate sought more control in judicial selection. Is it a good system? You'll hear the panelists talk about that; a strong comment will come from Sandra Day O'Connor, retired justice of the Supreme Court of the United States—she's gone through the direct election process in the state of Texas, and the appointment-confirmation process for the Supreme Court, and "they're both miserable." Madison once wrote, "If men were angels no government would be necessary." If we believe in democracy, we will live with the misery; the alternative is to go looking for those angels.

## 2. CHOOSING JUSTICE: THE COURSE OF THE DIALOGUE

This section considers the television presentation or videotape. The recapitulation of the dialogue that follows is not meant to be a word-for-word transcript of the tape, but a summary of the major themes, issues, and opinions that emerged in the conversation. It is for your review, and for use as a resource.

As you read through the dialogue, ask yourself the following questions:

1. What process of choosing judges would inspire my confidence—confidence such that, standing before that judge awaiting sentence, I could be sure that like it or not, that sentence would be fair?
2. We don't talk about "dignity" very much in the United States, but maybe we should; is the election process so undignified as to lower the status of the judge?
3. Should we have very strict limits on what can be contributed to a judge's campaign fund? Should we take campaign funds out of the picture altogether and give judges equal amounts of taxpayer money to run their campaigns?

Moderator: Arthur Miller

Panelists (from left to right on your screen):

Kamala Harris, District Attorney, San Francisco

Bert Brandenburg, Executive Director, Justice at Stake

Elizabeth Blakemore, Principal, Blakemore & Associates

Ted Olson, Former Solicitor General; Attorney, Gibson, Dunn & Crutcher, Washington, D.C.

Sandra Day O'Connor, Associate Justice, United States Supreme Court (ret.)

W. Mark Lanier, Founder and Lead Litigation Counsel, Lanier Law Firm, P.C.

Andrew Napolitano, Senior Judicial Analyst, Fox News; Former Superior Court Judge in the State of New Jersey

D'Army Bailey, Circuit Court Judge in Tennessee's 30th Judicial District

Antonin Scalia, Associate Justice, United States Supreme Court

Thomas R. Phillips, Chief Justice of the Supreme Court of Texas (ret.)

James Bopp Jr., Attorney, Bopp, Coleson, and Bostrom; General Counsel, James Madison Center for Free Speech

Barney Frank, U.S. Congressman (D-MA)

Stephen Gillers, Professor of Law, NYU School of Law

## **Part 1. Fairfield Runs for Office**

Moderator Arthur Miller introduces the scenario. "Panelists, I'd like you to meet John Fairfield. John is now a state trial judge. And he's thinking about living out his life's dream. And that's to become a member of the Supreme Court of Centralia. Now Ted Olson, would you be Fairfield for me?"

Ted Olson is unprepared. "You mean, run for office?"

Yes. Arthur Miller continues. "This state, Centralia, is a judicially elected state. State supreme court runs at large for the entire state. You are free to say whatever you want to say, and you are free to raise money any way you'd like to raise money. One incumbent has stepped down. So there's one vacancy. At the moment, there's one other candidate. His name is Judge Smith.

"Now I'm going to give you two friends. These are two very good friends. One is Bert. And the other is Elizabeth. Bert knows everything there is to know about Centralia judicial elections. Elizabeth has had a distinguished career in getting people elected. Alright, Bert, what do you say?"

Bert Brandenburg begins. "You're running for election, so you might do the things that anybody in an election does. But the fact of the matter is, of course, that the courts are supposed to be different. And therefore we have expectations for people who run to be judges, to run different campaigns, and you have a special challenge. What you will find as a candidate is that there are going to be growing pressures from interest groups and partisans to essentially get you to make commitments in advance as to how you might rule on a case. So that by the time you're in the courtroom, if you win, the parties who come in may not have as equal a shot at due process as guaranteed under the Constitution." What does Elizabeth say?

Elizabeth Blakemore describes her work. "My job is to identify people and groups and anybody I can think of, and give them an opportunity to financially support him." Money? Yes, money, the life bread of politics. For a state supreme-court judge, it turns out, in a state with more than ten but less than twenty million people, we will need about 2 million dollars for the campaign.

Brandenburg is less optimistic. "I wish it was that small. Nearby in Illinois, near Centralia, (it took) 9.3 million dollars just to get a supreme-court seat a couple years ago. You may have to raise a lot more than that."

Miller turns back to Olson. "Now you've been a U.S. attorney and a state court judge. You didn't inherit the farm. Where the hell are you going to get 2 million dollars?" Or more.

Olson finally gets a word in. "I must say, that I find that disturbing, unsettling. I believe very strongly in the judicial system and in people's perception of the independence of the judiciary. I suppose in order to get this 2 or 9 million dollars, or large amount of money, whatever it is—they [the donors] are not going to want to give that money to me unless they think I'm supportive of their positions, their corporations or labor unions or whatever it is. I'm worried about that process, because I see it play itself out in the legislative offices and so forth. It bothers me that I may be forced into relationships or associations or promises—or the *perceptions* of promises—that maybe judges or justices of the state supreme court shouldn't be forced to do."

Miller again. "Where's that money going to come from, Bert?"

Brandenburg gives the answer Olson feared and expected: "Most of that money will come from attorneys who appear before you or want to appear before you, and from corporate and labor interests who know what they want out of the courts. And they want you to know that they're your friend." Miller asks for an explanation of "who know what they want out of the courts." Brandenburg couldn't be clearer. "They want decisions that are favorable to them, and they want this candidate to know that they are his friend, so he will remember. I don't know why anyone would give money otherwise." Blakemore disagrees.

Judge D'Army Bailey takes up the narrative. "I think you have to also understand that a judge, just like a legislator or just like an executive officer, has certain core experiences, attitudes, and beliefs and that the individual doesn't lose that because they put on a robe. But certainly you're going to naturally approach those individuals and those segments of support where you think that they are most in line with your own experiences and core beliefs." So what's the quid pro quo? D'Army Bailey answers, "The quid pro quo is simply that: that you know me. You know what I stand for. You know how I have responded to the public interest in the past. And you know that I'm going to be consistent with that in terms of my honesty and my willingness to speak truth to power."

Elizabeth Blakemore disagrees. "I have never had one of my clients in my presence ask, 'What is your position on this?' People truly want good and fair judges. And they never know if they're going to be on the defense side or the plaintiff side. So why would you say, 'Well, I need to support somebody who's going to go to this side or that side'? Because truly what you want is a fair shake." The proverbial level playing field? "Yes," answers Blakemore. "John's promise is just to carry out the law."

Sandra Day O'Connor joins the conversation. "Well, I wish it were that simple. Because in these contested elections for judicial positions, aren't you pressed to take particular positions for particular constituencies? And aren't the people most apt to give money, those who are lawyers and expect to appear before that very judge? I mean, I'm sitting next to a prominent trial lawyer here. And let me ask you, if I may, Mark, would you be more inclined to give money to a candidate that you thought would be favorably disposed to your cases?"

Mark Lanier is delighted with the question. "Let me see, Justice O'Connor, if I understand this right. I make money generally on a contingent fee."

"Right."

"If I win, I get a cut."

"Right."

"If I lose, I get nothing."

"Right."

"These cases I win go up on appeal. I have a choice between supporting a judge who has a heart towards the victims or supporting a judge who has a heart towards corporate America. One judge may make me enough money to put my kids through college. The other one may cost me money. Would I let that enter my decision on whether or not to give money?"

"I think you probably would."

"Well, now that you *mention* it . . ."

Justice O'Connor underscores the general hilarity with the observation that "You know, this illustrates why it's a bad system to go around electing state judges."

Ted Olson gets back into the discussion. "I just want to say this, that I saw during those confirmation hearings just this year those same kind of questions being put to people for the United States Supreme Court where there wasn't an election."

Barney Frank agrees, opining that the Senate hearings are a bit more controllable. "But let me talk about the flip side. There are similar human instincts whether you're running for the city council or a state supreme-court justice or anything else. Gratitude in our society is generally taught as a virtue, and then you get to be a candidate, and ingratitude becomes a virtue. We who are candidates and



who accept the money that people give us are the only people I know of who are supposed to take money for very important purposes from strangers and swear that it has absolutely no effect on our behavior."

But legislators are different from judges, as Andrew Napolitano points out: "People vote for you because they know where you stand on issues. And that's why they give you money and that's why they vote for you. That's not what a judge is supposed to do. I agree with Justice O'Connor—"

Frank interrupts. "Supposed to, schmupposed to. There's still some difference between judicial elections and other kinds of elections, there's still some difference, but it's a lot narrower than it used to be. And I don't think that's healthy."

Jim Bopp joins in. "The reason that Mark is particularly concerned is because the courts do have a lawmaking role. That is the development of the common law, particularly in the area of personal injury. So the people have given that lawmaking authority to judges, that they quite legitimately are going to exercise. So the people would want to know, 'What's your disposition?'"

Frank has a problem with this. "It is true, there is a certain law-making type of activity. But we also have decided in society that there are things we want judges to do that are so unpopular that we can only rely on them to do them. The ability of judges to do unpopular things, I think, has eroded when you get into this sort of a situation."

Stephen Gillers raises a serious question: "The issue is not whether John is going to vote in a particular way because someone gave him money or not. The more fundamental issue for me is how the public will view John's votes, he having received these 2 million dollars from defined interest groups. Maybe he would've voted that way anyway. Fine. But will the public believe that, or will they believe that justice is for sale? Appearances are as important as the facts, and how do we avoid that appearance?"

How does Olson feel about all this? "I feel very uncomfortable putting myself out for bid, so to speak. You know, I think that people are going to give money to my campaign if they think that I'm going to be ruling in certain [ways] . . . I am disturbed about the process and the message that it does send out to the people. If I have to raise all that much money, it seems to me if it was a smaller amount of money, it might be easier to get."

"Is there anything in your head," Miller wants to know, "not about abstract outside interests, but the fact that the lawyers who will appear in your court, are people who did or didn't contribute to your campaign? Like Mark?"

"It does bother me," replies Olson. "I don't think I'd have as a chief justice or a justice on that supreme court, any trouble ruling against Mark. But I do believe that the people want to have the appearance of justice as independent and impartial. And if all of my money comes from the plaintiff's trial bar or these corporations that may be on the other side of the political spectrum, what are people going to think about what kind of justice I am?"

Barney Frank mentions a further complication. "The key question is this: Are you elected for the rest of your life? Or are you running for reelection? Because gratitude may ebb. But self-interest lives on. And if you are elected knowing that you were running for reelection, that's qualitatively different than if it's a one time election."

Justice Antonin Scalia raises a more basic question. "Why is the problem any different for judges than it is for Barney Frank? I assume Barney is supposed to vote on the many matters that come before him as a representative the way he thinks is best for the country, just as a judge is supposed to rule in each case the way the judge thinks—"

Napolitano jumps in immediately. "But the judicial is supposed to be anti-democratic. It's supposed to be faithful to the Constitution, not to the majority."

Kamala Harris adds, "Look, just because a donor thinks that you can be bought, does not mean you are up for sale when you run for election. And I think that we cannot discount the seriousness with which each of us who has been elected takes the oath of office. There is something we have sworn to do, which is to uphold the law, to be impartial, and to do what we believe is the right thing at any given moment."

Barney Frank is back with another objection. "Yeah, but I have heard members of Congress say, 'Of course, you're right; it's unconstitutional. But I gotta vote for it 'cause it's got a very popular base. And that's why we have judges.' Now, that may not be the way it ought to be. But there's one other point. And there is a tension. [I'm not told] by angry constituents, just do what I think is right. They think I do that too much. There's a democratic element. There's a representational element that's

totally absent from what you do. It's a mix in what I do. There's a tension there. I'm supposed to pay some attention to what the public wants. It's a spectrum; you're on one end and we're at the other."

Miller continues the scenario. "Judge Fairfield has heard all this advice, and he's decided to go into the swamp and run for election. So one of the first things you hit is something from an organization called Centralians for an Informed Public."

"That sounds good," says Olson. ("Or dangerous," from someone else.)

"They have submitted a questionnaire to all of the judicial candidates in the state. So here are the questions. 'Where did you go to law school?'"

Olson: "I can answer that."

"Okay. 'Describe your professional experience.'"

"And I can answer that. I've been a prosecutor. I've been a trial judge. People who have been before me have seen what a good judge I am and how fair I am."

Miller goes on. "Here's another one. On this one you have to check a box. Statement number one: 'I am a strict constructionist who adheres to the plain language and original intent of the framers.' That's box one.

"The Justice Scalia box," quips Olson.

"Box two says, 'I believe that the Constitution is an evolving document, the interpretation of which may reflect changing circumstances.'"

"I think I would decline to mark one or two. And I would try to describe—I would attach to the response—and they may not like that, but I can not be bound by the words that someone chooses to put me into a specific box with respect to such issues."

Scalia is annoyed. "Why am I voting for you? Because I like the way you tie your tie? I mean, I'm voting, assuming you want to elect judges. Now maybe you shouldn't elect them. If you don't elect them, that's fine. But if you have decided to elect them, what's the basis on which you're going to select among the candidates? Who's the most honest? Who's the smartest?"

Olson replies, "You haven't read what I'm going to write. I'm going to write something that will please both you and the people on the other side." Barney Frank adds from his own experience that it's easier said than done.

D'Army Bailey presents the first defense of the practice. "Election of judges on a state level is not a bad thing necessarily, because, to the extent that on the state level your judges are being appointed, who's going to get appointed but those who've got the most political leverage with the state house and with the political establishment in that state."

Tom Phillips presents a measured view of the dilemma: "I think it is legitimate, if you're going to be elected, to visit with the voters about how you see the role of a judge. I think you have to stop short when it comes to committing on a particular case. It's a judge's job to apply the law that the other branches of the government have made."

Stephen Gillers sees electoral advantage in the refusal to climb into box one or box two. "Might we not hope that even though Judge Fairfield cannot answer the question, that there are people who will find him more acceptable because he chooses not to play his hand on those questions? So there may be some who will say, 'I'll vote only for those who checked box one or box two.' But there may be others who say, 'I respect the refusal to answer those questions.'"

Jim Bopp rather likes those boxes. "The answer to this question is the most profound question in terms of the role of the judge, in my view. If the judge agrees with box number one, he's not going to go off making up the law to suit his own personal views."

Ted Olson again. "Well, we're talking about strict construction with respect to terms like due process, equal protection, cruel and unusual punishment, reasonable searches and seizures. And while I like the formulation and I like the philosophy articulated to a degree, I think that if I'm going to be on the state supreme court, I have to be a little bit more discreet."

Barney Frank wants to talk about reality. "The fact is those voters are going to translate that into specific issues. And to a certain extent, it depends on what issues are hot. 'Cause I agree with Justice O'Connor: there's no way in the current situation in American society today that judicial elections will be conducted in any way different than any other set of elections."

The survey continues. "Here's the next question. 'In *Roe v. Wade* the Supreme Court held that a right of privacy in the United States Constitution protects a woman's qualified right to terminate her pregnancy. Do you agree with that holding?'"

Scalia wants to know, "Did you make up this thing? Or did you filch it from some actual election?" Frank volunteers that he got it from a memorandum from the Senate Democrats on the judiciary committee.

Olson answers: "I agree that the Supreme Court of the United States rendered that decision. As a state supreme-court justice, it is binding on me with respect to Constitutional questions, and it's not going to be up to me as a state supreme-court justice to change that decision." Stephen Gillers notes that that wasn't the question. But Andrew Napolitano is supportive: "His answer is right. The opinion of a state supreme court is irrelevant as long as *Roe v. Wade* is still the law."

But is that the answer the people want? Miller points out that people want some notion of what the judicial candidates feel, especially on important questions like this one. Mark Lanier also wants to know more about the candidate if we're going to have an elected judiciary. Miller reminds the panelists that we've been talking about interests positions: "When you're giving money or when you're going into the voting booth, do you want to know whether the candidate believes that *Roe v. Wade* was rightly decided?"

Mark Lanier adds, "I think that can be an issue, absolutely. Because while the supreme-court candidate himself in a state is not going to make a decision that overturns Justice Scalia, he's still going to be faced with other laws that are written that deal on that issue, like whether or not you

have parental notification rights under abortion. There are a number of other abortion decisions that will come up to the state supreme-court judge that certainly you should be entitled to know about."

Jim Bopp adds that "this is a great question to reflect the judge's judicial philosophy. Because many believe, and I believe, that *Roe v. Wade*'s a penultimate example of judges essentially making up a constitutionally protected right. So people can approach this without a position on abortion, as a matter of their judicial philosophy."

Scalia adds, "It seems to me that the more you allow questions like these to be asked and the more that you are willing to answer them, the more you reduce the influence of money. It seems to me that money is a great factor to the judge who has to run in states that said judges can not take positions on any issue that is likely to come before the court. In that kind of a state, all that counts is name recognition. All that counts is advertising. In that kind of a state, boy, somebody that gives you a lot of money is somebody you owe. Whereas in a state where the positions of the people come out, I don't care how much money you get. If you're in a state that likes a strict constructionist judge and you're running as the opposite, you're going to lose."

Barney Frank adds, "The fact is that given the First Amendment and everything else, once you get a campaign, it's a campaign, no-holds-barred. Here's the issue that I think is connected. Do we want the judiciary to have as one of its functions the protection of constitutional rights that are not popular? Justice Scalia, if you had been a state supreme-court justice and voted as you did in the flag-burning case, that would not have been helpful if you were running for reelection, if you had to. And I want there to be a capacity in the judiciary to take unpopular positions on behalf of minorities."

The problem, they agree, is to maintain the independence of the judge, and just as important, to maintain the appearance of independence. Elections threaten that independence, and in the case of large contributions widely publicized, may destroy the appearance of independence. Sandra Day O'Connor comes back to her own experience as an elected judge. "Now I happen to have lived in a state where I ran on a campaign where I had to get money. It was lawyers who wanted to contribute. Nobody else did. I got questionnaires, not unlike what you were reading, and I thought if they were ones that just put you in an impossible choice, I wouldn't respond to the questionnaire and just took the hit. If that group chose not to vote for me, okay. But on questionnaires that were ones where I felt that I could go through and answer, I would."

"But this is the price," comments Napolitano, "the awful price of popularly elected judges, that we will never have an independent judiciary that is free to resist the majority and uphold the Bill of

Rights." Justice O'Connor joins the general agreement: "That's why I don't think we should have popularly elected judges."

## **Part 2. The TV Ad**

Miller advances the hypothetical. "The campaign's on. You're doing quite well. You've got enough money so that you can buy TV ads and your team has put together sort of a nice ad. It tells who you are—a family man, [your] career . . ."

"Dogs," Olson puts in.

". . . [your] accomplishments, dogs. Any problems with that?"

Olson replies cautiously. "No. I don't see any problem with communicating with the public, who is going to have to vote, in the most effective way. If it happens to be television, of course. That's the way most people get information these days."

Miller pushes him. "But it's plain vanilla. You know, it's boring. Are you going to be more aggressive than that?"

Blakemore, the campaign manager, objects. "I don't need to be more aggressive than that. You know when you've got gold, when you've got gold, what do you need to . . ."

Miller is doubtful. "Elizabeth, smell the coffee. Judge Smith comes from Central City. He's got name recognition. He's got money. And he's got some catchy ads."

"We're catchier," says Blakemore, "and we have 12,000 donors who will all go out and vote for Fairfield and tell their friends."

Miller is unimpressed. "That's wonderful in a state with 19 million people. That will get you nothing. Listen: He went into this in part because he believes Judge Smith is soft on crime. When Smith gets a conviction in drug dealing, almost all cases go to rehab. They don't go to jail. He believes you slam the door. You incarcerate them. Is that worth an ad?"

"Absolutely," says Blakemore.

Miller to Olson: "You got any problem with that?" Olson, nervous, stipulates that he wants to see the ad. "What a spoil sport!" snorts Miller. Olson explains: "She's produced some bland ones that weren't any good. Now she's maybe going to be over the top. I want to make sure that there is a fair line, presenting facts fairly, that the voters are entitled to know. You can't put this in the ad; we know, to be fair, that these are individual cases. And judges have to sentence people on the basis of the individual facts. But to the extent that there is a statistical difference based upon facts, the voters are entitled to know those."

The moderator and panelists gleefully imagine Olson's ad: "And she wants you at the end of the thirty seconds to be standing there at the jailhouse door slamming it," says Miller.

"Or maybe billboards with handcuffs on it and his name, right?" suggests Justice O'Connor.

In principle, Olson agrees: as long as the presentation is factual and fair, and relevant to the job, he can accept it.

Bert Brandenburg comes back to the key question. "But judge, we're creeping closer and closer to the point. I mean, you're a judicial candidate. You're promising in advance that no matter what the case, no matter how bad the facts, my job is to look at the law, the Constitution, and the facts of the case, and nothing else. Not whether I like to lock 'em up or I don't like to put 'em in rehab. That should be completely set aside. And if you as a judge run on that as a difference, what does that do to the sense of the public that you will decide cases one at a time and be unpopular and cut against your own stated philosophy if the case so demands?"

Olson works to strengthen his position. "I think what I'm saying with respect to this, is that I have applied the law fairly, and my opponent has not. My opponent has taken liberties with the



sentencing process in a way in which it is harmful and inconsistent with the way the laws were written and intended to be enforced."

Miller counters, "You're going to accuse another sitting judge of not applying the law fairly?"

"I'm going to present those facts. I think if the record justifies it, the people are entitled to know those things." Olson feels strongly about it.

Mark Lanier does not. "So this wasn't something that was focus grouped first and polled to see if it's going to be a strong issue with the electorate? Because if it's a strong enough issue, then all of a sudden you're going to come out on this position, you're going out there to try and win an election on an issue that you think another judge is bad on. And you don't want to tell us that you've gone ahead and focus grouped it? Not only focus grouped it, but polled some community attitude survey, and decided this'll help get you the job?"

"Well, look, it is an election," Olson says. "It is entirely appropriate, it seems to me, if I'm running an election, I'm running it fairly, I'm presenting information that's relevant to the public; to find out those issues that are relevant to a judicial election, that the people are interested in."

Gillers brings the discussion back to ethics. "The ethical dilemma, the hard question is, given your own values, your own standards, your own respect for law, are you willing to do that? Or [referring back to the questionnaire] are you willing to say, as Justice O'Connor said, who won her state election, 'I will not answer those questions'?"

"What's unethical about presenting factual information to the public on a relevant subject, that is to say law?" Olson wants to know.

Miller has another bright idea. "Let's push that. One of your aides says to you, 'Judge, if you're really going to do the soft on crime versus your view on crime, shouldn't you tell Centralians about little Haley? Don't you remember, Smith had that case with a small-time drug offender? He puts him into a rehabilitation program. And while he's supposedly in the rehabilitation program, he gets involved in a shootout. And it's his bullet that kills 5-year-old little Haley.'" Just the sort of story that grabs emotions and distorts elections.

"I understand the slippery slope," Olson agrees. "It is a hard question. If that sentence was blatantly unjustified, I think that it is fair to point out the consequences of a statistically demonstrable practice in real life."

"For the first time, Elizabeth is not smiling," chuckles Miller, "Because you're going to have to give him advice about using this in an ad."

Blakemore: "I think we only use it if we have to. We look at the polls."

"What kind of a punt is that? 'If we have to.'"

"We look and you see where you are," says Blakemore. "The name of the game is to win. The name of the game isn't to win at all cost. This is facts. This is true. But it's a little edgy."

"By the way, Elizabeth," Miller adds, "Haley's parents are willing to be on the ad with a picture of Haley."

At this point Kamala Harris intervenes. "Let's not discount the wisdom of voters. Because we've all seen elections that have reduced down to that base level, and it turns voters off. I think that there is something to be said for the checks and balances in the electoral process, both in terms of the standards that the candidates, judicial candidates, or others hold themselves to, in terms of the ethics of that profession. And then there are the standards that voters do have. At the point that it becomes pandering, they're not stupid, they know that, and they do take a step back. It often turns them off. I've seen that happen in many of our local elections." Is there a particular break point in this sequence? Harris continues: "At the point that it becomes so extreme in its example that it is not statistically based, it is not indicative of the life of that person's career. I mean, that is the great thing about an election. It takes place over a period of time. If it's done like it's done in San Francisco, you go and you talk to community groups. We have debates. We have conversations; and it's on that basis that they make a decision."

Sounds good. Mark Lanier thinks it doesn't work quite that way. "But I tell you, I live in a state where this happens on a regular basis. And here's what they do. They sit there and they run the polls

and the focus groups, and they say, 'Okay, this is going to get me four points.' And then they have Elizabeth Blakemore's good idea of 'This may be a little edgy, we don't use it unless we have to,' which translates into this. Three days before the election, when the other side has no chance to respond and tell the other side of the story, they decide they're within the four-point spread. They better use it. And that's when it comes on TV. And there is no response. And there is no educating the public in a debate or any other place."

'This happens in legislative and executive branch elections all the time; is it any different with judges? Lanier feels it should be. The separation of powers in this country may be being erased, but it can't be; it's what makes America great.

Bert Brandenburg is also convinced that there is a difference. "The job of the legislator is to make a promise and keep a promise. And the job of a judge is to decide cases one at a time based on the facts and the law, and not promises either explicit or implicit."

And Mark Lanier points out, "That's a strict constructionist view."

### **Part 3. Postpone the Hot Issue?**

The hypothesis continues. "Alright, we're a couple of weeks away from the actual election. And John, things are going pretty good. The problem is, there's a new candidate in. His name is Vince Values. And Vince believes that he's the candidate of true Christian family values. There's this case that's been submitted to you. It involves sort of a mundane insurance problem. You have this worker who gets killed in a car accident. And the spouse has applied for medical benefits under the insurance policy. And for whatever reason, the insurance company has said, 'No, we won't cover the spouse.' It's a straight-forward simple little contract question as to who's covered by the policy. And partners are covered. No-brainer. Now here's the problem. The worker killed was Chris Walker. The surviving partner is Pat Jones. They're both women. And they were married in Massachusetts. It has nothing to do with reading the contract. But you have this sneaking feeling that Vince Values is going to make a big deal about your rendering the decision in violation of Christian family values. Your court has a pretty clear rule: opinions, decisions within sixty days of submission. You look at the calendar. It's thirty days to election. Does it occur to you, 'Well, I'll wait for the 31st day?'"

Olson has no trouble with this one. "I actually think that's easy. I render the decision when I'm ready to render the decision. And if I allow that election to affect the timing of that decision, I don't

deserve to be elected. I don't deserve to be a trial judge." Miller gives him an out: "You're busy." He doesn't take it. "I know human nature. I know that those things might occur to people, and probably would occur to any human being. But to the extent that I allow that to affect my decision, I think that is fundamentally basically wrong." Lanier is impressed.

Barney Frank is dubious. "I got to tell you, in the circumstances you said, there's a number of people who I think would say, 'You know what, I can decide it on the 32nd day or I can decide it on the 28th day and it will make zero difference.' I am not confident that the overwhelming majority of candidates would make the decision that way [the way Olson made it]."

Lanier agrees, pointing out to Miller that he knows these people. Most judges would put off the decision. Justice O'Connor begs to differ, but Lanier is firm. "I'm just telling you, they—you've got such an impeccable panel. But that's not what exists out there. More and more of our judges sit there and they think, 'Okay, I don't have a job if I lose my election. I've got to keep my seat and I'm going to make the same ruling 31 days from now that I'm going to make today. It doesn't change anything. This way I still have a job.'"

Miller points out that, "In a curious way, he's avoiding misperception about the opinion. Because he has an instinct that Values is going to distort it."

"Well, that's another great rationalization he can make," Lanier points out. "I mean, he can sit there and say, 'Well you know, if I decide it today, then it's going to affect the election, because people are going to think I'm coming out and making a values statement, when really I'm not. I'm just making a legal decision. So to keep from being perceived as making a values statement, I owe it to the electorate and the country to wait.'"

Kamala Harris points out that a fundamental point of ethics is involved in this dilemma. "Is the standard 'What does that individual do when no one's watching?' or 'What they do when everyone is watching?' Because the question here is really in terms of the ethical; the integrity of this candidate is shown in *when* is he going to make the decision, not *what* will the decision be. And I think we should also think about how we probe that point in the course of an election."

#### **Part 4. Changing the System**

Tom Phillips joins the conversation. "Eighty-nine percent of the trial judges in America face some kind of an election. Almost two-thirds of them are contested elections. And over three-quarters of the appellate judges face some kind of an election. These ethical problems that we're talking about are in front of us." Miller promptly appoints him to be Fairfield. "You won. You won. You had a magnificent term. Now you're saying to yourself, 'I'd really like to the change this system.' What would you do?"

"I'd like longer terms," Phillips begins. "I would like to look at the public funding system, like North Carolina has, where occupation taxes for lawyers go into a pool of money. If you get enough signatures on petitions, you can share in some of that money. So you don't have to go with your hand out, and frankly, it is just the people who want something from the courts who are going to give. I raised 2 million dollars in my first race. And about three hundred dollars was from widows and orphans. The rest was from somebody else." He's willing to stay with an election system though. "Well, there's going to be some kind of an election in most states. It's going to be a vote. And it's going to be regular intervals. And so the issue becomes, 'How do you communicate with the voters?' And 'What do you say to help the voters make an informed decision?'"

Justice Antonin Scalia joins in. "I have said that I do not favor an electoral system for judges. I don't favor it because I have a relatively narrow view of what judges ought to be doing. And when you have a judiciary that has that narrow view, they are not making many basic social decisions for the society. If you change that view and the judges are doing more, it will be inevitable that in a democratic society the people will want to hold them accountable. We did not have elected judges in this country until the Jacksonian era, which is the same era in which we began to view the common law as something that changed. Prior to that, once there was a decision, the only change could be made by the parliament. The two go together. If you want to have unelected judges, it seems to me you have to have judges whose scope of activity is not as broad as that."

Miller turns to Sandra Day O'Connor. "Now I take it, Justice O'Connor, you would prefer a non-political appointed system?"

"Yes. With people recommended for appointments from a non-partisan bipartisan commission."

D'Army Bailey is skeptical. "Let me ask Justice O'Connor: if you go to the appointed system, do you complement that with some expectation that the judges appointed will fairly and proportionately represent the population in the area where they sit?"

"Yes. I think you can reasonably expect that. And in my home state where we went to that system, we got far more minorities on the bench than we ever had under the political election system. Far more."

Andrew Napolitano points out that "If we went to a system in the states similar to the federal system, the pressure on state governors, as there is on presidents, to appoint women and minorities would probably result in more of them being appointed than would ever be elected."

## **Part 5. Federal Court**

The hypothetical continues. "He [Fairfield] thought he was going to get off the court. But a funny thing happened this morning. You got a call from the attorney general. You're on the short list to be appointed to the United States Court of Appeals." That's a federal court. Justice Scalia points out that he'd never have to run again. Tom Phillips points out that he'll have all these people looking over his shoulder.

Miller appoints Justice Scalia and the other lawyers to tell the non-lawyers about the difference between state and federal courts. Justice Scalia obliges: "There's a whole separate system of justice at the federal level: federal district courts, federal courts of appeal, and the Supreme Court. They only deal with federal law. And the overwhelming majority of legal issues in the country are state-law issues, not federal." Others join in. Federal judges don't have to run for office, but they do have to go through the Senate confirmation process, which may be worse. They're appointed, so they don't have to collect money,

Scalia continues. "They are appointed by the President, by, and with the advice and consent of, the Senate. So they have to get a majority of votes in addition to being viewed favorably by the President." He goes on to add, once he realizes he can't count Justice O'Connor any more, that all currently sitting Supreme Court justices were judges on the court of appeals at one point. Miller wants to know, "Does it take politics out? Do we now have a system on the federal side without politics?"

No, says Scalia. "No Republican president is likely to nominate a Democrat to the Court. And no Democratic president is likely to nominate a Republican. I mean there being a million lawyers in the country, surely you can find some Republican who's worth the job, or some Democrat if you're a Democratic president."

"What do you do then, Justice," D'Army Bailey wants to know, "when you've got a situation where you've got a Republican governor, and you've got a county in that state that's heavily minority, all of whom pretty much who are Democrats, you've got a Republican governor and he's not likely as a practical matter to appoint a Democratic lawyer?"

"Well, he looks for a black Republican lawyer."

"Well, that's gonna be a hard search," says Bailey.

"Why did the feds opt for this system, so radically different?" asks Miller.

"Federal courts have never had common-law powers," Scalia explains. "They have never been able to revise the law of torts, revise the law of contracts. They only apply statutes enacted by Congress and the text of the Constitution."

Justice O'Connor points out that they also apply the law of admiralty. Is that common law or not? O'Connor and Scalia disagree. O'Connor takes up the history lesson. "We derived our system largely from that of Great Britain. The king appointed the judges, and they served at his pleasure. Finally in the Settlement Act in the 1700s they decided the king couldn't just remove them. They were going to serve for a certain amount of time, and not [be] subject to removal by the king. And that is the system we thought we were copying in this country."

What's the difference? Miller wants to know. "We know that there are political influences both in election and appointment." But is appointment somehow more genteel? O'Connor laughs. "Oh, they're both miserable. At least in the federal appointment process, you get the U.S. Senate involved, largely through the judiciary committee. And we've all been witness to what that entails. And it can be pretty miserable, too."

"But, you know, in a sense, the individual candidate is less on the ground in an appointed system than in an elected system," says Miller.

"Well, the individual doesn't have to run," counters O'Connor.

"Which is worse?"

"They're both bad. I've done both."

Mark Lanier joins the conversation. "I will tell you, from the practicing trial law perspective, a federal judge to us seems much more an independent judge, whereas the elected system—sometimes the judges just seem simply politicians."

"But I think that's more a function of the tenure than it is the process of getting there," Kamala Harris objects. "If you know that you're in a—you know all of us, as elected, I hope that we will be judged not on any one decision but on a body of work. And the reality is, that the longer time you have to demonstrate your principles the better it is and the more likely those decisions will be made with the right purpose. So when we talk about 'what is an ideal system?' perhaps if there is some reform, it would tend to lean itself toward longer terms, so that that process can take place and the decisions can be with integrity."

"The longer term presumably breeds more independence," says Miller. "Less accountability perhaps, but more independence."

"Absolutely. But that's why then there has to be more integrity in the process of getting someone to that longer period of time," Harris answers.

Jim Bopp adds an historical note: "But the problem is historically that that just hasn't panned out. The people want impartial judges that follow the law, and we have adopted an elective system in part because of the response to Dred Scott, in the states of the Midwest and the West. Their constitutions were formed by abolitionists that were concerned about judges not staying within their bounds. So an election is a mechanism by which the people can ensure that judges stay within their proper bounds. And this is a problem."



The hypothetical advances. "You have gone through the confirmation process. You are on the bench. You're doing fine. But as inevitably happens, there's another big battle. You sat on a three-judge panel that reversed the conviction of a supposed terrorist. You voted to affirm the conviction, but your two colleagues voted to reverse the conviction. And all hell has broken loose. People are getting up in Congress, calling your colleagues traitors. They're screaming, 'Impeach him! Impeach him! Impeach him!' How do you feel about that?"

"Other than glad I voted for the dissent?" Phillips asks. "Well, again, I go to what Kamala says. It's very unfair to judge anybody, particularly a jurist, on the basis of one decision. You need a career to look at. If the judge is doing his or her job, not making a judgment based on their own personal desires for what they'd like the ideal society to be, or even how they'd like the laws to be created, they're trying to apply a law passed by another branch of government or some rule promulgated by the highest court of procedure and then letting the chips fall where they may."

In the chatter that follows, it isn't clear that Phillips respects his colleagues' opinions; they may have been wrong. On the other hand, Napolitano points out, a tenured judge should not care about what other people think. He should only care about fidelity to the Constitution. As Gillers insisted and Phillips reemphasized, he should care about the perception of fairness. Is Congress worried that the process isn't fair, or are they making political hay by attacking the judgment? In the eyes of some Congressmen, those judges were traitors. Napolitano insists, "It's not the process that's being hammered. It's the outcome that being hammered. Presumably the process was fair. They reviewed what the trial judge did and they reversed."

Scalia isn't very happy with that. "It's one thing to say that you want to give judges lifetime tenure. It's another thing to say we can't criticize our judges. I mean, that goes with the job. It goes with any job in public service. And if you can't handle the criticism, you get some other job."

Ted Olson agrees. "I agree with Justice Scalia; it's entirely appropriate to criticize the merits of the decision. And it's the First Amendment that protects people's right to say it in an outrageous way. But it is the responsibility of those of us in the legal community who are not judges to speak out and defend the judges that did make that decision. They rendered a decision on the basis of their honest convictions of what the Constitution required. Some people might call it a technicality. That's what you say when you don't like the outcome: 'It's a technicality.' But I do think it's very, very important for the legal community, the academic community, the bar associations, and elected public officials to come out and say, 'We're not going to impeach judges because they rendered a very unpopular decision,' especially if it involves someone accused of being a terrorist."

Bert Brandenburg underscores that point. "That's exactly right. And if that doesn't happen, if after that absolutely protected criticism there isn't a good response, what we will see will be criticism turning into impeachment threats and attempts to get legislators to just oust judges. And this is what we saw in the Terri Schiavo case, where a determined minority got the Congress of the United States to run as fast as they could to jiggle with the case, threaten the impeachment of the judge. The guy had to have a deputy sheriff to walk his dog. And the American public stood up and said, 'We need to protect the rights of judges to make the right decision even if we disagree with it.'" Ted Olson points out that we are also protecting the right of the judges to make *wrong* decisions.

Justice Sandra Day O'Connor raises another issue. "The one thing that I get concerned about at times is whether there's an effort on the part of another branch of government to retaliate against a judge for making a decision. Now that's where I think we run into trouble. I don't think that's the system the framers had in mind when they wanted to protect an independent judiciary. Criticism is entirely justified. But is it justified to then say, 'Let's impeach that judge because of a decision with which we disagree; let's strip the courts of jurisdiction over that kind of case; let's cut the budget that we're going to approve for the judiciary'? These are retaliatory actions."

Miller turns to Stephen Gillers: "Do you have any sense of anything being at stake here when you've got this kind of unpopular decision?"

Gillers sums it up: "Yeah, there's a lot at stake. I'm glad you asked that question because I want to come back to the title of this forum, and it's *Ethics in America*. I think now we're talking about the ethics of the legislators who are attacking the unpopular decision by threatening impeachment or by threatening to cut off funding or jurisdiction or what have you. For my nickel the federal judiciary is perhaps the most successful man-made institution of government in Western civilization. Threats of impeachment and threats to cut off jurisdiction undermine what is a wonderful prize for the American people and legislatures who do that because of some immediate perceived political advantage are acting unethically. That's very different from criticizing the decision. That's a head-on challenge to the reasoning. It's quite different, however, to try to cut off the judiciary at the metaphorical knees through jurisdiction or monetary or impeachment threats."

After all this time, is Justice O'Connor worried? "I am. Because I've lived a long time. I'm an old person here now. And in my lifetime I have never seen such a level of attacks being made on judges. Are you aware of what's going on South Dakota, where there's a proposition to go on the ballot to amend their constitution to withdraw judicial immunity and allow judges to be sent to jail for some unpopular decision? This is quite radical. And it runs counter to everything the framers of our Constitution had in mind. Am I worried? Yes."

### 3. SYNTHESIS AND DISCUSSION

Judges and elected congressional representatives have different constitutional origins, different duties, different accountabilities, and different methods of reasoning. Barney Frank is clearest in articulating the difference between the representational function and the judicial function. He notes that as a representative, he has to represent the interests of his constituents: "They don't tell me to vote as I think best. They think I do too much of that already"; they want him to represent them. The judge is not supposed to do that. The legislature's vote has to be "popular," or at least not outrageously unpopular. But judges decide according to the law and the constitution; if flag burning is protected as political speech by the Constitution, then the justices of the Supreme Court, even conservative Justice Antonin Scalia, must decide accordingly. In the legislature, as Frank points out, the lawmakers sometimes cannot afford to do unpopular things, whether or not the law requires them. He points out that his colleagues will sometimes vote for legislation that they know full well is unconstitutional, just because their constituents demand it, counting on the courts to throw it out. We have a delicate, and beautiful, division of labor here.

How do we keep judges independent and the selection process pure and free from cronyism? The panelists do a beautiful job of sorting out the problems in both the election process and the appointment process. D'Army Bailey points out that if election is corruptible, appointment is simply corrupt. In these cases sometimes there is no infallible way. Yet in the end, underlying the complaints about the system, there is a confidence that we do in fact (in general) have a conscientious and independent judiciary, and the will to keep it that way.

That is not to say that there is not a powerful political overlay to the way we select and treat our judges. The panelists make a passing reference to the case of *Dred Scott v. Sanford*, decided in 1857 by a Supreme Court led by the powerful proslavery justice, Roger Taney. Dred Scott was a slave who had escaped, made his way to Illinois and Wisconsin, where he had been recognized as a free man and granted citizenship. His mistake (for his own case; it was a good thing for the nation) was to move back to Missouri, and asked to be recognized as a citizen there. He was denied citizenship, declared by Missouri to be a slave, returned to his master. The case made its way to the Supreme Court. It was a case of first impression; no one had ever decided whether a runaway slave who had resided legally and been granted citizenship in a free state was a free person under the law who should go on living freely, or a piece of property that had to be returned to its owner. Panelist James Bopp stated that when Taney's court decided that Dred Scott was not, and never could be, a citizen, just because he was black, antislavery states in the Midwest and West decided that they wanted elected judges, to keep them accountable, to make sure that decisions in the states would stay within bounds.

The panel ends on a somber note of warning. There has always been a process, impeachment, to remove from office a judge who had seriously abused the powers of his office or neglected his duties (or got himself into some really unsavory mess with the law). Never was impeachment intended to serve as a means of accountability for day-to-day decisions. Yet increasingly, from that sector of the American electorate known as the "radical right," we are hearing calls for impeachment of judges who make decisions that are not popular with that faction. More alarming yet, we are hearing threats of physical harm to judges, from fanatics newly empowered by the illusion of infallibility. The panel refers in passing to the sad case of Terri Schiavo, discussed at some length in the chapter "Three Farewells"; the case was significant because the Congress of the United States, for reasons of political popularity, tried to get involved in the disposition of a case at law, with disastrous effects. Incidentally, the Congressional acquiescence encouraged certain groups who opposed Michael Schiavo's right to decide to "pull the plug," to threaten the lives of the judge in the case. Has the beautiful balance of powers, maintained since the establishment of the Constitution, begun to tip toward the reign of the popular? The panelists suggest that the independent judiciary is a terribly difficult accomplishment, one that is by no means as secure as it seems, and eminently worth defending.

#### QUESTIONS FOR YOUR REFLECTION

1. Look up *Dred Scott v. Sanford*, and see if you can pick out the places where Justice Taney is simply deriving law from the Constitution and where he is interpolating his own convictions about the proper status of African Americans. What other decisions of the U.S. Supreme Court have shaped the whole understanding of law in this country?
2. What moral and political values are preserved by democracy in general and the election of all public officials in particular? What moral and political values are set aside or put at risk? On the whole, does the balance recommend democracy or some other system? Say why.
3. The panelists briefly discuss ways that a judicial system might be structured to maintain both accountability and independence in the judiciary. See how many of these alternatives you can find in the literature; evaluate them. What seem to be the characteristics of the best systems?

#### 4. SUGGESTIONS FOR FURTHER READING

##### Special Supplementary Text

Noonan, John T., and Kenneth I. Winston, eds. *The Responsible Judge: Readings in Judicial Ethics*. Westport, Conn.: Praeger, 1993.

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Johnson, Dennis W. *No Place for Amateurs*. London: Routledge, 2001.

Johnson-Cartee, Karen S., and Gary A. Copeland. *Inside Political Campaigns*, Westport, Conn.: Praeger, 1997.

McFadden, Patrick. *Electing Justice: The Law and Ethics of Judicial Election Campaigns*. American Judicature Society, 1990.

Nelson, Candice J., David A. Dulio, and Stephen K. Medvic, eds. *Shades of Gray: Perspectives on Campaign Ethics*. Washington, D.C.: Brookings Institution, 2002.

Taylor (Jr.), Stuart, and Benjamin Wittes. "The Law: Of Clerks and Perks," *The Atlantic Monthly*. July–August 2006.

Thurber, James A., and Candice J. Nelson, eds. *Campaigns and Elections American Style*. Boulder, Colo.: Westview Press, 2004.

## **CHAPTER 4**

### **THREE FAREWELLS Medicine and the End of Life**

#### **QUESTIONS TO KEEP IN MIND AS YOU READ THE CHAPTER**

1. When the prognosis for a child is very, very bad, what do you (the doctor) tell the parents? What if they are not interested in following your recommendations? Who should decide which treatments should be carried out and which should not?
2. In the opposite case, when surgical intervention is required to save the life of a child whose general prognosis is one of severely limited intelligence or other impairments, but whose life would otherwise be long and generally happy, what do you tell the parents? What if they are not interested in following your recommendations? What if they don't consent to the surgery?
3. As a patient slips off into dementia, what of the patient's desires can you take seriously? In the special case where the patient, well aware of her own condition, has firmly specified no extraordinary interventions (including most emphatically feeding tubes), what do you do when her swallowing muscles are paralyzed, she can no longer eat, and keeps telling you she's hungry?
4. What is the difference between allowing death and aiding death? Should doctors be permitted to prescribe lethal doses of drugs to their terminally ill patients who request them?

## 1. THE PHILOSOPHICAL BACKGROUND FOR MEDICAL CHOICES

### AT THE END OF LIFE

#### A. The Value of Human Life

Human life does not appear to be a complex value; every society has placed very high value on the lives of some members of the community ("May you live forever, O King!"), and contemporary Western ethics value all human life equally. The concept and practice of the profession of medicine, with which we deal in this chapter, arises from the dual insights that (a) any value that is to be realized for humans requires life (for where there is life there is hope, as the moderator begins), and (b) human intervention in sickness and injury can in fact save life, sometimes, and restore health. That last insight possibly goes back 10,000 years, and it is central to our understanding of human life and health now.

But what do we do about the newborn baby so badly handicapped that he/she will never talk or recognize her parents or have any awareness at all of the world around her? Earlier speculation attempted to explore our understanding of the value of life to draw out the meaning of *human* life. Human life is what is valuable, went the reasoning, not just mere life itself, and such a baby, lacking basic human attributes like speech and laughter and curiosity and love, was not really human. This line of speculation left us wondering which lives were "worth living," or for the physician, "worth saving," and at what point we might decide that the "quality" of such a life was so "low" that the patient might be abandoned to death as no longer worth our attention. Early in the game, about 25 years ago, the philosophers who specialize in medical ethics, or "bioethics," as it is called, realized that this line of speculation got us nowhere worth going, and moved away from that line of thinking. *Of course* the impaired baby, described above, is human. She has not transformed into some animal, nor, despite the popularity of the phrase *vegetative state*, into some vegetable. The question is not, What is she? let alone, What is she worth (or Is she worth saving?)? But rather, What sort of medical interventions are appropriate for her, given her medical condition?

To answer this question, the rule in force in the practice of medicine is straightforward and wise, but often difficult to apply. Only those interventions (support for breathing on a ventilator, feeding tubes, kidney dialysis, surgery, etc.) should be offered that promise benefit for the baby proportionate to the burden of the treatment.

Note, first, that the benefits are measured from the point of view of the patient, not from the perspective of those surrounding the bedside. Save for very limited considerations—a grandfather arriving the next day, for instance—the patient's interests alone count. Every intervention, every penetration of the body, insertion of tubes, even attachment of wires for monitors may be assumed to be painful or burdensome at some level; if it will do no good, it should not be done. This simple reasoning grounds the concept of "medical futility": if an intervention will not yield good, proportionate to the burden of the intervention, it is "futile," and should be withheld. And note, second, this rule is no different than the rule of medical appropriateness, the Hippocratic Oath, that governs all medical treatment, and has since the fifth century B.C.E., binding all physicians who took that Oath "to do *nothing* that is not for the benefit of the patient" (see Hippocratic Oath). Physicians do not administer laetrile for cancer any more than they administer aromatherapy for appendicitis or megavitamins for pneumonia. If it is not going to do any good for the patient, given the condition of the patient, it should not be done.

## **B. The Concept of Paternalism**

Through the three "farewells" contemplated in our stories, we can see different occasions for the exercise of medical "paternalism." The word comes from the Latin *pater* (father) and entails the following three values central to the practice of medicine:

1. Through the cultivation of knowledge, expertise, the physician is obligated to acquire and maintain that body of knowledge that ensures that he/she will understand the situation well enough to make good decisions, which almost always means that he understands the situation better than the patient.
2. In large part because of demonstration of that expertise, the physician is granted social and legal authority, to prescribe dangerous drugs, to invade the body in surgery, and most importantly, to command an enormously complex array of technical treatments (radiology, physical therapy) that would not exist save for the practice of medicine.
3. In exercising compassion, the instant identification with the patient's pain, fear, and disability, the physician is moved to action that will heal.



From these three qualities, the physician is governed by the value of medical *beneficence*, the duty to do the most possible good for the patient. Recall *beneficence*, *justice*, and *autonomy* from chapter 1. "Beneficence" is logically based on the greatest-happiness principle (see Mill, *Utilitarianism*).

By background and training, by legal and social approval, and by his/her commitment to heal, the physician is the person most to be trusted with the medical decision. Medical paternalism is one of the last vestiges of the ancient imperative to care for each other, especially when the "other" is most vulnerable. It is like a fiduciary obligation, as are all professional obligations: the physician has the power to exploit his authority over the vulnerable patient for his own advantage, but *must not* do so (see the note on fiduciary duty). This imperative, which has been in place since Hippocrates, was known to our ancestors as the obligation of the physician not to multiply visits after the patient had recovered, and, at the other end of life, to step aside in favor of the priest (i.e., to stop sending bills) when the *facies Hippocraticus* (signs of death) were seen in the patient. It is present today in all the moral prohibitions against the physician enriching himself at the patient's expense, for instance by entangling himself financially in the patient's treatment—by referring patients unnecessarily to his own radiology units, for instance, or prescribing exclusively drugs from companies in which he owns stock or maintains a lucrative consulting arrangement.

The physician then, in most senses of the word, "ought" to be making the decisions about what care a patient will receive, and until the early 1970s, certainly did so. At that time, largely because of the emergence of new technologies—like the respirator—that no one knew how to limit, a limiting value to medical paternalism emerged, that of "patient autonomy." The patient, in legal terms at least, "owns" his own body, and since time immemorial has had the right to refuse treatment from the physician. There is no legal requirement that the competent patient know what he is deciding; if the patient refuses the intervention that the physician recommends, the physician cannot proceed. An uneasy compromise between the physician's duty to recommend what is in the patient's best interest, and the patient's right to refuse that recommendation, has been found in the notion of "informed consent." When the patient has full information about his particular condition and the alternatives for addressing it, ideally as much information as the physician has, then the patient has not only the right but also the ability to make choices for his own case (see the *Belmont Report*).

How does that compromise affect the treatment of the patient? The reviews are mixed. On the one hand, the patient's (and the parents') assertion of the right to refuse, accept, or demand treatment has led to some massive distortions of medical effort, prolonging the agonies of patients who were clearly dying and could not profit from medical attention. On the other hand, patients assert that the feeling that they have control over their treatment is almost as valuable as the guarantee of a cure. The tentative nature of this compromise is felt throughout the episodes examined below.

Questions about autonomy in medicine arise under three different headings, all of which include both problems in determining degree of autonomy (how free and informed is the patient?), and problems of deciding whether freedom or rationality is more important.

1. *Patient competence*: Is the *patient* autonomous? We know that when we are sick we have trouble thinking straight. When a patient is sick, in pain, under sedation for pain, possibly suffering from some brain damage as well, suffering from identifiable clinical depression, both reactive (from unhappiness at being sick and hospitalized) and chronic (due to chemical changes in the brain brought about by sickness and medication), or in the most extreme case, demented, should the patient's refusal of further treatment be honored? Should it even be taken seriously?
2. *Fitness of means to ends*: Is the *choice* reasonable? When a patient seems competent, relaxed, and lucid, yet repeatedly insists that a clearly gangrenous limb is not to be amputated because it will get better or that her diseased appendix must not be removed because that would keep her from getting well, what assumptions must we make about the nature of the treatment decision? Should it be honored anyway?
3. *Authenticity*: Is it the patient's *own* choice? Does the decision express the patient's real wishes? When an inebriated friend makes a tactless remark about me or my car or my living room sofa, I'll dismiss it by saying, "It wasn't him talking; it was the drink." When a patient has cooperated eagerly with all prenatal care, but after many hours of fruitless labor refuses a necessary Caesarean section, we are tempted to wonder, Is that the patient *herself* talking, or is that the fear? When a comatose patient's surrogate decision maker, who has agreed for months that no resuscitation is to be undertaken in case the patient's heart stops, suddenly cries out for the nurses to *do* something when the heart actually stops, we are tempted to wonder, is that the person talking or is that the panic? On the one hand, we want to allow patients, on their own or through surrogates, to change their minds. On the other hand, we want to make sure that those are *their* minds that are changing.<sup>2</sup>

Difficult cases abound. If a patient in the early stages of Alzheimer's disease is insistent that there should be no "feeding tubes or other stuff" when she gets too sick to make her own decisions, what weight does that declaration have when she has lost all contact with reality, can no longer eat—but says she's hungry?

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<sup>2</sup> Newton, L., *Ethics in America*, © 1989 and 2/E, © 2004, 92-93.

If a Jehovah's Witness refuses a blood transfusion repeatedly, and all next of kin and friends concur in the decision, should we honor that refusal? The weight of law and tradition says that we must. Now, close to death, the same Witness suddenly cries, "Save me! Save my life!" Has the patient just changed his mind (in which case we should give the transfusion), or is this just a cry of fear, expressing no authentic desire of the patient's in these circumstances? What *should* we do? If a pregnant woman agrees ahead of time that no painkillers should be used during her labor, but starts crying out for drugs during the very last contractions of a normal delivery, that request is routinely ignored. If a patient dying of cancer has agreed ahead of time that no mechanical or artificial aids to breathing or nutrition should be introduced during the ebbing of his life, and then, in extremis, cries out for help in breathing, should we ventilate him or routinely ignore such requests?

The primary debate in all of the above is whether we should accept a person's choices as valid and unchallengeable when the major objection to those choices is that they damage no one except the person herself (see Mill, *On Liberty*). That is the situation assumed in most of the debates over "informed consent" in medicine, especially when the decision is to withhold life-sustaining treatment. If the decision materially affects the interests of others, it is generally accepted that those others must have a hearing before the decision is carried out. But what counts as "affected"? Patients' spouses will always be affected by patients' decisions; they should certainly have the right to say something. But should they have a veto? If there are minor children in the family, a mother's choice to forgo treatment that is likely to save her life and restore her to health will almost certainly be overruled.

Suppose the decision affects only some policy or practice. Contemplating the practice of removing feeding tubes from a dying person, a nurse of my acquaintance remarked, "You know, there are lots of places in this world where a person can starve to death. My hospital should not be one of them." Traditionally, medicine has not "given up" on a patient until everything has been tried to improve her condition. Suppose a patient refuses further treatment before that point has been reached. Is the traditional medical practice standard an appropriate limit on autonomy? Or should autonomy be taken most seriously *precisely* at that point where some set of professional standards, developed by professionals for professionals, imposes unwanted invasions on the person?<sup>3</sup>

### C. The Consensus and Its Challengers

The case of Karen Ann Quinlan, who lost consciousness in 1974 and then died slowly in a nursing home for the next ten years, raised in dramatic fashion the issues of obligations to the terminally

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<sup>3</sup> Ibid., 94–95.

unconscious. Karen never regained consciousness after her breathing stopped for several minutes, but her case went as far as the Supreme Court in an effort to determine whether life support—a ventilator, then antibiotics, and a feeding tube—could be withdrawn in the case of a person who would clearly not regain consciousness again. The tentative conclusion at the time was that it could indeed.

Some years later, Nancy Cruzan ended in the same condition after an automobile accident; her case also went to the Supreme Court in an effort to determine if the parents could order the removal of the feeding tube. In December 1990, when Nancy died pursuant to the legally authorized removal of that tube, the last issues in the medical obligations to the dying seemed to have been resolved. As we move into the twenty-first century, we may say that a consensus had been achieved, on the continuation or withdrawal of life support for the terminally ill, one shared by physicians, major religious groups, and that group of scholars known as *bioethicists*. The consensus was clear: life shall be respected from beginning to end. Only under very limited circumstances shall any action be taken to bring about death by deliberate action, either by the person dying (*suicide*, or *assisted suicide*, legal only in Oregon) or by another person with the consent of the dying person (*euthanasia*, legal only in the Netherlands). But when it has been determined that a person will not return to full consciousness, there shall be no further obligation to initiate or continue medical interventions. As death approaches, as extensive brain damage becomes evident, as the patient lapses into permanent unconsciousness, coma, or "persistent vegetative state," medical interventions shall be withdrawn and the person shall be permitted a dignified death.

Then came the case of Terri Schiavo, and that consensus broke down. On the morning of February 25, 1990, ten months before Nancy Cruzan finally died, Theresa Marie Schiavo collapsed in her home, apparently of a heart attack, and suffered anoxia, the loss of oxygen to the brain, for a period of time sufficient to cause extensive and irreversible brain damage—precisely what had happened to Karen Ann Quinlan. She was resuscitated, cared for, and subjected to experimental treatments over the next several years, in ultimately fruitless efforts to revive her. Through all this time her husband and legal guardian, Michael Schiavo, and her parents, Robert and Mary Schindler, worked together to obtain for Terri any treatments that might hold out hope for her recovery. After about four years of this, Michael Schiavo concluded sadly that his wife would never recover, and authorized the removal of the feeding tube that sustained his wife's unconscious life. At this point the parents insisted that there was still hope for her, sought legal help in an unsuccessful effort to have Michael removed as guardian, and began an eight-year battle to keep her alive.

On two separate occasions the feeding tube was ordered removed, and twice it was reinserted. Videos of Terri's random motions were circulated, discussed, and interpreted by religious circles across the nation. The tapes finally reached the Congress of the United States where the Senate majority leader, a licensed physician, pronounced without examining the patient, that she was not in a persistent vegetative state and that treatments should be continued.

Michael Schiavo received many death threats from the pro-life movement. Financial and other matters intruded on the public discussion of the case. Lawyers, physicians, and bioethicists watched in amazement as the episode unfolded, turning a private tragedy into a public spectacle. When Terri finally died, pursuant to the removal of the feeding tube, in March of 2005, the contours of the next round of "right to die" battles became unclear. Could one false step, one dispute within the family, shift the right to have one's dying wishes followed, out of the hands of the family and more firmly into the hands of the government and activist groups?

## **2. THREE FAREWELLS: THE COURSE OF THE DIALOGUE**

This section considers the television presentation, the DVD, or videotape, of the dialogue on the subject. The recapitulation of the dialogue that follows is not meant to be a word-for-word transcript of the tape, but a rather summary of the major themes, issues, and opinions that emerged in the conversation. It is for your review, and for use as a resource.

As you read through the dialogue, ask yourself:

1. If you were in a desperately puzzling medical situation and were trying to figure out what to do about it, whom would you ask to help you sort out the best course of action? Whom would you trust for advice, your doctor, your clergyman, a family friend?
2. We love our lives, and the lives of those close to us, and that is as it should be. At what point does the defense of "life" yield to a consensus that the burdens of prolonging life are not justified by the possible benefits to be obtained?
3. In the singularly wrenching case of terminal dementia, should advance directives be honored even if the demented maker of the directive now seems to be happy in an altered phase of consciousness?
4. Are there ever circumstances when the physician might assist a patient in ending his or her life?

Moderator: Arthur Miller

Panelists (from left to right on your screen):

Denise V. Rodgers, M.D., Chief of Staff, University of Medicine and Dentistry of New Jersey

Daniel Brookoff, Attending Physician at Integrative Treatment Center in Denver, Colorado  
(focused on the treatment of chronic pain)

Kathryn Tucker, Director of Legal Affairs for Compassion and Choices

Kenneth Connor, Attorney, Governor Jeb Bush's Representative in the case of Terri Schiavo

David Satcher, M.D., Ph.D., Interim President, Morehouse School of Medicine, Director,  
Center of Excellence on Health Disparities, Former Surgeon General of the United States

Marcia Angell, Senior Lecturer in the Department of Social Medicine at Harvard Medical School  
and former Editor-in-Chief of the *New England Journal of Medicine*

Elder Dallin H. Oaks, Member, Quorum of Twelve Apostles, Church of Jesus Christ of  
Latter-day Saints, Former Justice, Utah Supreme Court

Arthur Caplan, Ph.D., Director, Center for Bioethics, University of Pennsylvania

Melinda Delahoyde, Board Chair, Care Net, Writer and Leader for Nonprofit Organizations  
(focused on life and bioethics issues)

Deborah Campbell, M.D., Director of Neonatology, Montefiore Medical Center

Barney Frank, U. S. Congressman from Massachusetts (D-MA)

John J. Paris, S.J., Walsh Professor of Ethics, Boston College

Diane Hoffmann, Director, Law and Health Care Program, University of Maryland School of Law

### **Part 1. Baby Hope, Born Dying**

The moderator, Arthur Miller, starts us off with the case of a picture-perfect pregnancy tragically ended with a prolapse of the umbilical cord during the birth process. Deborah Campbell explains what that means: during the birth process, the cord has been compressed denying the baby oxygen and nutrients. Baby Hope is fully formed, perfect, but now is white, limp, motionless, unresponsive, with a very weak heartbeat. What shall we tell the parents? Art Caplan and Melinda Delahoyde are appointed as parents, anxiously awaiting word.

"Hope is quite ill," Campbell says. "We are supporting her breathing with the aid of the tube in her windpipe, as well as doing the breathing for her. We've given her medications to try and help her heart work more efficiently and establish her body functions." Miller wants to know, "Do you think they understand what you just said to them?"

"No," answers Campbell.

Art Caplan, in the role of the parent, responds, "What I think you're saying is that things are going to be okay. You're just going to do everything . . . you have the technology. I know you do." Campbell is concerned but noncommittal, admitting to Miller that "I'm not going to be able to solve it." But she agrees to aggressive therapy for a while, anyway, because she feels it is appropriate at this point. The parents, of course, are still very anxious for news. A week later, Campbell has to talk to them. By now it is clear that Hope has severe brain damage, a badly swollen brain, and very low brain waves. Campbell does not hold out a lot of hope. The baby cannot breathe on her own. She is fully dependent on the machine for breathing. Caplan, as parent, is very unhappy. "When we came, you said you would do everything."

Campbell points out that they have done everything: "We have her on the most advanced respirators. We're supporting her blood pressure. We're giving her intravenous nutrition. We're treating the seizures." Campbell makes it clear that no one is "giving up" on this baby yet. The parents' option right now is "to continue the level of care that we're providing, which is aggressive maximal care. In terms of withdrawing care or withholding care, I think we would still need a little bit more information, to be able to definitively say the true level of brain functioning."

Miller pushes the doctors. All right, you've had your time. There's no real change. Go back to the parents. Now do we take the baby off the ventilator? The parents do not consider this path an option. For them, it's too much information too quickly. Miller suggests bringing in Denise Rodgers, in the role of the gynecologist who cared for the mother during pregnancy. ("That was a *good* doctor," growls Caplan.) Rodgers suggests that they need some time to make decisions. Caplan is still scouring the Internet for possibilities that the doctors are wrong. Rodgers does not think so.

Denise Rodgers tries to make the major options clear to these parents. "I think it's important to understand what life for this baby chronically on a respirator is potentially going to be like. It isn't the baby will be on a respirator and life will go on. The baby will develop pneumonias. The baby will potentially develop any number of other complications, not the least of which is we have to make decisions about how to feed the baby." If the baby is taken off the respirator, she will die.

"That's *not* an option," says Caplan. Very well then.

Rodgers says, "I think given where you are right now, and given your beliefs, the baby will remain on the respirator."

Daniel Brookoff is invited to join the conversation. He is humble. "I can't tell you what's going to happen to your baby. Only God can predict the future. What I bring to the table is I know what's happened to other babies I've treated in this situation. That's what doctors bring—we bring our experience. And we bring our love for each of our patients; we want to promote their life." His experience in this case suggests that "babies like this don't live a very long time despite all of our efforts, because of the pneumonias, because of being on a ventilator. At the same time, I owe it to you to give you the options."



Melinda Delahoyde can't get away from the feeling that unplugging that respirator would be killing her baby. All the doctors are quick to deny that. As Brookoff points out, "life and death are not yours or mine [and it appears that] the baby is dying. I think she is. She shows no neurologic response and shows so much brain damage. I don't think things will be sustained."

Father John Paris invited to comment, assumes the role of their parish priest, and explains the Catholic Church's position on such decisions. "I've known the Caplans a long time. I performed their wedding. They've been in my parish. They're good Catholics. And we have great emphasis on the sanctity of life. And people think this requires that we do everything possible to sustain every life. But that's never been the Catholic teaching. We understand that God creates us—that we're created for the purpose of living this life and, ultimately going back to God. And that decision is God's, not ours to make. It can be eighty years. It can be eight days. And the Catholic tradition in this—and I've talked with both of the parents about this—is that if medicine holds out no realistic expectation that the child will improve, then there's no obligation to use it. And the cause of death is the underlying disease that's created this problem, not in the removal of the ventilator. So this isn't killing. This is letting die."

Yes, but Caplan doesn't want to stop the respirator or give up Hope. He'll never allow her to die, no matter what Father Paris says.

Maybe he can get some support from Ken Connor? Connor agrees that removing the ventilator is not taking "active steps" to cause the death of the child. He finds it a difficult decision—then adds that removing a ventilator is not the same as removing food or water, since that removal brings about death from dehydration or malnutrition, not of the underlying condition.

What does Dr. Marcia Angell think? "Well, you know we haven't been talking about the baby as much as we should have. And that's what I would like to get to. I do think that the parents have the right to make this very difficult decision. I would not stampede them into doing it in the first week or the first two weeks even. I would let them live with it for a while. But what I would try to get them to understand is that there is no higher brain function here. This baby, fast forward months, years, decades—this baby, even if it could be kept alive that long, would have no feelings, no awareness. None of the things we associate with being a human being. I would try to make them understand what it's like from the baby's point of view, which is nothing. There is nothing in this baby."

Is removal of the ventilator in Hope's best interest? No, says Angell. "Hope has no best interest at this point. No higher brain function means no best interest."

The message is not universally accepted. "How can you say that about our baby?" Delahoyde protests. "Our baby does have a best interest!" Angell points out that she wouldn't say that to the parents. She'd say it to the doctors, but not the parents just yet. The audience chuckles, but Delahoyde is deadly serious: "But why would you not say it to me? I am the parent. My baby does have a best interest. My baby has a right to life. My baby has equal protection under the law. All those things that babies have, whether I believe my baby has it or not. Whether there's a higher brain function or not. Unless you can tell me my baby is dying." Art Caplan chimes in: "You know, doc, medicine changes. Things improve. Someday they might find something."

Angell concedes the truth of that observation, "And as I said, this is your choice. This is ultimately your choice. And I would have the doctors and the hospital do what you wanted to do. But I would let you know that the things that we associate with being human, the capacity to form attachments, to love, to feel, to think, even if it isn't Albert Einstein thinking, that this will never happen to a child with no higher brain function."

This line of thinking is making Ken Connor uncomfortable. "But this baby is alive. This baby is a human being. She's not excluded from the human family simply because her thought processes may not be the same as others. For heaven sakes, lots of folks with dementia in the nursing homes can't form attachments, aren't aware of their surroundings. She's not disqualified as a member of the human family simply because she's profoundly disabled."

Brookoff rejoins the conversation noting that "none of the doctors here have talked about withdrawing support, if you'll notice. It's only the lawyers that have said that. And the thing is, you love your baby. Things will unfold, and there is time. There is no rush to death. And if I'm going to make a mistake, I'm always going to err on the side of life."

Miller invites General Satcher to comment. "I think from the beginning I would have been concerned about these parents. And I don't know if I would have dealt with them in isolation. I would've wanted to know more about their support system. These parents need to be prepared for the fact that this baby may not survive. I would have started that preparation in the beginning. But, I would have sought some help in terms of dealing with them because they're in a very difficult situation."

Angell adds, "I think it's important to tell these parents the truth, even while you acknowledge that it's now the parents who are your patients in a sense. And that they really do have the final decision."

Miller changes the hypothetical slightly. "Now, Elder Oaks, they're not Catholic. They're members of your church. And they come in and they say, 'These people are looking at the potential of success. They're looking at benefits, burdens. Isn't this just simply about sanctity of life?' "

Not really. Oaks says, "I think it's about the source of life and the purpose of life. Sanctity of life is kind of a political term. And you know the teaching of our church that when death becomes inevitable, it should be looked on as a blessing, and a purposeful part of eternal existence. I'm not telling you what to do or when to do it. But I am urging you as my friends and fellow believers to see what has happened to Hope as something that's happened to a daughter of God who loves her as much as you do. And who in the great eternal scheme of things is going to see that she is not denied any advantage in the eternities. And while I think you surely should not give up hope, if I can say it in that way, in the short term, take the long view, and seek guidance through your prayers and your personal consultation with one another."

Caplan is unhappy. "You know we tried to have a baby a long time." But more importantly, "If—if we do this now, are we going to kill her? Will that be on our hands if we say yes to that withdraw . . . to turning off that machine?"

"No," replies Oaks, "because you will be dealing with a situation that's known to your Heavenly Father. And he does not guarantee any of us unlimited existence. As I've heard some other people of other faiths say, 'We're sent here with a certain period of time.' And perhaps her period is short. And you could not realistically expect to sustain her life by heroic measures through a lifetime. And, I don't think that's expected of you by a Heavenly Father who understands the conditions of this circumstance."

The hypothetical advances. Hope experiences renal failure. Shall we initiate dialysis? Campbell points out that the baby's condition is deteriorating. "The concern for Hope was that even with maintaining full support for her, her organs would begin to fail. And we're seeing that now. We could initiate dialysis, but it's really forestalling an inevitable process for her. She is dying." That's enough for Delahoyde. If she's dying, there's no point in dialysis.

Caplan is willing to keep plugging, but Delahoyde's view has changed. "A medical opinion has been given to us by a doctor whom I trust, because when others said, 'Think of cost benefits and think of quality of life, and think of all these things,' she said, 'No. Let's—let's keep Hope alive and see what's happening.' She saw Hope as that person regardless of what her potential or quality of life was. But now, this same doctor is saying to me, 'Your baby is dying.' Now we're ready to stop."

Not Caplan. He wants to know if dialysis hurts. He obviously wants the dialysis for his baby. Brookoff isn't sure he's going to get it. "You can't do anything that's futile. We do have a standard. We're not going to do anything that we know is not going to be helpful. We won't do a sham treatment." Will dialysis be helpful? "From the point of view of the renal failure, it'll stop the renal failure from killing her. But it's unfolding. We have to face reality."

Delahoyde joins in, mind made up. "If the reality here is that our baby, from all medical indications, not quality of life indications, not cost indications, not any other indications, but if the medical indications are that our baby is dying, then I think that's a case where we say, 'What is the benefit here to Hope of—of putting her through a treatment like that when we know that we are looking, from a medical perspective, at her death?'"

Father Paris takes it to the next step. "The kidney specialists say, 'We won't do it.' And this would now be a clash between the parents' desires and at least one segment of the medical community's insistence that it's not appropriate. Then it goes to the ethics committee." And Miller says, "You're it." Paris continues. "And I'm it. What we ask is—what is the potential benefit to the person? To Hope? Not to her kidneys as isolated organs. Because we don't just deal with kidneys and hearts and liver and spleens. We deal with this whole person. Against the horizon of her eternity, what's the benefit that we can offer to her? We listen to the doctors. Dr. Campbell tells us this is a cascade of incidents she's going down. We're unable to reverse these. This is the first of the multiple organs that has failed. But others are surely going to fail. And the ethics committee would rule there's no obligation to provide an intervention that doesn't offer a realistic medical expectation of significant restoration to the patient. That's what the ethics committee will tell the physicians because we're only asked about the ethics of it."

## **Part 2. Baby Hope and the Surgery**

At this point the hypothetical does an about-face. "All right," says Miller, "let me give you an alternative world. It's still Baby Hope. She has severe brain damage. But she can see. She can feel. She can hear. But she has a defect in her intestines. And, of course, Dr. Campbell, you'd be ready to do the [surgical] procedure [that will remove the blockage and permit her to digest food]. Now, here's the rub: When you talk to the parents, the parents say no. And you know this baby will die without the operation. And, you know what they're thinking about. Some of these children never talk. They never get out [of] diapers. They're a burden. These parents don't want that burden. Does their will control?"

Campbell is cautious. "We do need to elicit from parents their views, their values. And that does have to factor into our discussions of what we offer babies."

Eliciting values changes nothing. Miller says, "The parents are a brick wall. We do not want the operation on the child." Campbell is tentatively supportive of their decision: "Actually in the context of a baby who you're describing as neurologically very compromised, but able to feel pain and able to suffer, it's adding another burden on this baby, without potential benefit beyond just correcting the problem." Denise Rodgers agrees with Campbell.

Daniel Brookoff advances another opinion: "If [when the surgery is performed] this baby is going to live a life, and it's going to be ended because I'm withholding what would be normal medical care for any other baby in this situation, I have to ask myself am I being complicit in terminating this baby's life unnecessarily?" Can we impose such values on the parents? Brookoff isn't imposing anything at all. He's just asking, "If you're in my hospital in my NICU, am I going to withhold a routine procedure that I've done to other babies because this is a baby you don't want to take home?" But can you ignore the wishes of the parents? Brookoff asks the crucial question: "Who's my patient? That's where we're getting discordant."

Horns are beginning to lock as Miller questions, "Do you have consent for this operation? No—I'll sic the lawyers on you."

Brookoff is ready for that. "Well, I'll get my own lawyers and protect the baby because the baby's interests and the parents' interests are now becoming divergent. And my patient is this baby."

Marcia Angell points out that "this case is very different from the other one. In the other case, we were presuming there was no higher brain function. That first baby was incapable of suffering, so was beyond suffering in a sense. And so, it had no best interest in that narrow definition. Here you have a baby who presumably is capable of suffering. So, once again, what I'm asking is that we look at it from the baby's point of view. Not just the baby's intestine, but fast-forward—months, years. What will be the condition of this baby? How much suffering will this baby endure?"

The next interchange ultimately brings out the two positions very clearly. Under the head of "feeling," the word used by both, Brookoff is projecting the *capacities* of the baby—the baby will see, hear, learn, and recognize caregivers.

Angell is focused on the probable *suffering* of the child in a life consumed by painful and burdensome medical procedures. If the child is projected as living a life close to normal, "then I think I would think about going to court and getting guardianship," says Angell. She defines the key issue as "what

does this mean to the baby? Not to the baby's intestine, but to the degree of suffering that will be a part of this baby's life." Miller wonders if such decisions depend entirely on a crapshoot—on which doctor you get. Shouldn't there be a law to cover these cases? Congressman Frank, would you comment?

Barney Frank points out that there are laws that cover the general case—if the child stands a good chance of reaching a normal adulthood, then of course we proceed with the operation. But that won't settle the facts of an individual case.

Brookoff is not happy with that general statement. "But where do you draw the line, then? What if the baby can't walk and they don't want it?" Someone points out that it's also a crapshoot, which parents you get. John Paris makes the distinction: If the parents see the child "as a burden on themselves, that's irrelevant. But if they see this, as Marcia puts it, as a horrendous burden on the baby, it's very different."

Frank agrees, but continues, "If you're talking about someone who is, who is gonna only breathe, have no other element of life, that's an easy one. But if you are then saying, 'Well, on balance is this individual going to suffer more pain than pleasure?' That's not a calculation the law would make. I would say if you're talking about someone who will be able to exist off a respirator, a sentient being, I would put a heavy burden of proof on anyone opposed to keeping that baby alive."

While the parents are arguing, Baby Hope dies. The death of the baby has devastated the parents, and especially the grandmother, Faith's mother Charity.

### **Part 3. Dementia in the End Stages**

It's maybe a year later, Miller begins, "and, sadly, Charity is beginning to show signs of early Alzheimer's. She's in her 50s." Miller, playing Charity, and wondering what lies ahead, addresses Denise Rodgers. You're still the family doctor."

Rodgers answers, summarizing our understanding of Alzheimer's disease. "Charity, from everything we can gather, it's likely that you have the early stages of Alzheimer's disease. What this means is that over time, you're going to have more and more difficulty remembering things. You're going to eventually get to a point where you may not be able to live on your own as you do now. And you

may need more and more support throughout the rest of your life. And it's important now to do those things that perhaps you said, 'Three years from now, four years from now, I think I'll do this.' It's important now for you to make those connections or reconnections with people that you kept putting off, because you've got a limited period. And I think this is the time." Miller ruminates. "Well, that's a lot to think about. So, I think about it. Then, I want to talk to my husband. Barney, will you be my husband?"

Frank doesn't miss a beat. "Sure, in Massachusetts." Miller continues. "I want to talk to you about something serious, Barney. When the time comes that I can't remember things, that I don't recognize you, that I don't recognize Hope— see? I said 'Hope.' I meant Faith. I still think about Hope. I don't want to be put on a machine. I don't want to have tubes. I don't want to be in pain. But Barney, let me die. Don't give me a cough drop. And I need your word on this. When that time comes let me die."

Frank agrees. "Absolutely, I completely agree with you. I think it would be useful for us now to write this out because there may or may not be some legal issue. But whether there is or there isn't, I love you, and I respect you. And I think you have the absolute right to decide the condition in which death comes and at what point it is appropriate, particularly when we talk about a complete loss of all the things that have meant life to you. And yes, you have my absolute word. And no matter what the consequences, I will honor that." Including no artificial hydration or nutrition. Frank agrees, absolutely. He will honor that.

"I watched Hope," Miller explains. "No tubes." Frank agrees: "I will fight for that. I will do everything that is legally possible to accommodate that and to keep you from a situation in which that would be imposed upon you against what I now know to be your will."

Fast-forward five years. Charity has received the best medical care, but she has deteriorated, and now she doesn't recognize Barney. Miller describes her present condition: "I have my good days and I have my bad days. They're about equal. And, you know, [a] friend brings a little dog, a little terrier to the house a couple times a week. And I pat it. And it licks my face."

Miller explains, "Then Charity has a stroke. Now, her attitude toward life and her ability to enjoy, or to be confused, that doesn't seem to have changed as a result of the stroke. But two things have changed. First, she no longer can speak. Second, she cannot swallow. So the only way to receive nutrition is through a tube."

How does Barney Frank react? "My answer would be first, I would feel obligated to try to get a response as to whether or not she had changed her mind. It may be that that's beyond hope. If I got no positive indication that she had changed her mind, my answer would be that she should be allowed to die. And that having clearly as an adult made clear what she wanted to be done, that my obligation is to honor those instructions."

Caplan and Brookoff wonder whether saying, "Let me die" is the same as "Cause me to die" or "Kill me"—if refusing a feeding tube is really causing death, possibly killing.

John Paris comes to Frank's support. "No tubes means no tubes." The argument continues. Did she mean *this* situation? She's not otherwise *dying*. Frank is clear: "She didn't say, 'When I'm at death's door.' She did not say, 'Oh, if I'm dying, don't stop me.' She said, 'If I reach this point where there is no quality of life, where I have no ability to enjoy, then don't put tubes in.'" Caplan doesn't think she's there yet. Frank does. "Before the stroke, she was already deteriorating rapidly. A good day was a day in which a dog licked her face. Now, by my standards, a day in which a dog licked your face, if that's the highlight, you're not in great shape. She, having made clear to me what she wanted done with her life, she continues to govern."

Would Father Paris comment? Yes. "I've been down this road many times, truly, with my grandmother, my mother, my sister, and my brother. All of them said, no tubes. No tubes were ever given. Aunt Moll has a stroke. My grandmother takes care of her. She bathes her, feeds her as she grows weaker, sips of tea. Weaker still, nothing. Into the scene comes young Dr. Miller. He says, 'We can put a rubber tube right down Aunt Moll's nose and feed her nasally.' My grandmother says, 'Glory be to God, Arthur, have you lost your senses? What is your tube going to do for that?' And then, she'd tell you where to put your blessed tube."

Miller turns to Elder Oaks who has a question for the doctors. "When you put the tube down a person's throat because they cannot swallow, how many inches of treatment are we talking about? I'm suspicious that this case fits in the category of what we should do to sustain life in a reasonable, non-intervention way."

Marcia Angell wonders if that matters. "People have a right to refuse medical treatment for any reason whatsoever. It's a battery if you force medical treatment on someone. So here you have a person who knows that she won't be able to exercise this capacity. But who then says to her husband, her proxy, 'Do it for me.' That transfers her right to him. He has the right to act as he believes she would want him to act. And I don't see any reason to get into how long the tube is."



Miller advances the action. "While you people are conducting this very interesting seminar, Faith has come into the room. And I'm Faith now. Faith says, 'Dad, what are you doing? Mom doesn't want to die. Don't you remember about six, seven months ago she had pneumonia? And, I took her to the hospital because she was having trouble breathing? And all the way to the hospital she just kept gasping, 'Don't let me die. Don't let me die. Do something.' That was Mom. And the woman who is here today, that's Mom. That was Mom. Not five years ago.' [So] which Charity are we talking about?"

Delahoyde answers: "Well, that's the point. You can't know who you're talking about. And when I listen to my father over here making decisions about when mom's quality of life wasn't what she would want, well, how do you know? On what particular day? Under what circumstance?"

Miller turns to attorney Ken Connor. "Do you think we have a lawsuit here?" Connor agrees: "There's a lawsuit and he will represent Faith. "I'll maintain that what Charity's decision would be today under the circumstances is what controls."

Would Diane Hoffmann care to comment? Sure. "I'll represent Barney."

What do they say to the judge? Connor starts out: "Your Honor, we're here today to decide what decision Charity would make today under the circumstances. We have admitted a previously executed living will that identified that she didn't want to have any tubes. That was done five years ago. But, more recently, confronted with her own mortality, staring the possibility of death in the face, she urged her daughter in the strongest of terms to preserve her life, to protect her, to provide her with the care that she needed. And we think that it doesn't matter what Barney wants. It doesn't even matter for that matter what Faith wants. The issue here is what would Charity want today under these circumstances? And we think the most recent evidence available indicates that she would want to live. She's not dying. All she needs is the provision of nutrition and hydration. And respectfully we would urge the court to provide her with the basic sustenance of life in order to preserve her."

Hoffmann presents her argument. "Your Honor, we strongly disagree with this characterization of the facts. The patient expressed to her husband in very clear terms when she was competent that she would not want to live under these circumstances, that she did not want any tubes. She made that as clear as she possibly could. Any comments or remarks that she has made recently, there's a question

of whether she was competent to make those comments at this point. She has Alzheimer's. She had a stroke. They do not appear that they would reflect what she would want."

Connor rejoins: "Judge, she has a right to change her mind. We make decisions far removed from the eventuality that we're going to face. But here most recently, just a few months ago, when Charity was faced with the imminence of her death if there wasn't intervention, she pled that her life be saved."

Miller grants time to Kathryn Tucker as an amicus curiae. "Your Honor, I'd like to frame the issue in terms of the right of the patient that's at stake here. When Charity made her wishes known in the advanced directive, she was looking forward to an eventuality such as we confront today. At that time, with all of her values and beliefs in mind, she decided then that should this day arrive, she did not want a tube. And the nature of the right, Your Honor, which has been recognized by our United States Supreme Court in the *Cruzan* case, is that this is one of the most fundamental, deeply personal decisions an individual will make in their lifetime. That kind of a decision is reserved to the individual. And we must respect that here. Now, it's appropriate to make sure the document was executed at a time she had decision-making capability, and that it's a valid document, and that the husband is also speaking from knowledge of the patient's wishes and beliefs. But we've done that here, Your Honor. We must respect that patient's wishes because these are her most deeply held beliefs."

Oaks comments. "There's another consideration, if I may, that a judge has to think about. Not only the case before him, but the effect of the ruling upon the whole field of the law. As a judge, I would be saying to myself, 'If I rule against the document and the stated regular intent of the individual, what is that going to do to the validity of such documents in this jurisdiction generally?'"

"So, you see footprints in the sand?" asks Miller. Oaks replies that a judge is responsible to do that.

"General Satcher," Miller asks, "what do you think about the consistency or inconsistency of the way the law approaches this and decides cases?"

Satcher replies, "I certainly agree in this case that, given what we know about Alzheimer's, we would think that once she made the earlier decision, she was at her highest competency. And so I would hope then that the law would see it that way. Obviously, it's not easy to resolve family conflicts, and you have one here. This is now in the hands of the court, and they have to rule based on judgment about her competency at that time."

#### **Part 4. Should Physicians Aid Suicide?**

The hypothetical advances. "As the case is being heard, Charity passes away. So now, we have Faith. Hope is gone. Charity is gone." Miller tells Kathryn Tucker (now playing Faith), "You're going through a tough period; you've been experiencing some physical symptoms. You've gone to your doctor, Dr. Brookoff. And he reports to you that it looks as if you have pancreatic cancer. Doctor, talk to her."

Brookoff takes a deep breath and begins. "I have to tell you that we saw in the CAT scan advanced pancreatic cancer. And it's a terrible cancer." Tucker agrees—an especially bad kind. What are her chances?

Miller suggests that since it's fairly early, maybe there is a 20 percent chance. Brookoff continues. "Well, if it's surgically removable; we're very aggressive. And like I said, you know what? There's no 20 percent chance. Your chances are zero or 100. Probabilities relate to other folks. All I care about is you. I think if there is any kind of reasonable chance that we can get you through this and past it, we want to do that. And I want to work with you to outline a plan so that we're both on this page. The one thing I can promise you is I'm sticking with you."

Tucker, still in the role of Faith responds, "Well, let me tell you what I want. I'm willing to pursue curative therapy. So if you think surgery has a chance, I'd be willing to do that and/or chemotherapy or any other therapy that might give me a good chance of a cure. But I do know that if that's not successful and I am approaching death, that I want to know that I can have a measure of control over the time and manner of my death. And, for me, based on who I am and my values and beliefs, it would be important for me to know that if my dying process is prolonged and horrific, that you will assist me in bringing about a comfortable and peaceful death when I feel my dying process is intolerable. I need to know if you would do that."

Brookoff doesn't really answer: "What I'm going to do is, I'm going to keep you comfortable. You're willing to take risks to fight the cancer, and I'm going to tell you, the chemotherapy can be dangerous. There are dangers that we might accept. I'm going to do everything I can to keep you comfortable."

That's not what Tucker was interested in hearing. "Right. But I want to push you a little bit further, doctor, because it's early enough that I could change doctors. What I need to know from you is if my dying process becomes intolerable to me despite your best efforts, and I say, 'It's time for me to have a peaceful and dignified death,' I want to know that you'll help me with that. And if you can't make that commitment to me now, then I do want a referral."

Brookoff is not interested in cooperating. "I don't think death is a treatment for anything. There are certain things that we might encounter because we're going through this together. There's pain that we can treat. There's sadness and depression we can treat. There are other things that are not medical, but come up. There's abandonment. There's despair. There's anger. And those are all things that have treatments. I want your life to be wonderful even . . ."

Tucker isn't sure he understands. "Let me tell you a little bit more about me, and that is I've been a person that's always exercised a lot of control and autonomy in my life. And I know as I approach death, I'll want to be feeling that I'm still an autonomous person. And so, if I need to obtain medication to let me hasten my death in a peaceful and dignified way, I want to know I'm in the hands of a doctor who will respect that. And so, maybe . . ." Yes, Brookoff understands. "Right." They agree to disagree.

"Dr. Angell, do you need a patient?" Tucker inquires, "Because maybe I need to look for a different doctor."

There are protests, but Brookoff sees a real disagreement. "I don't think a treatment aimed solely at hastening death is a medical treatment." Tucker insists that the decision is hers, and Brookoff agrees. He's not going to pretend to go along with her when what she wants is not what he considers medical treatment.

Tucker continues. "I don't hear a commitment from you that you would honor my request, though, to make available to me medications that I could take at the time that I felt I was ready to have a peaceful death." Brookoff points out that those medicines are "aimed at terminating your life," not at relieving pain or other symptoms, and Tucker agrees, appreciating his candor.

Miller wants to know if it would make any difference to Brookoff if this were taking place in a state like Oregon, with a statute that under certain conditions a doctor can assist a death. No, it would

not; the existence of a statute permitting such assistance doesn't mean he has to. "And, like I said, I know why I'm here. And it's to promote your life."

Tucker would look for a physician who would give her that commitment. Miller suggests Dr. Campbell. Tucker asks, "Dr. Campbell, would you be in a position to make that commitment to me if we traveled that path together?" Assuming, Miller adds, that "we're in a state like Oregon, and that the conditions of the statute could be complied with."

Campbell reflects that "under those circumstances, if, again, therapy was not beneficial, the patient was not responding, the cancer was spreading, the patient was in the process of dying, and it was acceptable, again within the construct of a societal stamp of approval, if one will to provide comfort so that the patient could make that final decision . . . ."

Brookoff comments that "that's not what she said. We're willing to give her comfort. She wants us to poison her."

Campbell demurs. "She's not asking you to poison her. She's saying that the decision—that once it is clear she is dying and that there are no other options—she's asking for the control to be able to limit the dying process." Miller observes that all that's asked for is a prescription, just a prescription—for a bottle of pills.

Tucker clarifies: "I'm asking for medication that I could consume when my suffering becomes intolerable and my death is impending, so that I can gather my family at my bedside in my home, looking out at the Willamette River, say my goodbyes, and take that medication knowing that it will bring me a peaceful and dignified death." Connor says that we're asking for physician-assisted suicide, and changing the name does not change the essential nature of the act.

Miller calls for Art Caplan to return, as Faith's husband who happens to be a bioethicist. Remember she is your wife. How do you react?

"I don't want her to leave me," answers Caplan. "I heard the story from the doctor. I understand what the cancer is. And I know she's a fighter. So, I know she'll do what can be done. And she'll try it. But I do support her if she tells me that she can't go on, not because of what these doctors say

about what's the quality of life for her. But if she says to me, 'I've now come to the point where it's unacceptable to me,' I'm going to do what I can to give her the means to end it."

Miller turns to Frank. "Now, Barney, you may recall that you are Faith's father. Talk to her."

Barney does. "I admire your dignity. And I think you are dealing with this terrible situation as sensibly as possible. And I will do everything I can to facilitate your desires. Because I think, in the end, there is nothing more important than the autonomy of the individual. And the more distressing the circumstances, the more I will come to the aid of your autonomy in dealing with it."

The circle expands, as Ken Connor, also a relative, weighs in at a family gathering. "I'd say, 'Well, I respect and understand the importance of her right to autonomy. But we're also part of the community. And our decisions have impact on others. I'm worried about the implication of Faith impressing into service one who is trained in the healing arts to hasten and facilitate her death. I'm worried about the implications that has on the confidence of other people when they learn that this physician was willing to assist a suicide.' The time and manner of our death is not something that we can bring someone else in ethically, I think, to facilitate."

Melinda Delahoyde is also in the family now. What does she think? "Because I love her, I understand how much she hurts. And I don't want to see her suffer. But at the same time, I cannot get out of my mind the fact that she's asking the doctors to help her kill herself. And that bothers me." Well, let's try to get the doctors out of the equation then.

Caplan asks, "If I get the pills on the Internet and give them to her, is that all right with you?" It really isn't. "No," replies Delahoyde, "it's the thought that we don't . . . have control over our life all the time."

"What if I gave her the medicine?" asks Caplan. That doesn't help.

"No, it's not the doctor," says Delahoyde. "It's the idea that she is actively doing something to take her life. Wait a minute. Suppose this is a situation where she wants to take her life, whether the pills are on the Internet or from the doctor, because it's her personal choice. But suppose that we were a family where, gosh, we are so sick of this situation and all the money it's taking. And all the time

away from our own family to take care of her. And she's going to die anyway. Why don't we go to the doctor and get the pills? And why don't we hasten . . ."

"Because that's not her choice," answers Frank. "There's a difference between her choice and your choice." What difference does that make? When it's her choice, then it's about the autonomy of the individual, and "there's a qualitative difference between your deciding and she deciding . . ."

Miller interrupts a babble of simultaneous speech. "As the head of this family, as dysfunctional as it is, I have the prerogative of having people speak in turn. Now Father, you're a member of this family."

John Paris joins in. "Well, I've consulted with Elder Oaks and Faith—we're coming to you now in the issue of faith, not of autonomy. You didn't create yourself, and you're not fully autonomous. One of the problems in this contemporary world is we just act as if we're absolutely isolated automatons, created ourselves, paint the picture of our own life, and paint it according to our own design. But it's God who created us. And it's to God whom we go. And we'll be judged on fidelity to God's design in all of eternity. So, it's not really this life, but the next life, that we consider as well."

Marcia Angell's approach is different. "I would be happy to be your doctor, Faith. I would give you the commitment that you're asking for. My obligation is to take care of you, to relieve your suffering, to further your sense of autonomy, to make your last days better. This isn't a matter of life or death. It's a matter what kind of death. And what I'll do is give you a prescription for some pills that you can keep at your bedside table."

"That would give me such comfort," Tucker says.

Angell continues, "And that will give you peace of mind. You may never use them. In fact, I imagine that you won't. But I don't want you to think that I'm going to abandon you at the end of your life, or impose my religion or my philosophy on you. I will do everything I can to take care of you as you want to be taken care of. I know that the issue is usually not pain. The issue is usually this sense of growing loss of control over bodily functions, of weakness, of dependence, of hopelessness. And I know that those things are not necessarily treatable. I will do what you ask me to do."

### 3. SYNTHESIS AND DISCUSSION

Let's further examine the discussion and ponder the competing values. The first Baby Hope case is a recurrent tragedy of our Newborn Intensive Care Units (NICUs). The parents have been trying for so long to have a baby, everything seems to be going well, then some calamity in the birth process, or some unsuspected genetic condition, renders the baby non-viable. The parents are broken hearted. Our society's fevered reaction to new medical discoveries has left them convinced of medicine's healing miracles, yet in the eyes of medical experts, that reaction about the baby's prospects is very unrealistic. A tug-of-war between the physician's realism and the parents' dreams begins. It may not end for weeks. Ultimately, according to the Hippocratic Oath, as well as all rules of medical practice written since the Oath, the physicians are not only not obligated to provide interventions that will not do any good, they are not *permitted* to offer or provide them. Providing ritualistic comforts to the parents may not be wrong, but it is no part of the practice of medicine. In the end, the obligations of the physician and the welfare of the baby must prevail over the understandable desires of the parents.

If we take that principle we just articulated, and apply it to the second Baby Hope case, we reach the opposite consensus. The nature of Baby Hope's problems are not specified. If they are mild, precedent is already set: some years ago, a baby known only as "Baby Doe" was born in Ohio with Down's syndrome (a genetic condition, a trisomy on chromosome 21 leading to mild to severe mental retardation, some heart troubles as the child matures, and, significantly, a tendency to surgically correctible congenital atresia, blockage, in the intestines, usually in the esophagus or at the duodenum). Baby Doe had intestinal blockage, and other things wrong with him besides; his parents refused the surgery, and he died. When the case came to the attention of the surgeon general of the United States, Everett Koop, himself a pediatric surgeon by training, he was very angry at the decision not to perform the surgery. His office issued a set of "notices" to hospitals, that if an impaired child suffered from a medical condition that would always be treated in a child without that impairment, then that condition must be treated in the impaired child as well. The legislation was far-reaching: it created a "Baby Doe Hotline," 24-hour access to law enforcement should any neglect in a baby's treatment be noticed by any member of the staff or, for that matter, any member of the general public, and it created "Baby Doe Squads" of physicians and prosecutors to investigate hotline complaints. Funding was quietly removed from this program years ago, and it no longer exists, but its principles are still influential.

The dementia case raises more questions than we can deal with in this essay: Is there such a thing as "personal identity"? Am I the same person now that I was yesterday? Fifty years ago? What kinds of agreements, contracts, obligations cover situations where vast changes in personality may occur? In this more limited medical context, we may confine ourselves to a single question: Are the signals Charity is giving us today more authentically hers than the clear written instructions five years ago? The fact that she has only limited ways to communicate does not necessarily decide the issue. Whose



desires are really Charity's—Charity-past, who was very firm that she wanted no feeding tubes when she could no longer eat, or Charity-present, apparently happy, playing with a puppy?

The issue is brought into glaring light by its connections and disconnections with Baby Hope 2, whose mental state throughout life, should the surgery be performed and no further complications arise, will approximate Charity-present's condition. The connection is the similarity of their lives and our conviction (most of us) that if Baby Hope 2 could spend an apparently happy life sitting in the sun and playing with a puppy, without pain, that would be reason enough to perform the surgery now. The disconnection is that Charity is *not* a baby, with no prior experiences to define her personality and her freedom, never competent, simply living a happy non-competent life. Charity was a thinking, choosing adult, with rights and duties, a moral agent competent under the law and author of her own choices in ethics. When Charity was such an adult, knowing what normal adults know about Alzheimer's disease, foreseeing correctly a time when she would not be competent to make choices, a time when medical interventions might prolong the course of her humiliating decline for years, at that time she chose that there would be no interventions. That was her right. As some on the panel point out, her present state of happy dementia was *precisely* what she foresaw when she said, "No tubes." That's the difference between the two cases.

Suppose in her terminal illness Charity asks to "end it all," to get medicine that will put her, as we used to say of our dogs, "out of her misery." Should we agree to do that? Clearly not: she is not competent to form a new desire of any kind, even in Oregon. But what about daughter Faith, afflicted with pancreatic cancer, which is not curable and which can be very unpleasant at the end? Autonomy, which grounds the right to make such choices, entails both non-coercion and rationality. In the hypothetical, Faith is rational and is not being coerced (as articulated by Kathryn Tucker), and she is terminally ill. She should have every right to make the decision to end her life in any state that permits it under those circumstances. A curious fact attends the Oregon law, incidentally, mentioned briefly by Marcia Angell: Of the terminally ill in Oregon who might be eligible, a minority seek prescriptions of lethal doses of drugs; of those who seek such prescriptions, and obtain them, only a minority fill them; of those who fill them, a very small number ever take them. It isn't the death they're after. It's being in control.

That search for control itself raises troubling questions, especially for those of us, including many of the panelists, who think that a power other than ourselves ultimately controls our lives. But more immediately, in these decisions to seek assistance in hastening death, can we be sure that the dying person is the one exercising control? How can we deal with the disturbing possibility raised by Melinda Delahoyde, that it may be the family and other caregivers who simply want her out of the way, and join in manipulating her to seek death? About all that can be said here is that every law that permits assisted suicide (or directly administered euthanasia, as in the Netherlands) foresees that possibility and provides safeguards against it. Two physicians must certify that the patient is terminal; often a third is brought in to ascertain competence; counselors talk to the patient if

possible without the family present. Here, as in the Schiavo case discussed above, we are dealing with a situation that lends itself to political exploitation. When an assisted-suicide law came up in California many years ago, TV ads that appealed to fear of betrayal by physicians flooded the state. The law did not pass. In truth, though, there comes a point in the safeguards where we can say that the protections are as strong as we can get, and that the danger of allowing a person to die, against his or her stated will, in prolonged pain or suffering, may be significantly greater than the danger of inadvertently hastening "too much" the date of death.

## QUESTIONS FOR YOUR REFLECTION

1. When can we decide that a person's safety and welfare outweigh autonomy, especially in the elderly or otherwise vulnerable individuals? When should we intervene to protect someone against his or her will? Should every person for whom conservatorship is sought be required to have a civil liberties lawyer to oppose the attempt?
2. Who is the patient? In what sense is the family the patient in cases involving newborns? In what other cases should family, friends, community be treated as patients? How do we decide when the interests of the patient conflict with others and what do we do about that?
3. Is it a good idea to recruit the medical profession into the dealing of death—through capital punishment, war, or assisted suicide? Why? Why not?

## 4. SUGGESTIONS FOR FURTHER READING

### Special Supplementary Text

Caplan, Arthur L., James J. McCartney, and Dominic A. Sisti, eds. *The Case of Terri Schiavo*. Amherst, N.Y.: Prometheus, 2006. Foreword by Jay Wolfson, Dr.P.H., J.D., Terri Schiavo's Court-Appointed Guardian Ad Litem.

## Other Supplementary Readings

Beauchamp, Tom L., and James F. Childress. *Principles of Biomedical Ethics*. New York: Oxford University Press, 2001.

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Galston, Arthur W., and Christina Z. Peppard. *Expanding Horizons in Bioethics*. Dordrecht, Netherlands: Springer, 2005.

Hall, Mark A., Mary Anne Bobinski, and David Orentlicher. *Bioethics and Public Health Law*. New York: Aspen Publishers, 2005.

Howell, Joseph H., and William F. Sale. *Life Choices: A Hastings Center Introduction to Bioethics*, Washington, D.C.: Georgetown University Press, 2000.

Newton, Lisa. *Ethics in America*. © 1989 and 2/E, © 2004. Reproduced by permission of Pearson Education, Inc. Upper Saddle River, New Jersey: Pearson Education.

Tauber, Alfred I. *Patient Autonomy and the Ethics of Responsibility*. New York: Basic Bioethics, 2005.

## CHAPTER 5

### WAR STORIES National Security and the News

#### QUESTIONS TO KEEP IN MIND AS YOU READ THE CHAPTER

1. What does patriotism mean to you? What did it mean to the Founding Fathers? When does patriotism *not* mean adherence to national policy?
2. What values trump the journalist's commitment to report the news, all the news? When is a picture, taken of someone without consent, an invasion of privacy?
3. What are "leaks"? In times of national emergency, is the leaking of "classified" information always wrong? Can it be seen as an act of patriotism? Under what circumstances?

#### 1. THE PHILOSOPHICAL BACKGROUND FOR JOURNALISM UNDER FIRE

##### A. The Concept of Patriotism

The moral universe is one, and essentially unified. While philosophers know that the three basic concepts of philosophical ethics—justice, happiness, and autonomy—are logically independent, and, in practice, can conflict, in some accounts of ethical theory the three imperatives can be logically linked, and can reinforce each other.

Thus Plato, in his elaboration of the results of justice in the soul, readily concludes that the person in whom justice resides must be also the most generous of people, honest, free, and respectful of the freedom of others (see Plato, *Republic*). And John Stuart Mill and other Utilitarians have no difficulty in deriving the essentials of justice and freedom from the basic value of human happiness (see J. S. Mill, *Utilitarianism*).<sup>4</sup>

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<sup>4</sup> Newton, L., *Ethics in America*, ©1989 and 2/E, ©2004, 129.

Patriotism, too, extends as a value far beyond the narrow associations of waving flags (and hunting down the enemies of the state!). It does not encompass the whole of morality, for it adds an assumption to the consideration of all moral duties: The assumption that the human race, for all its unity, is essentially divided into parts, nations, self-defining and self-acknowledging groups associated with histories, landscapes, and institutions that together the patriots call "home." That home, the patriot will serve, tend, preserve, and generally care for; if necessary he will fight and die to protect it. The patriot is essentially a steward of an inherited community of language, history, work, culture, victories, and defeats. This particular duty of stewardship is of tremendous importance. We have never encountered human beings in the natural state alone, in undifferentiated masses, unable to say of what group they were, specifically distinguishing themselves from other humans (not usually recognized as fully human). It may be that our social nature, the kind of social animal we are, requires just such a particular group, just such recognition of "we," different from "they." Bonds to our people bring out the best of our virtues—generosity, honor, compassion, and self-sacrifice. Our highest moral ideal, for as long as we have had moral ideals, has been to teach ourselves to transfer this loyalty beyond the tribe or family group to the whole of the human race; we have not been notably successful (see Plato, *Republic*).

Patriotism need not be entirely self-serving and exclusive. Josiah Royce, among others, insisted that in combination with justice, it entails the duty to respect the patriotism, or the commitments, of others (Josiah Royce, *Loyalty*, not included in this Web site). Such a duty would follow from any universal understanding of ethics, as from the general duty "to respect others as moral agents, as we find in Immanuel Kant"<sup>5</sup>. But the primary duty of patriotism is indeed limited. "It entails the duty to promote the interests or happiness of persons to whom we are bound by"<sup>6</sup> patriotism; it entails the duty to respect justice, constitution and law in the society in which we are loyal patriots; but it goes no farther. The nation is like the family: I did not ask for these people, but I was born into this community, and therefore I have a duty to care for those with whom I am identified, before all others.

"My country, right or wrong," clearly admits the possibility that the country may be wrong. When journalists under fire are asked as a matter of "patriotism" not to make public what they see, their country may suffer in two distinct and different ways: first, the journalist's function, to tell the truth that is needed for the citizens to act rationally for the public good (see below), may be lost, and second, the true and good understanding of patriotism, concerned for the "rightness" of the country as well as its identity, may be lost. Before we decide to ask journalists to self-censor their work for the sake of the American public, we might want to ask ourselves if we are willing to lose the unique perspective that the journalist brings to the country's understanding of itself.

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<sup>5</sup> Ibid., 130.

<sup>6</sup> Ibid., 130.

## B. The Concept of Veracity (Truth Telling)

Lying is wrong. We are all taught as children always to tell the truth. We soon find out that that duty has certain exceptions, as when our sister asks us if her dress makes her look fat. That question does not require a truthful answer. More seriously, we may (in the classic example) tell lies to save lives, as when the assassin asks us to indicate the location of his proposed victim, cowering behind our couch. We may tell lies to prevent crime or serious damage to person or property (as when the poacher asks us whether or not there might be a game warden

in the woods he intends to despoil). There are many instances when we may withhold the truth to spare feelings, to avoid damage to relationships, or to protect other values.

Why did Jefferson say that if he had a choice between a country without a government and a country without newspapers, he'd rather do without the government (see Thomas Jefferson, letter to Edward Carrington, Jan. 16, 1787)? For Jefferson, the journalist's relation to the truth is much stronger and more specific than our general obligation not to lie unless circumstances dictate that we must. In a democracy, journalism has what we call the "enlightenment function": It is the job of the free press to put before the electorate everything the electorate might want and need to know in order to govern well. The journalist is appropriately called by the name of the profession because he or she has pledged to tell the truth about power, to power, in order that the people may be able to control the use of power in a democracy. What limitations are there on this duty? How does the situation of combat modify or enhance it? Shouldn't we limit the freedom of the press for the sake of military secrecy? We ought not to forget that in December 1861, the *New York Times* printed the exact structural fortifications around Washington and what unit was in each part of the structure. It didn't change the outcome of the war. It is the nature of a free press to do its job aggressively, without much regard for the problems of the military. But to protect the troops, are there not other limitations that apply? The dialogue below considers that question.

### **C. The Concept of Beneficence**

Journalists have an obligation to tell the truth. But we also have a duty to be kind. Do we really want the mother of a young soldier to find out that her son is dead by seeing him blown to bits on the evening news, before the special duty officers of the armed services have had time to get to her home, tell her in person, soften the blow? Are we past all considerations of feelings, living now in an electronic neighborhood that includes the whole world? "If it bleeds, it leads," is the motto of the front-page editors of every newspaper; for simple competitive reasons, the newspaper (or 24-hour news channel) must cover the action as it happens, blood and gore and all, to attract and keep an audience. Their tendencies conflict, so we make a rule: No pictures of dead American military personnel, no pictures of the wounded or suffering, at least until all families have been notified (presumably a newsmagazine retrospective could include them).

The duty of beneficence requires us at all times to think out the consequences of what we do, and to do that which will produce, ultimately, the most happiness, or at least produce the least pain. If the reporter has a choice, to make public an embarrassing moment for the American military, or to forget about it, it may seem clear to him (and to anyone else on the scene) that omitting that reportage will minimize the pain caused by this conflict. But that is exactly the problem: The obvious gain in immediate human happiness is bought at the price of concealing from the American public something that the public might really need to know, at some point in the future. The problem in this, as in all consequential reasoning, is that we really don't know what the public will be grateful for, if only in the future, and what the public will ultimately reject as unacceptably distasteful. We just don't know that much about the future. But our ignorance does not give us permission not to decide at all or not to take the consequences of our decision into account. The conflicts with which our actors in the dialogue are confronted come from this quandary.

### **D. The Concept of Confidentiality**

Confidentiality is about the keeping of secrets; wherever it applies, it demands that information be kept from public view. The imperative to keep a secret, to protect a confidence, is always implicitly oppositional; if no one wanted to know the information that is being kept as a secret, there would be no point to the imperative. So the duty of confidentiality is always opposed, directly or obliquely, to any duty to tell the truth. Setting aside the personal duties stemming from intimate associations with friends and family, which may require keeping family secrets from the unfriendly gaze of the outside world, how do we incorporate a duty of confidentiality into the fabric of a body politic that lives on transparency?

Our solution, the one adopted in U.S. law for the most part, is to specify those occasions when the preservation of confidentiality, the keeping of secrets, is clearly justified, and refuse to grant any general right of secrecy beyond those instances. For instance, the U.S. government has always been permitted to keep secret that information which would aid the enemy in time of war. Note, as above, in the case of the description of the defenses of Washington in 1861, that even that duty has often been honored in the breach. For another instance, most of the professions, who gain their usefulness from caring for the needs of individual clients, have been granted the right to conceal whatever information they acquire about their clients' needs in the course of their profession, on the utilitarian argument that if clients feared their secrets would become public, they would hesitate to consult professionals, and their condition, whatever it was, would be worse than it needed to be. So physicians and psychotherapists are bound not to talk about their patients, and lawyers do not talk about their clients. Both these "privileges" of confidentiality are limited by law; lawyers, for example, are permitted to break their vow of confidentiality to prevent the commission of crime in the future (or to collect their fees). There are no formal protections of confidentiality for teachers, although teachers tend to assume there are, nor is there any formal protection for priest and penitent; the "seal of the confessional" is backed only by the priest's willingness to suffer legal sanctions, even to martyrdom, to protect it.

The duties of confidentiality and secrecy that concern us in wartime have to do with military advantage, and the need to raise hopes at home and sow despair among the enemy. Some people believe that the only stories and images that should emanate from the war zone should show the enemy still ruthless, but helpless and in disarray, while our troops are shown as heroic, enormously powerful, and winning. Some would say that everything else should be kept secret. The duty of confidentiality that most concerns journalists is the duty to protect the witnesses and other knowledgeable people interviewed for their stories, their "sources," who cooperate only on condition of anonymity, and will not be available for the next story if their names are released. Especially if these sources are criminals talking about their crimes or military officers talking about undesirable incidents in their mission—deviations from the rules of war or unexpected defeats—there may be strong pressure on journalists to say who gave them their information.

For the journalist covering a war, totally dependent on his military hosts for information, transportation, and protection, even "embedded" with military men and women who become his friends, both concerns are overwhelmingly important. In the matter of confidentiality, he must continually ask, where should his loyalties lie? Where is his duty?

## **2. WAR STORIES: THE COURSE OF THE DIALOGUE**

This section considers the television presentation or DVD of the dialogue on the subject. The recapitulation of the dialogue that follows is not meant to be a word-for-word transcript of the



program, but a summary of the major themes, issues, and opinions that emerged in the conversation. It is for your review, and for use as a resource.

As you read through the dialogue, ask yourself the following questions:

1. Would you rather hear everything about the battlefield—especially when things are going badly on the front—or would you rather have military censors make sure that no material got out that might give aid and comfort to the enemy?
2. Should stories of Americans behaving badly be off limits for the press? Do you think it will demoralize the home front to see images of soldiers torturing enemy captives, for instance? Do you think it will demoralize the military to know that the home front is viewing such images?
3. It is not unusual for frustrated government employees to reveal ("leak") currently "classified" or secret information to the press, or at least to selected persons who will go to the press. Which is more important to the good conduct of the republic: The ability of government to keep its secrets or the ability of those involved in government wrongdoing to make their knowledge public?

Moderator: Jake Tapper

Panelists (from left to right on your screen):

Stephen Hayes, Senior Writer, *The Weekly Standard*

James Hoge Jr., Editor, *Foreign Affairs*; Former Publisher, *New York Daily News*

Karen DeYoung, Associate Editor, *The Washington Post*

Jack Cloonan, Former FBI Special Agent, Counter Terrorism Division

Victoria Toensing, Attorney; Justice Department Official, 1984–88; Chief Counsel, Senate Intelligence Committee, 1981–84

Floyd Abrams, Constitutional Attorney, Cahill Gordon & Reindel LLP; Visiting Professor, Columbia Graduate School of Journalism

Max Cleland, Former Senator (D-GA)

Steven A. Boylan, Lieutenant Colonel, U.S. Army, Spokesperson, U.S. Military in Iraq, 2004–2005

John Donovan, Correspondent, ABC News, *Nightline*

Frank Sesno, Special Correspondent, CNN; Professor of Public Policy and Communication, George Mason University

Chris Danbeck, Captain, 2nd Armored Cavalry Regiment, Baghdad, 2003–2004

Michael Yon, Journalist/Blogger (embedded with U.S. Army, Iraq)

Bruce Lawlor, Major General, U.S. Army National Guard, Former Chief of Staff of the Department of Homeland Security

## Part 1. The Short-Lived Sewage-Treatment Plant

The moderator, Jake Tapper, begins: "We are in the East Asian nation of Khaoistan. After the Cold War, the totalitarian regime in Khaoistan fell and the country slipped into chaos and was run by warlords. One of those warlords had definite ties to terrorists and to terrorist acts. And a U.S.-led coalition moved in. That was four years ago. Now today, northern Khaoistan is relatively safe and secure, but southern Khaoistan is a mess. There are insurgents firing upon and committing terrorist acts against U.S.-led forces. It's in bad shape. The capital of Khaoistan is a town known as a Blubeck. And this is where you are, John Donovan, the chief correspondent for *Tonight's News*, the number one evening news broadcast.

"Now today, Blubeck Waste-Treatment Plant Number One is going to open. The military comes to you and says, 'We are going to escort you to Blubeck Waste-Treatment Plant Number One. And once you're there you can attend the ribbon-cutting ceremony and you can talk to the Khaoistani engineers who are going to work there. And then we will bring you safe and secure passage back to Blubeck.' John, what do you say? Are you excited?"

John Donovan is anything but excited, but he'll go. Colonel Steven Boylan confirms that, yes, the journalists are not that excited by reconstruction efforts and hesitate to go along on these jaunts, even when transportation is provided. Karen DeYoung concurs, especially "if this is the 14th in a row." Stephen Hayes is not so sure. "I think depending on whether this is a significant improvement of life [as it was] before the U.S. invasion, I think there actually could be some merit in covering this particular angle of that story." Steven Boylan concedes that this probably will not get much play back in the United States.

Tapper sums up: "So let us assume that Colonel Boylan's assessment is correct and that you go to the plant. But it doesn't really get much play back in the States. The opening of Blubeck Waste-Treatment Plant Number One. *Stars and Stripes* covers it. Fox covers it. But generally not a lot of people hear about it back in the States." Frank Sesno agrees that that is a fair assessment, and goes on to say that you'd have to fight to get the story on the air and even into print. "Even though I think it's a very significant story. Because there are several stories that are happening in Khaoistan. The instability is one of them. Efforts to put Humpty Dumpty back together is another one. And the taxpayer dollars, American taxpayer dollars, to repair the infrastructure is another story." But most editors, producers, and audiences have decided they don't care.

Tapper appoints Jim Hoge as Karen's editor back in New York. "What kind of prominence are you going to give this story?" Hoge speculates that "We're probably going to have two paragraphs with a

one column head on it just announcing that it is the first. And if it wasn't the first we wouldn't be having anything." The story will not be on the first page, but "somewhere back around page 16 . . . on the jump of a major story. Probably on the chaos that's going on in Khaoistan."

The hypothetical proceeds. Two weeks later Blubeck Waste-Treatment Plant Number One has been destroyed. Jim Hoge perks up: "Now you've got a story." Seems that Khaoistani insurgents have exploded the plant, one Khaoistani engineer is dead, a dozen are wounded, and the damage is extensive.

Tapper asks, "John, one of your stringers was there. And while he missed the first explosion on videotape, he got the fires rising from the plant. And got the second explosion on tape. What kind of story is this now?" Donovan is positive. "I would guess, given that we had been there two weeks previously and seen it whole, seen the sense of celebration and now seeing what happened to it after the fact, we have the video to do it, I think we would go with it."

Frank Sesno agrees. "I think it would be the lead story. The lead story is this wonderful accomplishment that the military thought they had put together in Khaoistan, that they proudly showed off two weeks ago, that with all of their security—that they took their journalists to, has now been destroyed by persistent insurgents and terrorists. And see how fragile the whole place is."

Jim Hoge also agrees. "I think this is probably the lead story of the day. It would be quite something I think to take its place. It has a ying and a yang, which is, it's both the story about destruction, but it is also a story about the efforts that are yet to come to fruition to try and make things better in Khaoistan." The tape, of course, helps, as Frank Sesno points out.

Tapper asks Senator Cleland, "Is it possible that more Americans will find out about the existence of Blubeck Sewage-Treatment Plant Number One now that it no longer exists than two weeks ago when it opened?" Cleland responds with a general comment on the media: "Yes. And that's exactly the point. There are momentary blips on the screen and then move to a commercial. There is very little insight or wisdom put forward about how we got there, the history of the place, why we are there, what are we going to do to pay for it, and how are we going to get out. All of those ultimate strategic questions are rarely ever asked. So the context in which a news event occurs is not there. It just is what it is and move on to the next event."

Would General Lawlor like to comment? Lawlor is quite clear: "My take on this is that, while the American public may not have learned of the opening of the new plant, this sewage treatment plant, the insurgents certainly did. And the insurgents would then react, 'How can we get our message out. And our message would be fear, instability, no progress. We do that by attacking the sewage plant,' because they will know that you will cover the sewer plant explosion in much greater detail than you will the opening." Does that mean that the journalists are tools of the insurgency? Yes, says Michael Yon, they are. And General Lawlor agrees.

Donvan joins in. "Yeah, and that's why, when you first put this to me, when I go with it, I don't salivate over the notion of, 'Oh my god. This is a great story and great video.' I know that putting on the story of two weeks ago of the plant and now it's blown up somehow, as the senator is saying, it's distorting, it's very easy for people to draw the wrong conclusions from those two facts placed in juxtaposition to each other, which is what I would probably end up doing. And at some level I would know that the situation is far more complex than the one-two punch of the story. I knew I would go with it. But there's a sense of, 'Damn it, do I have to go with it that way?'" Then, why do it? Well, it's a matter of employment and competition. They have to go with it because everyone else will. Frank Sesno points out that they've got good pictures, meaning more pressure to do the story—an explosion on tape speaks volumes about priorities. Donvan adds, "It's a very, very vivid, powerful image. But images don't necessarily tell their own story. The problem with them is that when you watch them at home you think they do."

What does Colonel Boylan think? "What I'm hearing and what I have seen while I've been stationed there is what we're seeing every day. The sensational explosion is what gets covered. The continuing progress doesn't get covered. Before I went there I expected to see nothing but devastation. And when I got there, that's not the story. So I think it's incumbent upon the media to be the storyteller and to provide news in its entirety, even though it may not be as sensational as the explosion that just happened."

"This was my pet project," says Captain Danbeck, "and this is an area I've been working in a lot. We train the security forces and the engineer's family. We've been developing a relationship with them. And I think that's the part of the story that's missing when you're talking about an insurgency. I'm trying to get to the heart of the people. Win the people to our side. And it's not covered. And it hasn't been covered. And when I meet a journalist, I try to tell that story. I try to show them the story. And then when I check back home, nobody's heard about it."

John Donvan disagrees. "But the journalist is seeing a broader swath of society than you are. And a journalist is meeting people who aren't meeting soldiers. I can drive around Khaoistan and meet Khaoistanis who will say very, very hostile things to me as a foreigner, as an American, who can talk

to me about how deeply they resent the occupation and then meet some troops who have a relationship with some local sheik who are telling me how wonderful everything is. Why aren't you doing a story about us? But if I have a sense that the larger narrative is that things aren't going well, I would feel silly doing stories about happy relationships about troops handing out candy or plants being opened. If you end up as a journalist in a situation, if you know the situation, (you have) a sense of where things are moving. You gravitate towards telling stories through elements that you think are relevant to where things are moving. And it can be very frustrating to somebody who has [these personal relationships], and I believe these personal relationships are real and developed. But they don't matter to what's gonna happen in the big picture."

## **Part 2. The Embedded Journalist**

The hypothetical changes. Jake Tapper tells us that it is now several weeks later. Michael Yon has been embedded with an Army unit for three weeks. "Fascinating," Yon tells us. "You start to get a lot of information that you never would have gotten before. People will take you aside and tell you things and you start to develop a fuller picture." "Do you come to like the people you are embedded with?" asks Tapper. Yon says it's hard not to, especially when they're protecting you. Stephen Hayes agrees.

Tapper moves the hypothetical along. Today there is big news. "A reliable informant has pointed to a hostile village outside of Blubeck in which a terrorist is hiding. And the unit in which you're embedded, led by Captain Danbeck, has been assigned to go and get this terrorist." Yon will go with them, a little scared. He is armed only with a camera, after all. What does Captain Danbeck think of bringing along an untrained civilian? No problem for Danbeck—just keep him close. In this case, he assigns Yon to the third platoon, which will be the outer cordon force. Yon objects: he wants to go on the raid, the inner group. He won't be able to see anything from the outer cordon. True, but his safety is very important to Danbeck; he's responsible for it. Yon is willing to take the risk. Jack Cloonan wonders if Yon is risking only his own life. Is he not jeopardizing the lives of the other soldiers if he gets himself in the middle of the action? Why does he have to go on this outing in the

first place? Danbeck quickly replies that he wants him there. They need good stories, and if this mission goes well, there's a good story, and real. Even if it doesn't go well that still might be a good story of American troops doing their best to secure the area.

They proceed to the place where the raid will take place, Yon bringing only his camera. Yon insists that he only wants to bring a still camera along, but the hypothetical calls for him to have a DV

(digital video) camera, so that's what he's got. Along the way, there are dead bodies on the road. "Okay to film?" asks Tapper.

Yon says, absolutely. After all, it's important. Later on they can figure out what the tapes are telling them, maybe talk with the intelligence people in the captain's unit, maybe look at their Significant Action Reports. Is Captain Danbeck happy with all this filming of dead Khaoistanis? It's no problem for him.

The hypothetical takes us a few miles down the road. "We come across a different scene where there was recently some action. And there are body bags there. And in the body bags are dead U.S. soldiers. Michael, are you going to film that?" Here Yon would ask Captain Danbeck, and indeed Danbeck has problems. Yon has promised no widespread publicity; it's not going to go on his blog for someone's family to see, but Danbeck wants to know then why is he filming it at all? Yon wants it "for information"—later he could write about it, again reassuring everyone that he will not make the photos public.

Tapper points out ingenuously that "they're in bags. You can't see who's in the bags." Yon is still uncomfortable and would ask permission; Danbeck is even more uncomfortable and asks him not to film the bodies. In the end, it matters that Yon is not one of them, one of this brotherhood of soldiers. "I'd rather you not [film them]. I don't see the purpose of it. It's a black plastic bag, you know, but it represents one of my guys. And I'd rather you not. I'm not going to forcefully restrict you from doing so, but I'm asking you not to. These are my guys. You've been with us for three weeks. I can respect what risks you're taking with us. But you're not one of us." So, captain, dead Khaoistanis okay to film, dead U.S. soldiers not okay? Right. "These are my guys," Danbeck reiterates.

Stephen Hayes backs him up, saying, "Yeah, there's a difference. I'm an American. I have a double standard. I would film Khaoistanis, probably from a distance or try to do so in a way that shows what's happened to the extent that we can without, you know, showing their identities or showing their faces. But I think I would respect the captain's request not to take the photograph, even of the body bags." Karen DeYoung disagrees. Get all the information you can, later you can decide what you're going to say about it. But take the pictures while you have the chance: You're there to collect information.

Perhaps Senator Cleland will object to the filming? Not at all. There's some hesitation, but "there's also a part of me that says, 'War is war. If you're going to cover it, cover it all.' Otherwise you'll begin to be selective. If you're going to cover up the bad parts, cover up the cost of war, whether on the

battlefield, in the hospitals, or with the flag-draped coffins that you're not allowed to take pictures of when they come back, then you're not reporting the full story. So the American people, when their sons and daughters go to war, they deserve the full story. The full story of war is very bad. It's a very tough thing. It's often said that truth is the first casualty of war. It should be the first cause of war. And in terms of journalistic ethics, it should be something that we absolutely insist upon.

"I've always wondered," he continues, "about the term *embedded*. Does that mean you're co-opted? You see what just happened here? The wonderful relationship that works for a while, when bad things happen, when the popcorn hits the fan, then all of a sudden you're 'embedded.' You have a 'relationship.' Are you a journalist covering your—covering your rear end or are you covering the story?"

"Now I understand all of the dynamics of the battlefield. I really do. I don't like seeing pictures of dead soldiers. Trust me. But I don't like seeing dead soldiers at all. So you're going to tell the whole story of war or are you not?"

Back to Michael Yon, who has just reached the site of the military action, the raid that he started out to cover. They do a "ballistic entry. Blow open the doors." He's right behind the soldiers. "And they go into the house throwing flash bang grenades and secure the place. Find the guy and I'm right there when the smoke is clearing, photographing everything."

The hypothetical continues: "The raid is over," says Tapper. "It has been a success. Congratulations, Captain Danbeck." Danbeck is appreciative.

Tapper continues, "The terrorist has been captured and taken away; the house was given the all clear. And Michael, you're told you can go into the house where the raid took place. You walk in. Your camera's going. And there you see a soldier that you know, named Sam, standing there with his rifle. Behind him on the ground an insurgent. Now you know Sam. This is his first real combat. This operation. This raid. Sam sees you filming. He's pumped up. He puts his rifle above his head. 'We did it. We did it.' There's a noise behind him. And before you can know what's going on, he fires multiple rounds into the insurgent on the ground behind him and you're filming. And the insurgent is killed. And blood is trickling on the insurgent's shirt. Sam pats down the insurgent. The insurgent is not armed. He has killed her. That's right, her. It's a female insurgent. Sam looks at you. You got the whole thing. 'Oh, god, man. Oh, god. You're not gonna do anything with that film, are you?'"



Yon's first reaction is to try to get Sam outside and report the incident to Danbeck. Danbeck is unhappy: "I can't imagine Sam being in the room by himself, first of all; it would never happen in my unit. But Sam's in the room by himself and he puts rounds into a suspected insurgent. I probably have already taken Sam outside and I have more senior NCOs in the room, my non-commissioned officers, and some of my other leaders in the room already secure the situation."

Danbeck is not going to talk to Yon right now. The hypothetical appoints Colonel Boylan as public information officer. What will he say to Yon about the tape? Answer: "Can I have a copy of it?"

Yon's response: Sure. "It will take me about 15 minutes."

Boylan is not going to insist on taking the tape itself? "Nope. It's happened."

It will probably be put on the Internet, and Boylan knows that. Yon agrees that he would put the tape on the Internet eventually. "But I would first do my homework. I would not put it out precipitously. It wouldn't go out in the next 48 hours."

The hypothetical changes. Now John Donovan is the embedded reporter. What will he do with the tape? John thinks. "I'm gonna hesitate. I'm gonna not know what to do, to be honest." He will talk to his senior producer, who turns out to be Frank Sesno. "Frank, something unbelievable happened today and it was awful and we got it all on tape. And it's hugely explosive and it's going to cause untold damage. It's going to make the rounds at Al Jazeera in a second. It's also something nobody else has. And we got it all." Exclusive? Yes. Sesno wants Donovan to think about how the tape should be used and make a recommendation. Donovan wants to think about it for a few days. What is gained by waiting, Sesno wants to know. Donovan just wants to think about the implications.

"And the troops are not going to talk and you're not getting pressure from the colonel?" asks Sesno. "The colonel is asking for a copy," Donovan replies. "I've told him we can't do that. That's not gonna happen." Sesno doesn't want to wait a couple of days; he wants a decision now. Donovan is very unhappy about that. He needs a few days "and if he's saying it's yes or no now and you have to decide, I'm going to say no. Because I just don't feel comfortable going with that."

Sesno comes right back: "And I may agree with you, but I'm also going to push it. I'm going to say, 'John, I know this was tough for you. This was traumatic for you. But you've got news. And there's

not much that's going to change in the next few days. We don't have to go with it tonight. But I think we need to go with it tomorrow. And you get to your contacts in the military and get an explanation for this and figure out how we go with this." Donovan wants to know if it's his call.

Sesno clarifies: "It's your recommendation. And if I push you to a point where you're uncomfortable, obviously you can quit. But it's not entirely your call." Sesno also has to share this tape with his superiors. "I need to call them. And you have cut to one of the most difficult, wrenching situations that we can possibly be in. Whatever we do we're going to get criticized roundly. If we air this, we will be criticized roundly for irresponsibly airing dirty laundry. If we don't air it, we're criticized for sanitizing war and for not doing our job, which is not a popularity contest. Ultimately we're going to put this on the air."

"The whole thing," asks Tapper, "including the moment of death?"

Sesno answers, "Probably not. We might pixelate that. But we will have to tell the audience that what we have for you this evening is very disturbing. But it is a moment of war. It is a difficult moment of war. You may not want to watch this." Somehow we have to keep a balance. "We negotiate and we wrestle with this all the time. What shred of humanity is left through that lens? What is enough to convey the story and what is too much? I don't know—I don't know. We probably will not show that instant moment of death."

What does General Lawlor think of *Tonight's News* choice? Lawlor's answer is no, he doesn't like the implicit assumption that the soldier has done something "wrong." Sesno wants to discuss the point. "I mean, it's about the confusion of war, the military's response, all these things."

The assumption, General Lawlor points out, is that the single image of Sam shooting the insurgent will not dominate the story. "And that's incorrect," says Lawlor. "That picture will dominate the entire story."

John Donovan continues: "Simply putting the whole story in context and even saying the guy was frightened and hadn't eaten in a few days, etcetera, you can almost justify what he did. The fact is that the story is going to go out there and it's going to become one of those crystallized, iconic moments of what the war is all about. No matter what context we offer to it. And the reason I hesitate—I say, 'I want to think about it'—number one, is we rush too much all the time anyway. We say, 'We got it.' We go with it. Personally I reject that and that's a career issue for me. I don't

necessarily think, given that it's exclusive, it might have been a few years ago I would have had to drive back three days to Blubeck to get that. And I would have had the time to think about it. But nowadays we're ten minutes away from airtime. We're under that pressure all the time."

"Stephen, how is the rest of the world going to look at that tape. Do they care about the context?" Tapper asks. Hayes replies, "No. No, I think they probably don't care about the context. I think the speculation that it will show up on Al Jazeera and other networks throughout the world is right."

Well, Tapper wants to know, is it "important for the American media to consider how their reporting might be misused?" Abrams thinks that "in general it's important for them not to. That is to say as a general proposition they should do their best to tell the truth, and if others are going to tell untruths based upon real truth, that's not the fault of the teller of truth. That said, however, I think the broadcaster would likely consider the wide range of audiences. Not just Al Jazeera, but Congress. Colleagues of Senator Cleland. The President may wind up attacking the broadcaster for putting it on. This is an institutional decision of the highest significance, for this broadcaster to make about whether the story is important enough, to take the heat for running it. And that will be a very serious internal decision that he'll have to make."

Donvan adds, "I keep asking myself as the person who witnessed this aside from its revealing, once again, that war is terrible, what have—what have I really learned? And I really think that what my producer in New York is excited about is I've got great B-roll. I've got an unbelievably sensational moment. But what have we really learned?"

Sesno objects. "You have been witness to history in the same way that Ernie Pyle was when he went on shore. Your job now is to put that into context. Are you going to convey this as a terrible war crime? Are you going to convey this as [something that may happen in] the fog of war?"

Well, how about not using it at all?

"That's a conversation we can have," says Sesno. Donvan worries if we really cheat our audience of knowledge of the war just by not showing them a random moment of the fight. Yon and Sesno are more worried about the integrity of the journalist, and of the whole reporting process. Sesno concludes that we're just going to have to show the scene, and take the chance that some networks might misuse the material. They probably will. Donvan still feels really badly about it, but admits

that the tape belongs to his network, not to him. If he feels badly enough about it, he'll ask someone else to do the reporting. Would he resign? No.

### **Part 3. Leaks**

The hypothetical advances. The company reassembles, not in Khaoistan, but in the treacherous waters of Washington, D.C. (Senator Cleland wants to go back to Khaoistan.) Three years ago, it seems, the Department of Defense created a new agency as part of the Khaoistani war effort. It is the Electronic Intelligence Agency (EIA), and moderator Tapper notes that Karen DeYoung has been covering it for the past three years. For the last six months she's been hearing that something is up. "Something's not right at the EIA."

Tapper continues. "One day, one of your trusted sources, somebody you believe in, who has worked with you on other stories and has been working at the EIA, comes to you. He is nervous. 'Karen, there is something really bad happening here, something that a lot of us even within the EIA think might be illegal. But I can't talk to you about it unless you can promise me complete confidentiality.'"

DeYoung certainly wants to hear what he has to say. "That doesn't mean I'm going to put it in the newspaper tomorrow. I want to hear what you have to say and that's really only the beginning of what I'm doing. I'm starting out to talk to a whole lot of other people. Because I've been covering this beat for three years. I know a whole lot about it. I know a lot of people to ask. I don't expect that anybody on this story is going to want me to use their name."

The narrator continues, in the person of the informant. "Karen, this isn't just some story. If you and I do this, I just won't lose my job if they find out I gave you this information. I could go to jail. I have your word?"

"Absolutely." They agree to meet, wherever the informant feels comfortable. He goes on. "Karen, the EIA has been conducting surveillance on Khaoistanis in Khaoistan and tracing the calls back to the United States. This document that I have here proves that after that, the EIA has been conducting surveillance on those individuals who received phone calls from Khaoistan; e-mails, phone calls, warrantless surveillance. This is not in the EIA's charter. And there are a lot of us in the EIA who think that this is illegal. This memo says 'classified.'"

DeYoung takes the memo, authenticates it, goes to talk to her editor, Jim Hoge. Hoge wants her to go right to work on it, check out the sources and find more if possible. They will call in the lawyers to hash out the legal context, then sit down and make hard choices. The narrator turns to Floyd Abrams.

"Floyd, have any crimes already taken place?" Abrams points out that the receipt of the classified information could be argued to be criminal.

"Did I commit a crime by giving it to her?" Abrams and Senator Cleland think so. Tapper continues, "What does Karen need to know before she proceeds with this story?" Abrams answers that, "given the current state of the law at least in Washington, you may well have no protection legally for your confidential source relationship. For a story of this magnitude there will be enormous pressure to find out who leaked and to go after you. Therefore you will be at significant peril and may have very little legal protection."

What would Victoria Toensing suggest? "Well, listen to the legal analysis that the journalist is asking for. Only is my rear end in trouble? What's my culpability? Why not a legal analysis on whether there was indeed a violation depending on whatever this classified material tells them?"

All right, the moderator obliges, "Let's say that they went to a bunch of legal experts and the experts say they think this is probably against the law. The government will make a case, but some very good legal minds say, 'This is not in the EIA charter. We think it's against the law.' What's your next step, Karen?" DeYoung and Hoge are going to have some long, serious conversations about this. Will they inquire further?

Tapper points to General Lawlor, saying, "Here's one of your sources right here. The source at the Department of Homeland Security. He knows about the program." So DeYoung gives General Lawlor a call. "God, you know, I heard the weirdest thing the other day—this wiretapping without warrants of the people who are talking overseas! Do you know anything about that?" Lawlor responds vaguely, drawing her out, committing himself to nothing.

Tapper questions whether Lawlor has conveyed anything to DeYoung in the conversation. "A little bit, just in the nervousness of his voice," Karen notes. "In the care with which he chooses the words to not say, 'This is not true. This doesn't happen.' And he's trying to question me about where I have this information from."

Would General Lawlor be more communicative with the reporter if he really hated the program or thought it was a direct violation of the law? "It doesn't change my requirement to obey the law myself," Lawlor responds. "I would have an obligation to go to my superiors. I would have an obligation to fight it as hard as I could within the system. I would have an obligation, if I felt so strongly about it, to resign in protest and then let people ask the questions, 'Why did this man resign?' But I don't have an obligation, an ethical obligation, to tell a newspaper reporter about classified information."

Victoria Toensing agrees. "It's absolutely right. Besides, there's a statute. You could also go to Congress to the oversight committee. And that's the process that we should take instead of going to Karen. If I were your lawyer, I'd lead you right up to the oversight committee."

What is the general status of "leaking" in Washington? Jack Cloonan weighs in: "I think people leak all the time. I'm a bit troubled by it, frankly. I think as the general suggested, there's a way and a means to address issues such as these. Leaks are very damaging. And leaks can be incredibly disruptive. Certainly, in the so-called war on terror that we're sort of discussing today; the consequences can be incredible."

"Even if the government's breaking the law?" questions Tapper. Cloonan is annoyed. "Look, there's a way to address those issues. I mean, you've got whistleblower statutes. You've got the oversight committee. You've got a variety of different things."

Jim Hoge cuts in: "And one reason you have some of these is because the press has been vigilant from time to time throughout history pointing out things that otherwise don't get pointed out within the system. It's wonderful to have a system with oversight, with supervisors. But the chances of violating the system within the system is always there. We're human. If you had a governing system in this country with no leaking whatsoever, I think you'd regret it. And I think the public would be shortchanged. It learns a lot this way. Now are there mistakes? Yes. Are there things that would have been better not leaked? Yes. But to try and close it down entirely and on the basis that classification is sacrosanct when we all know it's also a political activity and which an awful lot of stuff gets over-classified, is the wrong road to go down." Cloonan agrees that there is over-classification. But he is still very ambivalent about leaking under any circumstances, as is General Lawlor.

The hypothetical advances. Karen DeYoung nails the story and goes to interview Jack Cloonan, who is acting as the new director of the EIA. Cloonan may not like every aspect of the program, but he's

charged with protecting it. What would he like to say to DeYoung? "Well, Karen, it's come to my attention that you've got some information that I'm very, very concerned about. I understand that you may in fact have in [your] possession some classified information. You may feel it necessary to write a story about it. And I'm here to try to persuade you that that's not what I would like to see happen. The information, if you do choose to acknowledge that you have this, is very sensitive in nature. If you indeed publish this information not only will lives conceivably be jeopardized, but our ability long-term to either identify, preempt, and possibly interdict acts of terror against the United States are at risk here. What I'm telling you in effect is that we are not as good as you think we are; that our ability to get this type of information is so difficult and so sensitive that if you do publicize this story, even if you don't go into detail and publicize sensitive sources and methods, I cannot replicate this system that we have."

DeYoung understands that. "But—why couldn't you achieve the exact same results without going outside the existing statutes? That's what I don't understand." Cloonan fumbles for an answer, about variety of venues, complexity of the topic, cumbersome procedures set by the law. "Well, why not ask Congress to change the law?" counters DeYoung.

"That's something that we're certainly looking into. And I think that is a very, very real issue," Jack Cloonan responds.

The moderator steps in. "Let's assume this conversation ends in an impasse, which I don't think is so hypothetical. Jim, you're Karen's editor. You get a phone call from one of Jack's superiors. And he says, 'Look, I understand you're talking about doing this story. Please just—before you publish anything, we have three crucial field operations going on with this program. Can you just wait until we finish these field operations?'"

Jim Hoge reflects, "[First,] I have to make a judgment on my part if I want to take his word for it alone. Secondly we're now down to what my lawyer has told me is an institutional decision. I would go to my publisher as well, because if we go ahead and we're running the risk also of not only Karen going to jail but others also, and penalties and fines. I would also be going to jail because I would not publish this story without knowing what the source was."

"So the field operations don't matter that much to you?" queries Tapper. Hoge does not want to take one man's judgment as final. Okay, the moderator elaborates, he gives you some secret information so you're convinced "that there are some field operations going on right now that if you publish this it would ruin those field operations."

Hoge responds, "Then I think I would fall back on an interim step, which is indeed I would hold it back for a period of time. I also would go to a Congressional oversight committee and say, 'I think you all need to know.'"

"How long would you wait?" the moderator wants to know. "I can't tell you how many days or weeks, or months," Hoge answers, "but let me tell you what happens if you wait too long. Let us say you wait a year with information that you have. And then you publish it. One of the very first questions that gets asked is, 'Why did you wait a year? Is it because you were trying to influence the election or not influence the election?' In other words, non-journalistic reasons. Non-security reasons. And that happens all the time. Journalism is in the business of transmitting information that is of interest and sometimes of importance to the public. When you find it, when you're satisfied that journalistic obligations of accuracy [have been met], as best you can determine, publish. If you're not publishing for non-journalistic reasons, you almost always get into trouble."

Let's change the angle. Tapper asks, "Karen, is it possible that if *you* shared that information with members of Congress that maybe Frank and John would start hearing about this program?"

"Sure. Absolutely. People in Congress are big gossips."

Sesno adds, "Within about five minutes . . . not quite that. But it clearly would come out."

Tapper moves on. "A year has passed. You still haven't published it. You're getting word that Frank and John and the people at *Tonight's News* are working on this story. Are you eventually gonna publish this story?" The answer is yes.

The moderator continues. "The story is published. It is huge." (Jim Hoge wonders about a book contract.) "The country is even further divided. Is it legal? Is it illegal? Congress is going to hold hearings. Everybody's concerned and trying to figure it out. Except for you, Victoria Toensing, because the attorney general has asked you to be a special prosecutor to figure out who leaked that information to Karen DeYoung. Are you going to take the job?"

"Absolutely," says Victoria.



"Are you going to subpoena Karen?"

"Absolutely. But I'll do it according to the attorney general's guidelines. Even though I'm a special prosecutor, I will adopt whatever [procedures] the Department of Justice would in that regard."

"Karen, a special prosecutor's been appointed. Do you want to talk to Floyd?" She responds, "Absolutely. Floyd is my first call."

With a smile suggesting the opposite of his remarks, Floyd assures Karen that it's going to be all right. "But at some point we'll have a ruling from the court [on whether or not the source of the document must be named]. And Karen may then be in a situation where if things don't go well, she's got to make a new decision. The ultimate decision, if we lose, is yours alone. And it's extra-legal. It's whether you're going to engage in a sort of civil disobedience by saying, in effect, 'You know, I know I've lost this legal battle, but I just can't and won't betray my source.'"

"So, Floyd, a journalist's promise to a source is not legally binding?" asks Tapper.

Floyd responds, "A journalist's promise to a source is subject to a lot of different laws, which are conflicting around the country. But here in Washington right now, where there's a federal grand jury, there is no real legal protection for a journalist who promises confidentiality to a source."

Well, Karen, what are you going to do? "You have a tough decision, huh?" Karen doesn't think it's tough. She's made her commitment. Should she go talk to her source? Probably not. "Because that person's probably already under suspicion and probably doesn't want to hear from me. But I think I've made a commitment. You know I've given my word."

Will Victoria send her to jail? "Of course." Not that she wants to; she understands the obligation. "I know she's doing her job. And she has certain considerations just like as a lawyer, if I'm in a situation where somebody's trying to get me to testify against a client, I have to decide whether it's appropriate under the law or not."

Fast forward to jail, where we just put Karen. "And while you're in jail you have a lot of time to reflect. And you can reflect on what a lot of people in the country are saying about you and your colleagues. They're saying that you're in jail because you're protecting somebody who leaked classified information about a national security program to protect American lives. And your colleagues in Khaoistan are sending images around the world that the U.S. government says is fueling anti-U.S. hatred and anti-U.S. actions. Are these the actions of patriotic Americans, what you and your colleagues are doing?"

DeYoung responds, "I believe so. Yes. Because I believe that the whole basis of this country and the way it operates is on the informed consent of the population. And I think that the government has an obligation to first of all follow the law. And there were easy ways for the government to avoid this. The government not to have [followed these procedures], in my view, put itself in a position of violating the law. And I think that that's my job. My job is to tell people."

Sesno in turn is asked, "Are these the actions of patriotic Americans?" and answers, "Yes, I think they are. Because first of all, I think, you know, we fast-forwarded through a lot of events. Suddenly Karen's in jail. I hope to visit you regularly and bring you food. But there is an enormous amount of thought and angst that goes into this. It's why Jim didn't publish for a year. We didn't spend a year not thinking about this. We thought a lot about this. And we have had ample examples through our history of places where the press, the media, have exposed government wrongdoing. But no journalist does this, whether it's exposing ugly, horrible images or putting their own lives and reputations on the line, without a lot of thought. There's a lot of ethical and moral soul searching in this. This is tough, tough stuff."

"General Lawlor, are these the behaviors of ethical people?" Tapper questions.

"I think they're the behavior of ethical people," the general replies, "but not within the context that's sort of surrounding this whole discussion. Terrorism, if I can use this terrible metaphor, is like a movie. And too often journalists believe that they're reporting on the movie as reviewers. They're talking about the content. They're talking about the people that were involved. But in reality they're producers. Journalism is what gives terrorism its throw weight. Because ultimately terrorism is about fear, and the communication of that fear." Journalism can facilitate that communication.

The last word belongs to Senator Cleland. "Adlai Stevenson once said that patriotism is a long and steady dedication of a lifetime. I think what I've seen around the table here, with the media, is the sense in which they feel responsibility for the country. They feel responsibility, a duty to their profession. And ultimately, their responsibility under the under the First Amendment to do the right

thing. That is at times an agonizing decision. We've approached it case by case, item by item here. And I think that what testifies to me that they're patriots is that they agonize about these things. We all agonize about these things, particularly in terms of war, when there's massive gray areas. So I give tribute to those who are involved in the journalistic ethic. And the long and steady dedication of a lifetime."

### 3. SYNTHESIS AND DISCUSSION

The dialogue presents us with three scenarios, all having to do with journalists in wartime, all raising thorny ethical dilemmas. Let us take them one at a time and inform our discussion, as far as possible, with the conceptual considerations in this chapter and with theoretical considerations raised in the accompanying Ethics Reader.

#### A. The Patriotic Journalist

First, the patriotic journalist: Is it the work of a patriotic American to find, record, and bring to the public news that may dishearten the people at home ("Look, we had the waste-treatment plant, and already it's gone," the citizen may think), give courage to the enemy ("Look how effective we are," the enemy may think), spread anti-American hatred and an increasing conviction, on both sides, that the Americans cannot win? Are the news gatherers, in the words of a previous era of patriotism, "aiding and abetting the enemy?"

Let us recall that the purpose of journalism, strictly from the point of view of the national interest, is to tell the American people what they need to know in order to make responsible choices for political action. If the war is not "going well," from the point of view of those who started it, the citizens need to know that so that they may begin to consider alternatives. This question was never raised during the formative years of battlefield journalism. Prior to the twentieth century, journalists had only distant unconfirmed reports to work on, and a considerably more relaxed idea of the permissible limits of accuracy. In World War II, we had been attacked by a foreign enemy. There was no doubt in anyone's mind that the war had to be won. No talk of just-war concepts like "proportionality" entered the political discourse; there was no talk of negotiating a peace "after our major objectives were obtained." We had to win, completely. All America was drafted into the battle: the young men to fight, the old men to man the Civil Defense Corps, the women to roll bandages for the Red Cross, the children in the schools to crochet squares for blankets for the soldiers' beds in the hospitals or draw pictures for their walls, and the journalists to tell the tale of the war as it was unfolding. On the whole, the military did not limit Edward R. Murrow's ability to broadcast, any more than they limited Bill Mauldin's freedom to draw cartoons, save for making sure that no details

of troop locations or specialized equipment were given away. There was no need for external censorship. We were all in it together. It helped that both in the European and Pacific theaters, soldiers still wore uniforms and non-combatants could be distinguished from combatants. In retrospect, it was a very orderly war.

Vietnam changed all that. (Korea didn't.) Now there was real doubt about our motives in getting into the war, the nature of our allies and our enemies, the geopolitical strategy we were pursuing and the legitimacy of throwing American sons and brothers into that strategy. There were crucially important decisions to be made, and only the American public and its representatives could make them; the "enlightenment function" of the press became absolutely essential. Since the war did not always go well, there was pressure on the press to be selective in reporting; but the bad news was most needed. Every round of bad news lowered the home-front commitment to the war. Every lowering of that commitment threatened the entire war effort, and by the time the war was finished, there was intense hostility between the armed defense of this nation and its free press. In the first Gulf war, reporters were generally kept off the battlefield; that tactic backfired in hostility against the military. So in the second Gulf war, as of this writing, the military went the other way, opting for a policy of transparency; hence the reporters "embedded" with the troops, befriend them, learning about their lives, and reporting the war from their point of view.

## **B. Telling the Battlefield Truth**

Why is it important to bring the embedded photographer along on a possibly dangerous raid? Because if there's a sympathetic story to be told, he will be able to tell it, and because, while it may be inconvenient to have a reporter photographing a failed mission, it's more so to have all the reporters back at base complaining about how they're never allowed to see anything. Why is it important to show dead bodies on TV? Because they're there, and on the argument of the previous section, the people have to know that they are there if they are to be responsible citizens. Why is it important to show a young soldier making a terrible error in judgment? For the same reason. Should the journalist be allowed to take these pictures, show them to his editor, put them on his blog? What's the force of that "allowed"? In the very recent past, ranking political and military figures have asserted the right to confiscate material inappropriate for circulation. These assertions have been abandoned.

For one thing, they have been outpaced by technology. Do you remember the days when the journalist would have had to pack his undeveloped film in cans, find a safe way to fly or if necessary ship them to the U.S. across the ocean, where his editor would receive them and develop them so that people could see them for the first time? I didn't think so. Now the pictures are digital, and can be "shipped" to Washington in seconds. Any image that is anywhere can be put on the Internet and picked up by any station anywhere—including Al Jazeera, the Arab nationalist channel located in

Dubai—for instant rebroadcast. For another, the military (if not the diehard Congress) recognizes the change, and knows better than to fight it—hence the modest request for "a copy" of the video sequence, not a demand for the original. It is bad enough to have pictures of American soldiers shooting Khaoistani civilians on TV. It is worse to have the same pictures with a hostile voiceover commentary on how the military tried to confiscate or block the use of the pictures.

The immediate availability of battlefield information—not to mention the efficiency of search engines and databases—has led to another phenomenon new to our time. From initial conception to final production, a significant book on any topic used to take some years. History books, especially, requiring the careful sifting of data from battle reports, private correspondence, newspaper reports from the morgues of the major papers, took years to write, and demanded perspectives chastened by years of distance from the battle. But look at the "Suggestions for Further Reading" section at the end of this chapter. For sentiment's sake, we have chosen Ernie Pyle's *Here Is Your War*, the reportage from several theaters of World War II that laid down the standard for wartime reportage. For the sake of just-war theory, still occasionally referred to, we have included Michael Walzer's *Just Wars*, from the 1970s. But all the rest are from 2003 onward, all about the war in Iraq, all full of information from the battlefield. Instant information has replaced historical perspective. With all these trees, how will we ever see the forest?

### C. Leaks and Confidences

Whence the obligation of confidentiality, the obligation to keep secrets? Note that it always has an ultimately utilitarian justification. We allow information to be withheld because it serves some larger long-term purpose, even though it might be convenient for many to know it now. The third scenario brings up this obligation and raises questions about it, turning it under the light to capture its several facets. Two parts of the scenario bear on the obligation: first, "secret" information, information that has been restricted to a very small segment of the United States government, has been "given away" to the press. That is a breach of confidentiality, in the opinion of many, and probably a breach of the law. Second, since if a law has been broken, it is important to catch and punish the lawbreaker, and since the reporter obviously knows who the lawbreaker is, the reporter is obligated to give the name of the criminal to the police. But the reporter has promised anonymity to the leaker, and therefore will not violate the confidentiality promised. Who's right, in both scenarios?

What is a "leak"? A leak is a piece of information made public that according to law or custom, or to someone's opinion of law or custom, should not have been made public. When a "leak" places information crucial to the preservation of the lives of Americans in the hands of those who would kill them—as revealing the positions of American military to the enemy in wartime, or disclosing the identity of an undercover agent working abroad—we don't call it a "leak," we call it treason. A "leak" has to be disputable—information clearly in someone's interest to keep private, but arguably in the

public interest to make public. Any information that we will need to have to make an intelligent decision on any public issue would qualify as justifiably leaked.

Such, for instance, is the information suggested in the hypothetical, of an illegal monitoring operation. Similarly, the activities at the Guantánamo Bay detention center, not to mention Abu Ghraib Prison (which were not leaked, but showed up on the Internet!), were very embarrassing to the officials involved, but arguably essential for the electorate to know about. It is never easy to decide what to do about leaks: the decision of the *New York Times* to publish the activities of the government's financial-monitoring system may well have been correct, but may yet garner a criminal prosecution from an offended government—the first for a major newspaper.

Once the decision has been made that the leak concerned criminal activity, what shall we do about the reporter's refusal to say who gave her the information? We, and the law, understand the reporter's obligation of confidentiality up to a point: we want sources who are aware of evildoing, especially lawbreaking, in government to feel free to talk to the public. We have "whistleblower" laws to protect such informants from persecution and retaliation, but none of them really protect the whistleblower's career in the face of general hostility. If for fear of loss of their careers, they will not go to the FBI and blow the whistle, which is what we tell them to do, we are better off if they will at least talk to a reporter, and get the information out in the air where we can deal with it.

The law does not in general protect confidentiality. The only way to find out if it is protected in any given case is to go to court and ask the judge, who will weigh the law, the public interest, the seriousness of the matter, and the real risks to the source, and render a judgment. If the judgment is that the reporter must reveal his or her source, then the reporter has another choice to make. He can give the name of the source immediately; he can go back to the source and ask to be released from the promise of confidentiality; or he can go to jail until he does one or the other or until the term of the grand jury ends. Nobody likes the resulting spectacle. But in a sense, these conflicts may be the most useful education the press could give to the public: there is no way to dissolve once and for all the conflict between government efficiency and public participation; there is no ultimate wisdom telling us what should be public and what should not; and the price of liberty of the press is continual vigilance and an occasional jailed reporter. That makes it worth fighting for.

## QUESTIONS FOR YOUR REFLECTION

1. What do you think of the new policy of transparency adopted by the military, of embedding journalists among the troops and encouraging them (within very broad limits) to report on everything they see? What are its advantages and disadvantages? What are the major conflicts you see introduced into the role of the journalist by such association?

2. We sometimes worry that reporters close to the action will "lose the forest for the trees," see only the individual action and not the broad sweep of the trends in battle (one of the panelists brings this up). In "embedding," we send the reporter right into the middle of the forest. Does his close-up perspective distort or complement the historical perspective?

3. The Greek poet Homer (c. 800 B.C.E.) once claimed that "war is the business of men"; much of the rest of our inherited culture contains an undercurrent of admiration for military action and adventure. Has the military history of the late twentieth and early twenty-first century changed our minds? The kind of "war" glorified now—Hezbollah actions featuring soldiers who commit suicide, rockets fired at random at a civilian population, and deep "embedding" of guerrilla fighters among the civilian population, is not the kind of war Homer—or Clausewitz or Walzer—had in mind. Shall we abandon the law of war in favor of unlimited tactics? Try arguing both sides of the question.

#### 4. SUGGESTIONS FOR FURTHER READING

##### Special Supplementary Text

Pyle, Ernie. *Here Is Your War*. University of Nebraska Press, 2004.

##### Other Supplementary Readings

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Katovsky, Bill, and Timothy Carlson. *Embedded: The Media At War in Iraq*. Guilford, Conn.: Lyons Press, 2003.

Marx, Willem. "Misinformation Intern: My Summer as a Military Propagandist in Iraq." *Harper's*, September 2006, 51–59.

Massing, Michael. *Now They Tell Us: The American Press in Iraq*. New York: New York Review of Books, 2004.

Newton, Lisa. *Ethics in America*, © 1989 and 2/E, © 2004. Reproduced by permission of Pearson Education, Inc., Upper Saddle River, New Jersey.

Schechter, Danny. *Embedded: Weapons of Mass Deception (How the Media Failed to Cover the War in Iraq)*. Amherst, N.Y.: Prometheus, 2003.

Seib, Philip. *Beyond the Front Lines: How the News Media Cover a World Shaped by War*. New York: Palgrave Macmillan, 2004.

Tobin, James. *Ernie Pyle's War: America's Eyewitness to World War II*. New York: Free Press, 1997.

Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977.



## CHAPTER 6

### MY BROTHER'S KEEPER Personal Ethics

#### QUESTIONS TO KEEP IN MIND AS YOU READ THE CHAPTER

1. How has contemporary American life changed the family? What new pressures make it particularly difficult to raise children with traditional values? How do children develop a sense of values in twentieth-century America?
2. Am I my neighbor's keeper? What, exactly, do I owe to people whose only connection with me is adjoining driveways or a clear view across the street? To whom is that obligation owed—to them, to the community, or to some ideal of community and family life? Should I intervene when I see bad things happening around me, or should I mind my own business?
3. To whom is the *family* responsible? Is it the family's primary work to raise the children in community values or to promote their children's interests above others in the community? Is it my job to make sure that my children cooperate for the public good or that they compete successfully for their own interests?
4. What is the community's responsibility for the family? Is it the neighbor's job to make sure the child becomes a good citizen? What if the neighbor's boy is doing drugs? If a child misbehaves in public, should the nearest adults intervene to correct his or her behavior? Or should only parents do that?

## **1. THE PHILOSOPHICAL GROUNDING OF PERSONAL ETHICS**

### **The Family and the Community**

The incidents portrayed here show painful rifts in the fabric of our personal lives. In large measure these dilemmas arise not from the personal failings of the characters involved, but from the drastic changes in social roles that evolved in the United States in the last century. When the transformations were complete, the notion of "the family" had changed, the notion of "community" had changed enormously, and the individuals left in the wake of the storm were seriously challenged to live without the institutions that have nourished us since the caves. Let us take on the transformations in order.

### **The Family**

Let us start out by acknowledging that "the family" has radically changed in the last two generations. While the underlying structures that ground family and community are ageless, changes in borders and relationships create the particular problems encountered by the characters in the hypotheticals. Where "family" means extended family or clan, governed by councils of elders with the good name of the family at the top of their concerns, the family will move more quickly than any outsiders to put an end to misbehavior on the part of all generations, no matter what the willful individual members might want. A teenager cheating on an exam (or application), a wayward daughter, a husband fooling around where neighbors can see him, all threaten scandal to the family's good name, and will be stopped. But where "family" means only a husband and wife, alone with their children, alone against the world, there may be no support or recourse if the demands of a lazy teenager, or an amorous husband, threaten the bounds of morality. The family, no further than four generations ago, was a community unto itself; now it is a paltry few individuals, with little or no power to insist that compacts be kept and covenants observed. At this point, when things in the family go desperately wrong, are there any others in the community (beyond the police, in extreme situations) who are justified in stepping into the situation? On what justification?

## The Community

The meaning of "community" is more problematic than "family." "Community" may mean any going organization that exercises limited political authority over a small region—any town or village. Or "community" may designate a pattern of life or sociological orientation where collective demands and interpersonal relations are as important as individual goals and choices. There is a general consensus in the literature that "community" in the latter sense is in trouble.

"Community" in the first sense, community as local political authority is value neutral. When we set up the traditional dichotomy between the individual and the community, we do not mean to prejudice either, but to adjust the claims of each so that some level of harmony may be achieved. Thus individuals are free to pursue their own private objectives and serve their own private convenience to a certain point; beyond that point they must respect laws and restrictions laid down for the health, benefit, and convenience of all (for instance, in disposing of trash from their homes). Individuals are free to keep what they earn or otherwise obtain by lawful means, but must render a certain amount of their resources each year to the community to provide for services designed to benefit the whole (for instance, the police department). Intrinsic to our accounts of individual and community is the recognition that neither set of interests is superior to the other.

Put in philosophical terms, "individual" and "community" in this sense are simply two aspects of the social nature of the human being. Humans must live in community or be less (or more) than human; as Aristotle put it, that man who lives outside the polis is either a beast (or psychopath) or a god. By the same token, the citizenry are the material cause of the polis, without which it would have no existence (see Aristotle, *Politics*, book 1). The individual owes what is specifically human about her—language, thought, love, responsibility—to the education and social life of the community; the community owes its existence to its legitimacy, and legitimacy is nothing but the recognition given it by the individuals who are its members. This interdependence of meaning is the material for the tragic dramas of conflict between individual and community, as in the trial and death of Socrates (see Plato, *Apology*). Socrates made a logical but unusual decision in opting to die rather than defy the laws of the city that had raised him (see Plato, *Crito*). Ultimately, community and individual can withhold from each other the value for which each most depends upon the other: the individual may deny the moral authority of the community, and the community may take the individual's life.

In the second sense, "community" is unmistakably a value. As a normative concept, it is closely linked with "intimacy," "trust," "fidelity," or "loyalty," even, if you must, "togetherness." It is that closeness generated in traditional primary relationships, family and friends, in which people know each other not in function-specific roles, but as whole people in a whole community, living, working,

and worshipping together. It is a precious part of human life, strengthening and preserving the individual, protecting religious and moral traditions<sup>7</sup>.

Max Weber, a nineteenth-century sociologist, first tracked the transition from primary associations to the bureaucratic authority of mass society. In common parlance, "mass society" is always seen as threatening "community" in this sense.

While no two writers can be expected to use the term in quite the same way, for purposes of this chapter, we will use it to mean a mechanical or bureaucratic organization of people and resources which carries on, in separate locations and institutions, all the functions of human organization that used to be exercised by primary associations and caregivers, in the family and the community. Thus one aspect of mass society occupies the individual's working life, another, his playtime, another set educates the children, yet a fourth attends to municipal services, and God is worshipped in a fifth group of institutions, by law separated from all the others.

How is "the community" for any individual determined? Is it always my town? Or, if I am a member of an ethnic minority in my town, is my community my ethnic group or the part of town where we all live? Could it be some group larger than my town? Could it be, say, "all right-thinking people in the United States, that is, all white Anglo-Saxon Protestants"? Or is that the sort of community I should *not* acknowledge as my own? Could it be the whole world, the whole human race? But then, how will I ever distinguish my community from yours (or should I try)? In short, is my community *given*, as far as I am concerned? Or is it *chosen* by me?

The question is very important. It really asks, is community a *fact of nature*, necessary for human existence, as unquestioned as the oxygen we breathe? Or is it a *conscious project*, adopted by a group of people in order to rediscover, and reinstitute, the values perceived as lost? If it is the first, it is given as a part of our environment, like bodily life and death, and we do no more than adapt to it. If it is the second, then we are responsible for it, for its quality and value as well as for its maintenance. The move from the first to the second understanding of community has created the sense of fragility concerning human associations; on the other hand, it has given currency to the notion of individual as well as collective responsibility for the crimes committed by the collective, and to a much higher moral standard for the acts of our own associations (especially government).<sup>8</sup>

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<sup>7</sup> Newton, L., *Ethics in America*, © 1989 and 2/E, © 2004, 41–42.

<sup>8</sup> *Ibid.*, 42–43.

Answers to the traditional questions about community may follow from the answer to that one—is my community simply the residential area I use for my zip code, or is it the product of some contract or covenant I have freely made with others?

What ethical obligations follow from my membership in it? And what are its limits? At what point do I cease to be bound by the decisions and customs of my community when they appear to violate some universal moral law—some law like Immanuel Kant's Categorical Imperative, which demands obedience from the whole human race and all of its members? What do individuals and private organizations owe to the community in which they live or carry on business? What are the rights of the private and the public sectors? What, indeed, is the criterion for distinguishing between them? Are their rights and obligations symmetrical, or is there a presumption for the perceived privacy rights of the individual? Can the association, in its own person, assert a right to exist and to maintain certain customs and identifying characteristics even against the wishes of its present members? (For instance, does a Catholic college have the right to maintain its Catholic character even if the vast majority of its present faculty and students have no interest in maintaining that character?) From the fact that human beings are social animals, does anything follow on the rights of individuals or associations?<sup>9</sup>

And above all: do I have any real obligation to support and enhance the life of the community if it is to my immediate advantage that the community leave me alone to do what I want to do?

One way to survey the ethical aspects of community—the identification of the group and the implications for obligations—is to outline briefly three major problematic dimensions, and see how they intersect in the television case study.

**1. American individualism:** The human being is a social animal. Americans are famous for forgetting that fact. As commentators on our scene have observed since Alexis de Tocqueville in the nineteenth century, Americans are swift defenders of individual interest, fanatical in protection of individual liberty and rights, prickly about privacy, and unaware of their neighbors and the deep streams of society that flow through their lives. "Individualism," a word that Tocqueville may have coined, describes the dominant American orientation to life and society. The notion of the involuntary community—the unchosen framework of human beings among whom one was born, with whom one continues to interact, and with whom one shares a

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<sup>9</sup> Ibid., 43.

scarcely perceived complex web of interdependence—is no large part of the American's moral universe.

Especially since the Second World War, when Americans began to become self-conscious about the lifestyles of a nation grown so important, our sociologists have traced the damage done to the American soul as a consequence of uncontrolled individualism. At the personal level, we acquiesce readily in personnel transfers, which uproot families and remove us from social ties to local communities, with no reckoning for the disruptions caused by such practices. On the societal level, we find it very difficult to take control of problems like substance abuse, pollution of air and water, acid rain and other assaults on the natural environment, because their solutions require intense collective action over a long period of time. We have apparently lost the traditions, religious and civic, that would have prepared us to devote a common effort to a common goal. The "Me Generation" was not news in America; we have been the quintessential Me Nation for the last century and a half.

**2. Social technology:** Americans are also famous for placing a very high value on technological progress, and until very recently, we have been preeminently good at it. The local farm community was destroyed by the explosion of technology that brought first the railroad, and the domination of commercial powers far from the ken of any previously self-sufficient community. Then we saw the demise of the factory and the lure of the city that left the countryside an archipelago of ghost towns; and finally the "factory farm," neutron bomb of rural America, machinery rich, rendering the laborer, that work force, unnecessary. The urban neighborhood was destroyed by the automobile, the high-rise office or apartment building, and, ironically, by the very political and economic advances that enabled the children of the neighborhood to move to previously inaccessible areas to live out the American Dream of upward mobility.

We love to hate our machines, but we will not give them up. Twenty years ago, the villain of the day was the computer. The computer has reduced the number of tellers in the bank, the billing clerk in the department store, and for the day trader, even the stock dealer on Wall Street; we mourn the passing of all but the last. Now we complain about the cell phones, instant messaging, and e-mail that overwhelm us. But we have no intention of returning to the pre-computer age. Whatever we valued about the old human contact, and the web of dependency on human beings that formed the infrastructure of our community, we will gladly sacrifice for the tremendously exciting possibilities that the machines open up for us.

More subtle in their effects on our lives are the elaborate social service institutions, especially those that are publicly funded. Schools that were not a branch of the Church used to be founded, as occasion demanded, by a group of families that wanted schooling for their children. (Is that a good example with the current burgeoning of charter schools?) Such schools have been largely replaced by sprawling bureaucracies of public school systems, presided over by superintendents, very largely outside the control of parents. Aged parents, who used to be cared for at home (if they lived that long), are now the charges of bureaucracies, which administer social services, and (through Title 19, Medicaid) all medical care up to and including the last in a network of convalescent and nursing homes unknown two generations ago.

The removal of education for the young and care for the old from the primary home settings where they developed has been accompanied by similar displacements on many smaller scales: music has moved to the radio, the CD player, and the iPod, ritual and dance to the television, and game playing to the arcade. Above all, care for the troubles and needs of people of all ages has moved to the social service agencies set up by municipal, state, and federal government, and out of the realm of family, church, or neighborhood responsibility. That, as we shall see in the hypothetical, will come back to plague us.

**3. The family:** Whatever happened to the good old days when marriage was for life and only movie stars got divorced? The role of the family has diminished considerably—not only its role, but also its function, legitimacy, meaning and thus much of its ability to sustain itself in mass society.

Its role used to be that of sponsor and mediator for the individual in the community. The individual had no independent status, nor any right to enter into the community without family permission and protection. (The forms, if not the spirit, of the last century are preserved in the custom of the "coming out party," in which a young lady is "introduced" to the society by her family, to become for the first time a full member of society.)

Its function used to be that of full caretaker for all its members, responsible for their education, enculturation, health and health care, even their lives (although the father's right to take a child's life has always been severely circumscribed).

Its legitimacy stemmed from the fact that it was, for all purposes, the final authority on matters pertaining to its members, and none could interfere; that understanding ensured, if nothing else, the respect of its members for the family authorities.

And its meaning was that it provided the whole of social life for all of its members except the head of the household, who alone was a full member of the larger community. Social interaction for the members occurred only through the family. It was the body, they were the parts of the body. It was one organism, which embodied the meaning of community for its members.

It is commonplace that all these understandings about the place of the family in the life of Western culture are gone, replaced by the complex interaction of all family members with that array of secondary institutions mentioned in the last section. Since many of the reasons to stay in a family are gone, the very strict rules that people used to follow, that protected the existence of the family, are no longer applicable. Both of these developments have confusing consequences, some of which emerge in the hypotheticals that follow.<sup>10</sup>

## **2. MY BROTHER'S KEEPER: THE COURSE OF THE DIALOGUE**

This section considers the television presentation or DVD of the dialogue on the subject. The recapitulation of the dialogue that follows is not meant to be a word-for-word transcript of the program, but a summary of the major themes, issues, and opinions that emerged in the conversation. It is for your review and for use as a resource.

As you read through the dialogue, ask yourself the following questions:

1. Would you help your children to cheat, sort of, if it would really help their success in life?
2. Would you turn in a child using an illegal address to attend a better school? How about an undocumented alien trying to make money to send back to his family in Mexico? Would you hire a maid knowing that she had entered the country illegally?
3. What are the claims of friendship in the workplace? Does friendship interfere

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<sup>10</sup> Ibid., 43–45.



with appropriate choices at work, or is it the glue that holds the workplace together?

4. If you observed your neighbor entertaining a lovely young woman in his house when his wife was not there, would you say anything? To anybody? To whom? What if it was the teenage daughter having huge drunken parties when the parents were on vacation?

Moderator: Charles Ogletree

Panelists (from left to right on your screen):

Rabbi Daniel Zemel, Temple Micah, Washington, D.C.

Elayne Bennett, President and Founder, Best Friends Foundation

Barney Frank, U.S. Congressman (D-MA)

Charmaine Yoest, Vice President for External Affairs, Family Research Council

Anita Allen, Professor, Law and Philosophy, University of Pennsylvania; Author, *The New Ethics*

Randy Cohen, Ethicist at Large, *New York Times Magazine* Columnist, "The Ethicist"

Dallin Oaks, Member, Quorum of Twelve Apostles, Church of Jesus Christ of Latter-day Saints  
Justice (ret.), Utah Supreme Court

Denise Rodgers, M.D., Chief of Staff, University of Medicine and Dentistry of New Jersey

Vince Passaro, Contributing Editor, *Harper's Magazine*

Victoria Toensing, Attorney; Justice Department Official, 1984–88; Chief Counsel, Senate Intelligence Committee, 1981–84

Russell D. Moore, Dean, School of Theology, Southern Baptist Theological Seminary

Jill Ker Conway, Former President of Smith College

Stanley Crouch, Syndicated Columnist, *New York Daily News*; Jazz Critic, Slate.com

## **Part 1. The College Essay**

The conversation begins with a familiar scene. Jason is applying for college, and would like his mother to look at the all-important essay he just wrote. She looks at it. It's awful. It is very unlikely to bolster his application to the good college he wants to go to. Mother, Denise Rodgers, says something tactful, amounting to, do it over. "Son, I'm a little disappointed in this. I'm not sure that the subject you've chosen is one that's going to present you in the best light. So I'd like you to go back and think about it a little bit more. And maybe write another draft so that I can look at it again."

Jason whines, but redoes the essay. No improvement. Tomorrow's the deadline; the application is important. Rodgers is encouraging: "I'm going to help him a lot, because Jason, you know, this has been our problem—this waiting till the last minute. It isn't that I don't know you can do better. You can. But we're up against the wall now. And this is about your future."

Jason has an idea. "Well, I appreciate that, Mom. And I think I've got an idea if you will help me. I'm going to tell you my ideas. And if you sit down at the computer, then you can type them up and then you can put the things in the right order so that I can get an essay out of this." In short, I'll play with ideas and you write the essay.

Rodgers will have none of that. "Yeah. Now, we've crossed the line. So, Jason, you know I love you and I want the best for your future. But I'm not writing your essay for you." Jason is still hopeful. "I'm asking you to help, Mom. This is important."

Rodgers agrees. "This is extremely important. So, we're going to talk through your ideas. If you have a problem with the correct usage of words, I'm going to help you with that. But, I'm not writing this for you, Jason."

Jason suddenly spots his father. "Oh, Dad, Mom and I are talking about this essay. You know tomorrow's the day it's due. You want to talk to her about what we've just talked about?"

Vince Passaro is asked to play Dad, and queries, "Well, what does Jason need?"

Rodgers answers, "Unfortunately, he needs a total rewrite. You know, this is classic Jason. He waits till the very last minute. The deadline is tomorrow. He's written this thing without a whole lot of thought. And personally, I think he needs to learn a lesson now. I mean, clearly this is going to be an all-nighter for all of us, but I don't think we can write it for him. And that's what he's asking me to do."

Dad sizes up the situation: "Somebody's gonna have to stand in the room with him while his fingers are on the keyboard to get this done." Rodgers is right there with the answer.

"That's right. And I think as his father, that's your job."

Jason still wants someone to do the job for him. "Dad, do you have any sympathy at all for my dilemma? I mean, tomorrow's the day. And I've been workin' real hard. I've really been trying." Dad has sympathy and recognizes that while the essay will not get him into college all by itself, it can easily sink an application. "So would you sit down at the computer, Dad?" Dad will not. He will stand in the room while Jason types, and he'll help talk through the essay.

What if Jason just can't do it? A rift appears: If he just can't do it, Mom (it appears) will eventually, after 3 a.m., write the essay for him, or go a long way in that direction; Dad clearly will not. Mom

feels guilty; she's had a lot going on at work and feels she hasn't really spent time with him in the past months, so she will help write it. Not Dad. Jason decides he needs a new dad, and turns to Stanley Crouch.

"Dad, you're a great writer. You know my problem. Can't you help me get this thing in?" Crouch will, but "maybe not the way you want me to help you."

"How are you gonna help me, Dad?"

"By reading and by criticizing it."

"Oh, and then you'll write in what it should say?"

No. Actually, Crouch answers, "No, no, no, no, no, no. I know the choice you're facing because it's the same one I face. If I don't make a deadline, then I don't get paid." Jason pleads his youth, to no avail. Crouch comes right back. "Rules start early on you. And for you, they're starting now."

So far, the family has not been very helpful, so Jason goes to Barney Frank. "Uncle Barney. Can you help me? You know, my parents just don't understand me. You do. You're my favorite uncle." Flattery will get him nowhere. Barney Frank has quite a different take on the situation. "I think we have figured out that it's probably not a good idea for you to go to college right away. You probably ought to go to work, because here's the deal: I can't go to college with you. This pressure that you're now facing, you're gonna face on a regular basis in college [and] it would be a great mistake to send you off there; ready to fail."

Time to change the subject. "But you know," Jason continues, "there is a friend of ours who's also applying to college. And her wealthy family has hired a consultant to craft the essay, to work on it for months. And she's competing for the same space that I'm competing for in this college. Is it fair to me, Jason, that no one's gonna help me the way that she's been helped?"

"Well," says Frank, "there are a lot of things that are unfair. It's probably unfair from your standpoint that her parents are a lot wealthier than your parents are. So, no. I think this is a question of what's good for you."

Moderator Ogletree goes back to Denise Rodgers. Jason disappears and returns, new essay in hand. You read the first paragraph. It's terrific. And the second paragraph is just outstanding. And the third paragraph is just amazing. It's really clicking. But you can't believe it's really Jason. You're not 100 percent sure. But you're more and more suspicious that maybe Jason didn't write this essay." Rodgers begins, "Jason, I read your essay and it is phenomenal."

"Thanks, Mom. Thanks. I'm glad you liked it."

"Just amazing. Did you write it?"

"What do you mean?" What, indeed.

"Well, it's such a turn around from where you were yesterday. And quite frankly, it doesn't sound like the voice that you've used in other essays that you had to write for school."

"But you told me to go work on this. And I did exactly what you asked me, and now you're challenging me?"

Yes, that is exactly what "Mom" is doing. "I need to know, I want to be sure, Jason, that you really wrote this." Jason is hurt, betrayed, crushed, by her mistrust. He announces that he is leaving. Rodgers would like to know where he's going with no money and applications due the next day. Jason tries to get some other response from Dad. Passaro is already wondering whether with a bit of searching, he's going to find this essay on the Internet. Jason is stricken. "You don't trust me?" Passaro is unmoved. "I'm asking you a question. You can answer it yes or no. Clearly, we're both reading this essay, Jason. And as your parents, who know you better than anyone's going to know you in your life, we don't think you wrote this."

Moderator Ogletree turns to Rabbi Daniel Zemel. "Rabbi Zemel, let me ask you about issues of trust and loyalty. How are you reacting to what you're hearing the parents say to Jason?"

"I agree with the parents. I think we have to teach our children honesty before we teach them anything else. Integrity is everything in the world," replies Zemel.

Ogletree moves the hypothetical along. Jason leaves. In fact, he had a planned bike trip, and he's gone the next day. But fortunately for you, Vince, a good friend of yours who actually runs a computer company is coming by to help you with a computer problem that you have at your house. So you tell him about this agony with Jason. And this computer friend says, "You know what? Let me see your computer because I can take a look at it, look at your son's essay, and let you know whether or not it's on the Internet."

Had Vince had a program to do that, he'd have searched the Internet already. Jill Conway would not search the Internet. "I would not because I want to keep the problem we have as a family in our family and between us. And I would simply say to Jason, 'I am absolutely convinced that this is not your writing. You can tell me that you faked it, and I will respond as lovingly and caringly as I can. I will not go double check on you because I want you to tell me what you have done.'"

Let's go to Victoria Toensing. Victoria, do you agree with her? "No, I don't because I think it's good—this is the lawyer in me—to say, here's some evidence. And Jason, if you do something that's wrong, if you do something that's unethical, every so often you're going to have to wake up at two o'clock in the morning and wonder if somebody's going to find the evidence of that."

On with the search. Victoria. "You search the key words, key phrases. It's inconclusive. But you know what? Your computer friend tells you, 'Your son has a laptop, right?'" Toensing allows as he does. "If you can get me access to his laptop in his bedroom, I can go and check, and we can get the final answer. Will you do that?" Toensing sees no difference in what he proposes; she'll do that. Vince Passaro, however, would not. It's like going through his drawers. It's not right. Toensing disagrees: "You have a responsibility to him to find out whether he's trying to play a little game with us because if we don't teach him this now, he's going to do this kind of dishonesty throughout his life."

Jason needs a third father. "Randy, you're the father. What would you do?" Randy Cohen has yet a third approach to the boy. "I think Jason has failed to understand how difficult cheating is. I think I

failed as a father if I haven't gotten across that lesson that it's hard to be a thief. That he has to work harder if he wants to be a thief and a cheat; it's a very demanding line of work." The moderator cannot resist the obvious question: "How do you know that, Dad?" Cohen continues: "College admission officers are not idiots. They read thousands and thousands of these essays. And it becomes immediately apparent who's plagiarized an essay. If Jason wants to enter the challenging field of cheating, he will find he must work much, much, much harder. I would respect his privacy. I would not go through his drawers, virtual or actual."

Let's get Elder Oaks in on the conversation. "What's at stake here, Elder?"

"What's at stake is the moral development of my son," replies Oaks. "I don't think it would help me as a teacher of moral development if I were to invade his privacy. I think I need to work this out with my son over a period of time. Whatever it takes. And see that he is guided and helped to make the decisions that he needs to make to be a responsible member of the community. And I surely agree with his Uncle Barney's advice that you not send a boy to college to fail."

Jason finally comes clean. Back from the bike trip, he admits his girlfriend Olivia wrote the essay. "I mean, she's a good writer and it captures what I was trying to do. As you know, the deadline was last night. So once it was finished, I sent it. I hit that instant on-line button. And all my applications to all the universities are now there. So, it's done, but I'm really sorry that I used Olivia to do the essay."

Jill Ker Conway, now the mom, doesn't give the answer Jason wants to hear. "Well, Son, I'm afraid you're going to have to tell all those schools you applied to that it wasn't your work. And ask if you can submit something late."

Jason turns to Reverend Russell Moore as his new dad. Help? Absolutely not. "Withdraw the application. Absolutely. You have to notify the admissions offices to every university to which you applied. And you're going to let them know that you're withdrawing your application for this year. And you'll work for Uncle Barney for a year." You mean, all these places, Jason wails, I'm going to have to go back and say I submitted false documents? I'll never get into college! Jill Conway is not so sure. "Well, you'd be surprised. People will be astonished that somebody actually had the personal integrity to admit this."

So parents and son make a visit to his favorite college, State University, to the office of the dean, Stanley Crouch. "So, what problem do we have here with your son?"

Conway answers. "Our son faked his essay in his application. And we believe it's very important for us as a family and for him that we address that problem right away. We know that he is a good student in other respects, but he has failed us and himself here."

Mother and son might have been surprised at the response: "Does he use drugs?" Not that Mom knows. "Is he a thief?" Possibly, if using somebody else's work is theft. Crouch is still not going in that direction. "Well, that's not exactly a thief. You did say that his girlfriend did it for him. So that's sort of a present to him." Dad Moore is concerned that the kid is a liar, which Dean Crouch admits is "a bit of a problem." But his direction is still positive for Jason: "As far as I'm concerned, he can do it again, if you all can work with him to do another submission of a letter. That I don't mind. The thing I'm interested in is whether or not you all can influence him to handle his business better. The problem is whether or not, like you said earlier, and you said, whether or not the student has integrity." This is not the response they expected from the dean. The family has been given a handsome way out. Moore is not interested in taking it. "And that's why we're asking you to not make an exception for him. We want him to resubmit his essay. But we want him to do it at the next regularly appointed time for a submission of essay."

Ogletree returns to Vince as the dad. "Let me ask you, Vince, what would you have said?"

"What I'm concerned about, Jason, your application's gone off. Olivia wrote it. You should marry her by the way. But that's not the main thing. I want you to know in your heart that you have to make some serious decisions about yourself here. You panicked at the last minute. And you did something that, if you look inside, because I know you from when you were this big, you know you didn't want to do."

Jason responds, "So, what do you want me to do now?" Passaro wants to know what he's feeling, and Jason has a ready response: "I'm feeling terrible. That's why I told you Olivia wrote the essay." So what do we do now? Jason doesn't think we can do anything. Passaro, still undecided, still thinks there is a moral lesson to be learned. "On the one hand, to take him at this age and drag him by his ear is to have shown him how rules get enforced. But what I really want to accomplish here is to find out what has happened to him morally, and to get to the heart of that and to help him solve the problem."

## **Part 2. The Handyman's Child**



Well, let me talk about another family. Randy Cohen, you're a parent. And you're a handyman doing work for this particular family. Your child is about to enter first grade. Where you actually live, schools are absolutely terrible. Terrible. And this neighborhood where you work, schools are good. And, in fact, one of the people whom you work for, they've actually volunteered to let you use their address so that your child will be able to go to this school and get this quality education that he could not receive where you live. Who's that volunteer that's going to let Randy's kid come and use their address?"

Denise Rodgers will do it. "Randy, you've worked for us for a long time. You and I both know that quality education is critical in the development of children in this society. My husband and I are fond of you and your wife. And we're grateful for the work that you do around the house for us. You know, if you want to put down our address to use for your daughter to go to school in our neighborhood school, we're willing to do that for you."

Randy is delighted. "I've already filled out the applications just that way. The idea that local school district lines have some kind of moral weight is insane. It sentences the poor to third-rate education. This is not a moral boundary. This is an administrative convenience. And the idea that, because I live down the block from you, my child can't get a good education is so offensive that my obligations as a parent compel me to do this."

Ogletree suggests that, "Before you conclude this deal, you should at least talk to your wife, Anita (Allen), and see how she feels about it? Tell her the good news!" Randy obliges. "Anita, this is great. Instead of our kids having to go to the third-rate school that our society sends poor kids to, we get to send the kids to a decent school. We do have to tell a lie. And every lie has a social cost and I regret that we have to lie about the address. But my employer is letting us use her address for Billy Bob. I'm sorry we named him Billy Bob, by the way, but is that okay with you?"

Anita is not receptive to the idea. "Absolutely not. I'm insulted and I'm infuriated that you would think that we should rely upon our rich employer to solve our problems. Let's go down to the school district and point out this problem; that we were tempted to lie on our application in order to get our kid into a better school down the street. But we're not going to do that. We're going to let them know why. We're going to publicize this problem."

Randy objects. "But the school district can't change it. We have to take this to the people of our town. And the people of our state."

"Okay," answers Anita, "I'm all for you. But not for lying."

Possibly a new family will get on better. "I'm surprised this family's so divided here. Let me go to another family." Ogletree appoints the Reverend Moore as his new handyman. "Talk about the offer you've gotten from Dr. Rodgers to actually use her address."

Moore responds, "I'm not supportive of that. That would be teaching Billy Bob that it's alright to lie. We're lying. I'm not saying the rule is correct. But our lying about it is teaching him something about his moral development that I think is unhealthy." Wife

Victoria Toensing agrees: "Well, now I know why we're married because I agree with you. But I think what we ought to do is see if there is something that we could work out."

Moore tries an obvious possibility: "We could ask her, since we've been doing such good work for her for so long, maybe it's time for a raise."

Ogletree shoots that down. That's not going to work. Moore responds, "Well, then we're not going to sacrifice the truth and our integrity and his moral development for the sake of his school."

Suppose Jill Ker Conway had a 5-year-old entering first grade. Would she take the offer? "Actually, I would take advantage of the offer because I believe the whole system of funding schools today and the way the boundaries are drawn is one that it is not a moral problem to subvert." A legal problem, maybe, but "I don't see it as an ethical problem because my obligation as a parent, trumps many other obligations I must fulfill. And I have a friend who is willing to help me. And I will take advantage of that."

What does Elder Oaks think of it? Is this an ethical dilemma? "Yes, it is an ethical dilemma," responds Oaks. "There are two competing goods. But I think anyone who wants to take advantage of Denise's offer needs to think about how far they will go because as soon as you commit yourself to lie about where this child resides, then you are really committing yourself to a succession of lies should the matter be investigated. And if you pick up one end of that stick, you better know that you're picking up the other end of the stick. How far are you willing to go with this succession of lies? That I think is what needs to be thought about at this point." Is Elder Oaks just worried about

getting caught? No. "You're worrying about the consequences of one lie which commits you to another lie. And so, it's not enough to say it's only a small lie in service of a large good."

Barney Frank takes another angle. "First, there may be people on this panel who have never lied under any circumstances. I salute you. Everybody else I know has. So, the notion that once you have lied once, you are condemned to an endless chain of lies, there's a lot of us in that category. Secondly, in my view, there is no ethical principle being transgressed here. That is, I am in favor of kids getting the best education. It's not zero sum. I'm not bumping some other kid. But I would say this to Dallin; it's a very reasonable point. My guess is that the penalty for having misrepresented your kid's address is simply that the kid has to go back to the original school. So, I would say, yeah. I'm willing to say on this non-sworn application the kids lives here."

Rabbi Zemel's analysis is much the same: "I think there's no ethical obligation to follow the rules of a system that's immoral. The system itself is immoral. The parents' obligation is to their child. And you're teaching your child a lesson about what morality really is. The higher value is—the system is corrupt. And we want to provide education for everybody." Nor would he flinch from telling another lie if necessary. "What? Are they gonna put me jail?"

"Charmaine [Youest], you're not gonna do this, right?" "No, I'm not," answers Youest. "Because it's wrong." "And I'm torn. I'm very torn." "But you're not going to do it," says Ogletree.

"No, I'm not," essentially, because she is concerned about that rule being broken.

So let's put her on the other end of the hypothetical, as the mother of another child in that school district. "You happen to know that there is someone who is using an address of someone in your neighborhood. And therefore, they're going to a better school, your school, where your child's going. So, you're gonna turn them in, right?"

Youest would try to talk to the parent first. "Look, you are doing the wrong thing. You are teaching your children to lie in the school. And you're putting me in a horrible position because my children don't have the opportunity to go to that school and it's wrong what you're doing." And when the parent answers, "My child's going to this school, and it's none of your business," Youest is not happy. "It is my business because you're hurting my children. You're hurting the whole system."

Well, what's she going to do about it? "Are you going to turn this person in who happens to have a fake address? You're going to go to the principal and say, 'Hey, the Smiths, that kid is from another neighborhood.'"

She admits, "I'm torn on that one. I'm really torn on that one. Probably—probably not."

Will Victoria Toensing? "No."

"[But] it's wrong!" says Ogletree. "The rules are broken, right? We've got to have some standards here, right?"

Russell Moore suggests that the issue is not "the rules," but the integrity of the agent; failure to rat on someone who is cheating is very different from cheating oneself. "And teaching your child to lie," Toensing points out. "Exactly right," Moore agrees. So Toensing can conclude only that she would hesitate a long time before turning anyone in for that sort of thing.

### **Part 3. A Promotion for Chris**

The moderator begins by going back to Uncle Barney Frank. "Remember when you didn't have a job. Your good friend Chris actually took your application to the job, put it on the top of the pile. He also put in a great word with his boss about you. He didn't know whether you were qualified or not. But he told you what the boss was gonna ask in the interview. You got the job. The good news is that it turned out that you did a great job. Such a good job that you've surpassed Chris. And now you have an important decision to make because you have to decide who's gonna get a promotion in this company. Chris is one of the applicants for that promotion. Is he qualified? Absolutely. Is he the best candidate? No. There's someone better. Do you recommend Chris for the job?"

"Well, I hope I won't," answers Barney. "I'm a human being. And I have these personal feelings of gratitude. But I do not have the obligation primarily to Chris. I have the obligation to the company. If there is someone who is clearly better than Chris, I will have to recommend that person and accept the consequences of Chris's anger. I will understand if Chris will be disappointed. But I think one of the great problems in society is when people put personal loyalty ahead of loyalty to the institution because the institution often represents the greater good."

The moderator makes it harder. "This is very close. Chris is qualified, but there's somebody that's better, but it's close."

Barney thinks out loud, "If someone else can do it better, maybe only a little bit better, and it does not have any noticeable consequences on third parties, I have to tell you being human, I guess I would put it this way: the likelihood in this case is that I probably would have persuaded myself that Chris and the other person were even. But if I could not make that rationalization, then I would appoint the other person and accept the consequences."

Ogletree turns to Elayne Bennett. "That's what friends are for, right?" Elayne answers. "I think you have to go with the best qualified person. I think if we keep equivocating all the time, and obviously we've all had these situations, I would, if there was another applicant better than Chris, and I knew that, even if it was a little bit better, I would have to go for the other applicant."

"Then what does friendship mean?" That question seems to have no easy answers. "Friendship's important, but we're talking here about ethics," counters Elayne. "We're talking about honesty. We're talking about not lying and I think if you start equivocating with, okay, let's help a little bit with the essay. Let's change the address. Let's push the son of the friend when there's someone else more qualified, you know, it's—where are we?"

Denise Rodgers finds a certain inconsistency in that position. "Well, but I got situational ethics quite frankly because I had no problem whatsoever accepting Chris's help when I got the job initially. I had no problem getting the questions ahead of time. I had no problem with him putting my name on the top of the list. All of a sudden, now that I'm in the position of power, now all of a sudden I have ethics? I don't think so." Ogletree adds helpfully that there were more qualified candidates than I, when I applied for the job Chris helped me to get.

What does Vince Passaro think? "I think I can be no lover of institutions. And you're saying he's qualified. And he got me this job. And he pulled strings. And my career has been made. And my well-being rests upon this fundamentally courageous and selfless gesture on his part for me. And he's my friend. The institution is a pale ghost, compared to those kinds of obligations."

Anita Allen disagrees. "Where does this quid pro quo conception of friendship come from? So your friend does you a favor. You do your friend a favor back and forth, back and forth. This is an easy

case to me because I think a true friend would respect my decision whether it was to give him the job or to give the job to somebody else."

Rabbi Zemel is nervous about the black and white feel to this sentiment. "On the other hand, objective criteria are rarely as objective as we're saying there are. But in the business world, in all kinds of areas, this notion of, there are these objective criteria that are quantifiable and measurable in such an accurate way, it doesn't exist."

Denise Rodgers brings out another aspect of the choice. "There's the theoretical discussion here. But there is the reality of what goes on in this world all the time. I think part of what is difficult for us in our personal ethics is to what degree do we hold ourselves to a standard far higher than the standard we see operational in this country on a day to day basis? I think part of what becomes difficult is that we have disadvantaged populations who never even get to know Chris. Who never get to know the Chris's of the world, to be able to get the answers to the questions so that when they go into the door, of course there is the appearance of being less qualified because they don't have access to those who have access and then can't advance their careers. This absolutely is a common practice. You'll never convince me that it's not." But she would put Chris in the job. "I would not say to myself at all that I'm doing it because you're my friend. That is why I really would be doing it. But you are loyal. I know you, we could be a great team." How far will she go? She tells Chris he's getting the job. Ogletree, acting as Chris, tries to get her, or Vince Passaro, to go on to say flat out that he was the best qualified candidate or admit the choice was based on friendship alone. They are very unwilling to do that, and after the third try, Barney Frank intervenes: "Chris, does the phrase 'quit when you're ahead' have any meaning to you?" Ultimately there is agreement: the person doing the hiring will have to believe, as well as say, that Chris was in some sense the "best qualified" for the job. Admit it: we rationalize, we tell little lies to ourselves, and we probably have to in order to stay sane.

#### **Part 4. Neil, the Cheating Neighbor**

Ogletree moves the scenario along. "Let me go to Professor Anita Allen. You have a new neighbor across the street. His name is Neil. Neil comes to you one day and says, 'Hello, neighbor. Good to meet you. Hi, neighbor. I'd like to ask you a small favor. My garage is broken. And I have one of my colleagues coming over to work with me this afternoon. I've got my car in the driveway and yours is empty. Do you mind if my colleague parks in your driveway this afternoon?'"

"Fine, no problem," says Anita Allen

But "the neighbor calls several times. You happen to notice, that [his] colleague is a very attractive young woman, and that she always seems to come in the afternoon. And she always seems to leave before Neil's wife gets home." Moderator Ogletree continues. "So I call you. 'Hey, Anita, how you doing? I'm going to use the driveway today. No problem?'"

Allen's reply is very hesitant. "Well, you know, this is—this is—I was very happy to welcome you to the neighborhood. And I hope you enjoyed that pie and that pasta I gave you. But I'm starting to feel a little bit like I need my driveway back."

"Oh, what's the problem?"

Allen mumbles and stutters about everything but the problem. "Well—I—I—you know, I—I've people coming to the house who are—handyman—handymen or handywomen and painters. And—and—and my housekeeper and my—my kids' friends. Their parents' cars and the carpool and I—I'm beginning to as if—that—that my—my—my driveway cannot become a permanent parking lot for you."

The moderator comments, "I think I'm hearing a flat-out lie."

"You are," Allen replies.

"What are you struggling with?" asks Ogletree.

Allen tries to get it in coherent form: "I'm struggling with not wanting to be a total moralistic, puritanical nerd. On the other hand, not wanting to facilitate something that might put me in an awkward position vis à vis the spouse or the partner of my new neighbor. I want to be friends with both partners in that household."

What would Elayne Bennett do? "I would not have any qualms about saying, 'How does your wife feel about this person who's parking in my driveway?' And that I'm beginning to get a little

uncomfortable." Back in character as Neil, Ogletree quickly answers, "Oh, that's a good question. It's my colleague."

"I know it's your colleague. But is your wife aware your colleague comes in the afternoons and needs a parking place?"

Suddenly offended, Neil asks, "Are you trying to get in my personal life just because I'm asking to park a car in your driveway?"

"You're in my personal life now," Bennett points out, "because you're using my driveway."

"So what are you accusing me of?"

"I'm not accusing you. I'm just saying; is your wife comfortable with the fact your colleague comes in the afternoon and needs to use my driveway?"

"Yes."

Stanley Crouch refocuses the hypothetical: "What about the fact that you might not feel like being drafted into a situation? That's the thing I don't like. If you do it, you're in it." What would he say if Neil asked a third time? "I'd just say, 'Look, man, have your fun without my assistance.'"

"I'm just asking for a place to park."

"No, you're not asking for that. You're asking for something that I don't understand and I don't want to understand."

All innocence, Neil asks, "What are you talking about?"



Crouch is candid: "I got the impression that this girl who comes over here is comin' in your house and taking her clothes off, and you're doing something with her, and I don't want to be a part of . . ."

Neil feigns outrage, and suddenly has allies. Charmaine Yoest joins in: "Just because she's a—an attractive woman? This is what's troubling me: he has a colleague who's an attractive woman. And now, you're taking this parking space away that you were willing to extend. I think you want to ask some questions like, 'Oh, tell me more about your business. What do you do? What does your colleague do?'"

The hypothetical advances. "Charmaine, he's not using the driveway anymore, but the colleague still comes by. And Wednesday you happen to notice that Neil brazenly, right in front of the house, very warmly kisses this young colleague in a very passionate way."

What does Charmaine do? She strolls over to meet the neighbor's friend. "I haven't had a chance to meet your colleague who's been parking in my driveway." She continues: "I would walk up and I would meet Carol. And we'd all have a nice conversation. And then, when I saw the spouse, who I'm sure is my friend by now, I would say, 'Yeah, I ran into Neil and his beautiful colleague Carol the other day.'" ("Ooh, you're mean," says Anita Allen.)

What does Randy Cohen think? "You have an obligation not to abet what you disapprove of; what you see as immoral conduct. But you don't have a duty to report it to other people. Once they're canoodling, you have no obligation to approach the wife. Even in your cunning little way." But Ogletree insists (over several objections) Nina, the wife, doesn't know. "Everybody in the neighborhood knows except Nina." Is anybody going to tell her? No.

Anita Allen explains. "Until and unless I had developed a close personal friendship with her, I wouldn't tell her about the apparent affair. And I wouldn't do it because I would be afraid that I might be inserting myself into a situation that I wasn't able to handle. There's a responsibility which comes from disclosure. What if Nina has a mental-health problem? What if she has an agreement with her husband? You never know what you're getting into when you insert yourself."

Doesn't anyone think that all these nosy neighbors have some sort of duty to tell her? Reverend Moore? What would you tell her? "If I'm present and I see her husband kissing this woman, I'm going to say, 'Look, Nina. This is not any of my business except that I was present in the

neighborhood and I feel an obligation morally to let you know what's taking place here. You can do with it what you will. But I think there may be something going on."

Fine, says Ogletree, "Persuade Randy Cohen that you're right." Randy Cohen interrupts and insists, in the person of Nina, that such revelations are "destroying her marriage," that she knew all along, for many years; that Neil is a great father.

Moore backs down, says, okay, continue going along this way, but Randy is still outraged. "No, because you forced a confrontation on something we were handling in a different way. We chose to make our own accommodations. We chose this. I was able to not see him, to preserve my dignity, to preserve my respect for him."

Moore digs in his heels. "Well, then, your husband shouldn't be kissing the woman on the front lawn." Randy is still on the warpath. "It's not for you to say, you neighborly busybody. When you said it was none of my business, you were right." But Moore points out that she's been parking in his driveway.

"Dallin Oaks," the moderator continues, "let me ask you this: Neil and Nina are not married. But they're engaged to be married. She's his fiancée. And she's out working every day paying all the bills while Neil is supposedly working on this novel. Are you gonna tell Nina?" Oaks does not think so. "I don't think she has a right to call upon all the information about Neil's life that may be out there among neighbors or employers or friends or former employers. I think if she's getting ready to marry the man, she has a responsibility to inquire. And I don't feel the duty to come forward."

Reverend Moore, is he right? "No. If I'm living in the neighborhood with these people, and I know this woman is about to make what appears to be a horrible mistake, I'm going to let her know. Look, there may be some legitimate explanation. I can't think of what it might be. But this was taking place on your front lawn. I think you need to know that as you're trying to make this decision."

Ogletree interrupts. "Let's see if your wife agrees with you." Victoria Toensing does not. "I think we need to talk. Look, why are you insinuating yourself into that relationship? We hardly know them. They just moved in. And now, you're gonna get over there and you may ruin something that they have some kind of an agreement, an accommodation. We need to stay out of this." They continue to disagree.

Finally the moderator decides that they need marriage counseling and turns to Jill Ker Conway. "Jill, tell me what you're thinking about this. What would you do?"

"Well, I'm interested that a number of people seem to feel that the sexual behavior and conduct of their neighbors is their business. And I do not think it is. I may observe all sorts of strange behavior among the people who live near and around me. But I see no responsibility to intrude myself and my judgment of what I think their relationship should be. I would leave it to them." Even if you're the only person who could give her information, it won't come from you? "No, it will not."

Elayne Bennett, on the other hand, will; she doesn't like this affair in public, because it is teaching her teenage daughter all the wrong lessons. She would go to Neil and say, "First, you know, we know, we see, and our children see, and we don't like that. [So] take it inside."

Charmaine Yoest takes the issue back to essentials. "I want to respond to your question about why it's our business to care about their marriage per se. And it's because as a society we take marriage vows in public." Moore agrees. Yoest continues, "And there's a reason we do that. It's because the community is involved in the marriage. And you take those vows in front of an assembled congregation. In many traditions we say, 'Does anyone here have any reason why these two should not come together?' And the community has a vested interest in the marriage; in each and every marriage."

## **Part 5. The PTA Election**

The moderator introduces a new hypothetical. "I'm gonna change a few facts for you. Neil and Nina are relatively new to the neighborhood. They're married now. They actually have two children. They go to the same school that your children attend. And Neil's still cheating on Nina. But now, he's running to become president of the Parent Teacher Association, the PTA. So, the question, neighbors, assembled here: Will you vote for Neil who's the most qualified candidate? He's done fund raising before—let me finish the hypothetical! You're already rejecting Neil?"

The panel seems to have reached consensus about that one. He's not qualified. He's cheating on his wife, and that undermines the whole idea of the PTA. Think of all his good traits, implores the moderator. "He's a great fund raiser. He's done the newsletter. Every time someone needed time, he's been the parent out there."

Yoest counters, "He's a cheater."

Denise Rodgers modifies that a little: it's the publicity that hurts. It was on the lawn. If it had been private, "I actually would not have any problem with him being the head of the PTA." Victoria Toensing points out that Rodgers is saying, that if he cheats *well*, then there's no problem.

Jill Ker Conway concurs. "I agree totally with that point of view. We have no foundation to believe that a man who raises money for the school, is available to meet all the particular needs of the Parent Teacher Association will do any better or worse job at that because he's having an affair. If we really think that people's sexual behavior should disallow them from performing other kinds of public service, we would have a very small cadre of people who perform public service."

Barney Frank? Frank would advise Neil that it is a bad idea to be part of the parent-teacher organization, which turns on a family nexus. "Why don't you run for the city council, where this sort of thing . . ." the rest of his answer is drowned out, amid suggestions that Congress might be equally appropriate.

What does Rabbi Zemel think? "I feel if I know, everybody knows. It's not a secret. I don't have secret information. I'm not a spy. Everybody in the community knows. I don't think we want representing us as our PTA president, someone who's violating a basic parental responsibility."

Randy Cohen does not agree: "His responsibility is not to be a paragon of what you regard as the right kind of marriage. His responsibility is to do the specific jobs called for in the PTA. I know that people can have wonderful marriages and have affairs. Millions of people do. And if he can do the job, he should have the job."

Barney Frank returns to the discussion. "You're asking me as a voter is this something I would take into consideration? And yeah, it is something I would take into consideration." Denise Rodgers agrees: "I think that it's a very slippery slope that we're going down here, particularly with this representation of the PTA, of sort of family values and that sort of thing. Because I think we go into a very—should divorced parents not be able to be head of the PTA?" Barney Frank points out that gay parents are perfectly acceptable. This is not a slippery slope at all.

The hypothetical advances. "I'm a potential voter about to vote for this, and you're a good friend of mine," Ogletree says to Elayne Bennett "You're gonna support Neil, right? He seems the best candidate. He's got my vote. He's got yours too, right?" He doesn't have Elayne Bennett's vote, for "personal reasons."

"It appears that he has these qualifications [fundraising and service]. But I think there are some other aspects to being head of the PTA. And I don't think Neil meets the qualifications." Ah? "What do you know that I don't know?" asks Ogletree. Bennett is "not at liberty to share that particular component of Neil." That kind of mysterious allegation raises the usual questions: "Has he committed a crime?" No. "He's not committed a crime. He's not someone I'm going to vote for, though." Barney Frank is losing patience. "Get a life. It's the PTA."

Moore is still struggling with the responsibility of doing something about the affair, but concludes, "It's a very different situation than my informing you about what I have heard about a potential candidate. I'm simply going to say, 'I'm not voting for this person.'" Crouch would add a little to that: "I would say— because he's playing on his wife. And I think that in our time particularly, that's an extraordinarily dangerous thing."

Charmaine Yoest adds, "Barney makes an excellent point. The PTA campaign is going to be very unusual. And there's going to be a lot coffee, kitchen-table conversations. And if it's a very good friend of mine, I have a responsibility to share information that I have about someone. And to me, the fact that someone is cheating on their marriage vows is relevant to public office."

Can we get some final statements on what's at stake here? Elder Dallin Oaks? "In certain kinds of offices," Oaks begins, "whether a person keeps their promise, whether they tell lies, big ones or small ones, are extremely important to me. There are other kinds of offices for which I don't consider it so important. In any event, I would be very reluctant to spread gossip. And it would take a very important kind of office for me to tip over into repeating what I'd heard, have you heard, and so on."

The moderator continues, "Professor Anita Allen, when is personal life ever relevant?" "It's always relevant. The question is what does its relevance call upon us to do? I think the personal morals have a lot to do with how we in fact structure our schools and our families and our communities. And so, to pretend it's not there is not very helpful. But I do think that we have to give people privacy, that to assume that the best thing to do to is to blab, to tell, to talk to, to interfere is wrong."

Randy Cohen weighs in: "What underpins this I think is the notion that there's something called *character*. And that the glimpses we're given into someone's character is through their personal conduct. It reveals something about a consistent pattern of behavior into the future in their public life. And the more I've had my cushy job, the less I've come to think that's true. That I think the way we behave is more profoundly shaped by the circumstances we find ourselves in. The kind of society we live in. The kind of social justice we encounter or not. That what we call notions of character often don't correlate in this way. It's a word we use to disguise our lack of knowledge and a kind of prejudice."

Dallin Oaks will not go along with that. "I disagree with that. I think there is a bright line of truth-telling and promise-keeping that comes out of the deep roots of a person, and makes their conduct predictable across a wide range of activities, whether in public or in private life. It's not an invariable test. But it's the best one I know."

Would Jill Ker Conway care to comment? "I do believe that American society is so obsessed about people's sexual conduct that it is invasive in all sorts of ways about people's personal sexual life, which we have absolutely no evidence from any kind of social-science research in any way effects how they behave in other positions and responsibility."

Ogletree gives Rabbi Zemel the last word asking him, "When is a person's personal life or behavior ever relevant to you when you think about issues of ethics?" Zemel reflects, "Well, I agree that a person's personal sex life has become way too public. But I think character is critical. I think who a person is and what their life is about and what they believe is how we get to know a person and what a person really is; it is what underpins them."

The moderator finishes up: "Well, what we have done, I think, with this discussion today is to have all of you tell us that these personal ethical issues are complex. They're painful. They're conflicting. They're difficult sometimes to understand. But they are things that we have to discuss and grapple with. And you as a panel have done that in an excellent and professional way. Thank you all for being with us today."

### 3. SYNTHESIS AND DISCUSSION

How do we really hold our children to a moral norm? Note that when Jason turns in the false application, suddenly all the "parents" are on the same page. You have to withdraw the application from every place. This is the kind of consensus that is needed for community. Here, there is no "agonizing," no willingness to let Jason cheat his way through life, not on anyone's part. But borrowing a note from Barney Frank in a later scenario, we may ask: Are these parents just hoping that they'd react this way? In the event, would they actually help Jason hide the evidence of his cheating in hopes that all would be forgotten in his later success? In the long run, what is really important to a parent?

What role do relationships play in our schools, jobs, governments, and associations? One of our problems in our uneasy adjustment to the unfamiliar demands of the post-tribal world is that we think we should operate ourselves like machines with mechanical functions. We expect ourselves to acquiesce in all the structures of the secondary institutions that define our roles. Ponder for a moment, or more: Why does Barney Frank *hope* that he will not hire the friend. Why would he have that hope?

At the same time, we cling to the associations of family, friendship, and mutual support that have made it possible for us to live and grow as human beings. Should we hire the friend? In the calculus of the bureaucracy and the rules we accept, no, we should not. But just below that surface acceptance, there is another web of rules, of gratitude and affection, holding us close to friends and relatives, constituting a good part of our emotional stability in our destabilizing world. Should we hire the friend? Probably, yes. We will never forgive ourselves if we do not. But what would be the utilitarian solution, the course of action that would bring about the greatest good for the greatest number? Think about that question in relation to the problem of filling the job opening in the company; it is not an easy question to answer. There may just be no answer.

What is "character"? What is "integrity"? Are we just unchangeably what we are, or are we the (fortunate or unfortunate) products of our surroundings? Randy Cohen and Dallin Oaks square off, for a brief part of the dialogue, in a fascinating discussion that you might want to follow up. We know that there are tendencies inherent in all of us to pick up social cues and follow them; we know that these tendencies vary in strength from situation to situation. If I'm in an unfamiliar situation, I tend to be much more watchful for the cues of others, and much more likely to accept the judgments of others on the right course of action. If I am in a situation I know well, I may be much more confident in proceeding as I know is right despite the doubts of others. Greater than the difference from situation to situation is the difference from person to person. Personality types vary from the infinitely social, always at the heart of any group, to the forms of abnormality known as

Asperger's ("little professor") syndrome, exhibited by people who simply carry on what they're interested in doing without feeling any need at all to adjust to the expectations of those around them. Are these personality types the indicators of "character," of "integrity," that character trait that makes it possible for a good person to carry on the right course of action without reference to the disapproval of others? Is the emergence of "character" one more aspect of a social situation? In a rapidly changing society, even the simplest touchstones of our moral experience become problematical.

## QUESTIONS FOR YOUR REFLECTION

1. Should we intervene in the lives of our neighbors for their own good, or not? We have no general answer. Or rather, we have two very clear and definite answers, at odds with each other. Discuss. At the conclusion of the discussion, which answer is correct (for the most part)?
2. Was a mountain being made of a college essay molehill? What's the matter with simply writing the essay for Jason? He'll have plenty of English classes in college. *This* isn't the English class. This application procedure is just forcing open a gate in order to get access to the English class, the engineering class, and Jason's future in general. Why this moral consensus that Jason must not be allowed to "cheat"? Discuss.
3. Is there a way to recreate the village, the close-knit primary society that regarded its interests as single and clear, and helped all members to survive and thrive at the price of stern understandings of what is permitted and what is not? How? Is it desirable? Weigh the benefits and losses of the re-establishment of this level of authority.

## 4. SUGGESTIONS FOR FURTHER READING

### Special Supplementary Text

Farley, Margaret. *Personal Commitments: Beginning, Keeping, Changing*. New York: HarperCollins, 1990.

### Other Supplementary Readings



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Continuum International Publishing Group, 2006.

MacArthur, John. *The Power of Integrity: Building a Life Without Compromise*.  
Wheaton, Ill.: Crossway Books, 1997.

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Education, Inc., Upper Saddle River, New Jersey.

## CHAPTER 7

### A BETTER BRAIN The Ethics of Neuro-enhancement

#### QUESTIONS TO KEEP IN MIND AS YOU READ THE CHAPTER

1. Is there a moral obligation to accept yourself as you are (or your children as they are), even if you're not very attractive and they're not the smartest or strongest kids on the block? Why?
2. At what point does a comparative deficit (an IQ somewhat lower than the class average) become a disease or impairment, that requires treatment? Is there a natural boundary, or are all such judgments culturally determined?
3. How much should we worry about safety, "side effects," when experimenting with a new drug? If a drug is developed for a specific disease (as Provigil was for narcolepsy), should we fiddle with using it to keep us awake to study? Or is that asking for trouble?
4. If we found out that a certain medication raised IQ by a significant amount, enough to guarantee success in school and career, but also raised a 20 percent probability of brain or liver cancer after the age of 60, would that stop us from using it? What if the percentage were 40 percent? 60 percent? What if the age were 50? 35?

#### 1. THE ETHICAL ISSUES SURROUNDING THE "ENHANCEMENT" OF HUMAN LIFE

"Enhancement" is not a complex term. It means "betterment," the improvement of any thing, product, service, or activity. The object of enhancement in the dialogue that follows is nothing other than the betterment of human life itself—to make the life more enjoyable for the one living it, more productive, more useful for self, family, and society. The aim is to maximize human happiness, the most obvious aim of human activity (see Mill, *Utilitarianism*). What could be wrong with that? Social approval of "enhancement" would seem to be automatic, even demanded by definition, for anything

valuable. (The enhancement of less valuable objects or activities, like poisonous snakes and burglary techniques, would not automatically be approved.) How could it be wrong to improve human life?

Yet the enhancements suggested in this unit have been controversial almost from the start, not because there is any doubt that they might be improvements rather than detriments, but because they have the potential to "improve" on what is taken to be "natural" and "normal" for human life. Is it wrong to do that? Let's take a look at those terms; we may find that there are enough landmines hidden in the terms themselves to make this exploration very tricky.

### **A. The Terms in Dispute and the Value of the Normal**

Here's the problem: We have, or think we have, a clear idea of what is normal for humans. The notion of "norm," or standard, carries two meanings in our language (and in any language you'd care to translate it into). It means what *usually happens*, what is statistically the most common occurrence; it also means what *should happen*, what is good, what is normative as well as normal, what is the right standard to aim at. Anything that is not normal is abnormal and therefore bad. If we introduce any kind of significant or permanent change, therefore, in a normal human being, we have led that person away from the norm, made that person abnormal, and that is bad. We have, you'll sometimes hear, made him a "freak."

What's a freak? Just someone so abnormal, far from the usual standard that you have to notice him. P. T. Barnum made quite a bit of money collecting and hiring freaks (he paid them well) to exhibit in the sideshow to his circus. People are curious about freaks; they like to look at them and marvel. A freak of nature can occur in any species. Freaks among the farm animals are routinely destroyed, while freaks in the wild have been worshipped (the Spirit Tree of Vancouver Island, a spruce with insufficient chlorophyll and consequent gold color, or the Spirit Bear, a light-colored bear of the Great Bear Rainforest in British Columbia, are examples). Much of human abnormality is similarly ambivalent: epileptics have been treated as god-inspired shamans to be protected, as demon-haunted wizards to be burned or simply as sick people. (The man who cut down the Spirit Tree pointed out that it was simply a sick tree that should be destroyed.) Natural abilities, subject to natural variation, are often implicated in the same ambivalence, and the word "natural" has the same ambiguities as "normal." Abnormal speed in running has always been valued as good. For the entire existence of the human race, we have been trying to catch things. Abnormal speed in mathematical calculations, however, probably had no value for most of that time; we still describe a "freakish" any streak of brilliance not obviously chosen and cultivated. Throughout our history, the abnormal has been shunned, admired, or subjected to whatever means came to hand to try to correct it. Frankly, we don't know what to do about freaks.

For that reason if for no other, the natural and the normal is the comfortable for most of us. The dangers of dismemberment by accident, war, or disease, the pitiable failures of those born without the normal (usual) complement of physical and mental abilities, have so formed us to value the normal that the introduction of abnormalities, for some purpose other than saving function or restoring health, seems positively wrong. The use of utilitarian reasoning (see Mill, *Utilitarianism*) to show that making a "freak" out of a person will significantly improve (say) income-earning abilities, seems unworthy, and tends to be lumped in with the reasoning of the slave owner who cuts off the legs or hands of the slave children in order to inflate the money they can gather for him as beggars. Is that any different from half-starving a young girl so that she can make good money as a model? (What if she decides to starve herself for the same reason? Should we stop her?)

We should add that there is a strong religious dimension to our trust in the natural and normal, and our suspicion of "enhancement." This is the way God made us, and surely the way He intends us to be. To correct this or that birth impairment introduced by environmental stress or the random action of genes is certainly permitted, for the same reason that it is permitted to bind up wounds and heal germ-caused disease. Jesus did that, after all, curing the man born blind, the epileptic boy, and others afflicted with birth injuries, as well as lepers and those suffering from fever. But there is no need and no good, it could be argued, in attempting to improve on God's Creation by seeking to "enhance" the normal functioning of the normal person. As the Stoics argued, we are as we should be; we should act the part we were given, not try to rewrite the script (see Epictetus, *Enchiridion* or *Handbook*).

## **B. The Forms and Varieties of Enhancement of Human Functioning**

That said, there are forms, "natural" forms, of enhancement of the natural that have always been approved. Education certainly falls into that category. After 22 years of education, I was surely a different person than I had been at the outset of my schooling, and arguably more useful to society, depending on how society values philosophy professors these days. More to the point, simple practice can enhance natural abilities and in the process, transform the human body to accommodate them. The athlete in training can run faster than one who has not trained, and his body also is different in appearance and metabolism. The pianist who practices four hours each day is not only able to play the piano better than I can, he has muscles in his hands that I do not have. In both cases, the training has enhanced the person. This transformation is (almost) universally approved; the training has created a human superior to the norm.

That approval is the root and nerve of the problem. If harder training can develop, enhance, men to run a mile in four minutes, would there be anything wrong with modifying their diets to improve the time by a second or two? They say that Lance Armstrong, the seven-time winner of the Tour de France, achieved his remarkable strength and endurance not only by practice and training, but also by counting every calorie he ate and every calorie he spent. If he found that special juices or grains enhanced his performance, would there be any objection to his consuming large amounts of them? I don't think so. What if he found that steroids would make him even faster, might he take steroids?

Back up. May athletes take any medication at all? Of course. If they have headaches, they can take aspirin. If they have infections, they can take penicillin. After that, it gets surprisingly dicey. The story of Rick DeMont, an Olympic swimmer suffering from allergies, is instructive. He was ordered to take an allergy medicine by his physician, a medicine approved by the United States Olympic Committee. He won his events and came triumphantly home with the gold. Then they analyzed his allergy medicine and concluded that it had ephedrine in it, which is good for allergies but illegal, and he had to return his medals. The most recent winner of the Tour de France also had to return his prize when he tested positive for testosterone, a normal hormone that can be artificially enhanced. Our rules now permit athletes to practice inordinate numbers of hours in pursuit of excellence, ignoring spouse and family in the process. They may invent their own diets to enhance performance, and take any medications they need to overcome conditions that are emergent and that detract from performance, but they are not allowed to take stimulants and steroids.

There seem to be two reasons for the prohibition: First, we want competitions to happen on a level playing field, and if some athletes take stimulants and steroids and others do not, the first group will have an advantage that is unfair—in a way that the advantage possessed by the athlete who worked harder and watched his diet is not unfair. (How much of that opinion derives from the fact that we think hard work and effort are always good while, other things being equal, we think that pill-popping is bad?) Second, in the long run these stimulants and steroids have evil side effects, some of which are still uncertain.

Are there other major ethical limits faced by those who would enhance human life? From the above, we have by way of objection to the enhancements two major reservations: first, that we already have a body and mind that are good, very good, and if we have the good fortune to be born normal, there is no reason to fiddle with that; and second, that in any competitive situation (college admissions or sports, for instance) if one competitor pursues the enhancement, then all must do the same or drop out of the game, and that factor leaves little room for personal preferences or doubts over long-term side effects. If competition is the major consideration, there is another obvious objection to elective "enhancements": if everyone is enhanced, there is no more competitive advantage, but the price of competing has been raised, and the competition made more dangerous for all participants. Many say that it is better by far to ban the enhancement and let the competition go on as it did before the

enhancements were discovered, and most of our athletic associations have adopted just such a rule on the use of steroids.

### **C. The Practice of Medicine**

What is the role of the physician in the dispensing of enhancements? The ethic of medical practice is simple, clear, direct, and goes back to Hippocrates: do good (i.e. help the patient), or at least do no harm (the Oath attributed to Hippocrates). In the twentieth century, when the public became interested in the contemporary ethic of medicine, the Oath was reexamined; most of its provisions had already found their way into the explicit ethic of physicians. One central part of the tradition, for instance, specifically mentioned in the Hippocratic Oath, contained a powerful prohibition on sexual encounters with patients. Another central part established medicine as a profession, a lifelong vocation of dedication to patients. A third provision, to do nothing that is not for the (medical) benefit of the patient, comes powerfully into play in the scenarios of this dialogue. Where the physician cannot heal the patient by his art, he is expected to withdraw, in accordance with the command to do no harm—not to undertake medical procedures for any purpose except to heal a sick or injured patient, since any medical intervention is itself risky. The physician should not be providing any such medical intervention if the patient is not sick or injured.

Well, what counts as "sick or injured"? You can get sick from a germ, and injured by being hit by a truck, and the physician will attempt to get you back the way you were (we call such episodes "acute" illness, and medicine was invented to treat them). If you are born impaired, missing a limb or suffering from some physiological defect like diabetes or cystic fibrosis, a physician will attempt to remedy that deficit through regimens of medication that will help your body function the way a "normal" person's does. Is ugliness a birth impairment? The medical establishment decided that it was fairly early in the game; we have records of cosmetic surgery to make noses and lips more beautiful going back to ancient Egypt and India (no such record in ancient Greece). Is simple lack of intelligence a birth impairment? Some forms of mental retardation arise from physical and chemical deficits in the brain, and to the extent that medicine can bring the mental functioning of the retarded person up to average intelligence, it will certainly do so.

Is bad behavior an illness? By this time our instincts are primed to say, absolutely not. Yet we treat it; about two-thirds the way through the twentieth century, attention deficit hyperactivity disorder, ADHD (which sometimes appears without the hyperactivity) became a standard diagnosis for children, especially boys, and medications were developed to calm down the fidgety children—mostly stimulants, like Ritalin. Ritalin wakes up adults, makes them more active, in contrast to its effects on children. The effects are the same, however, on mental functioning: adults and children alike can concentrate better, for longer periods of time, get more mental work done, and get it done faster,

when they are on the medicine. That fact should make it a popular substance among those who have to do a lot of reading and studying, especially late at night. Unsurprisingly, college students tend to take large amounts of stimulants—especially Adderall, amphetamine-dextroamphetamine, a drug developed to treat ADHD, which has the same effect as Ritalin.

The use of stimulants for these purposes has raised serious protests. Not very many people have narcolepsy; no pharmaceutical company is going to make money on them. The money is in treating a disease which doesn't sound very much like a disease—it sounds very much like an artifact of the institutions in which we expect our youngsters to grow up. Boys will be boys, and boys are active; if they can't sit still in school, maybe we should change the school. If college students need drugs to help them stay up all night to study for exams, maybe we should change the exams—or teach them to budget their time better (maybe cutting out a few of the parties). The widespread use of the drugs may also be a product of overanxious parents in the competitive situation outlined above—if all Susie's classmates are using this drug to get their homework done and perform well in school, then Susie has to use it too or she'll fall behind. Add to that the marketing activities of the pharmaceutical companies themselves, which can encourage further use of these drugs.

There is one more confounding circumstance in our attempts to evaluate the desirability of developing and using medicines that enhance mental functioning. As we get older, our memories get worse. Sometimes the loss is due to an identifiable disease, like Alzheimer's disease, but often as not it is due simply to the deterioration of mental functioning in old age, varying in rate and severity from individual to individual. Here the confounding ambiguity of "normal," noted above, comes back to bite us. If by "normal" we mean statistically typical, then such deterioration is normal and not to be treated. But if "normal" means "meeting the norm or standard," then it is surely a sickness, and therefore treatable. In general, we have felt that any deterioration, whether (statistically) "normal" or not, is sickness and therefore treatable. Do any of these drugs, developed to increase mental acuity, hold out hope for healing the mental deterioration of old age? If so, what objections could there be to using them? At least among the elderly, we are not worried about "competitiveness" on standard tests. The use of such drugs by failing elderly, since they risk harm only to themselves, is certainly protected by J. S. Mill's standard of liberty—if the act is self-regarding only, then no one has any right to object to it (see Mill, *On Liberty*). But certainly there is no frustration, no pain, no loss, worse than the degeneration of the mind in the elderly, pain all the worse for the person who in earlier years had been more independent and competent.

But then, when is it appropriate to start such medication? Deterioration is present in normal adults surely by age 60, detectable on tests for the most part by the mid-40s and 50s. Shouldn't we start before the deterioration begins, probably in the mid-30s? But this sort of action could bring us back conceivably to competition in the work place where companies competing with each other would pressure their executives to take enhancing pharmaceuticals that could sharpen their wits, their

bargaining skills, their memory. Is this a future that we can envision—one that we would pick for ourselves?

#### **D. The Substances in Question**

Some of the panelists characterize the nootrope (mind-modifying) pharmaceuticals they are discussing; by way of information, here is a standard layman's brief on the ones they talk about.

Amphetamines like Dexedrine, Benzedrine, Ritalin, and Adderall have been around for a long time. They are stimulants; by allowing the release of extra quantities of neurotransmitters in the brain (and preventing their normal reuptake by the nerves), they keep nerves much more active than they would ordinarily be, so they keep you awake and active when you are tired. The amphetamine mechanism uses up the neurotransmitters by not allowing the normal recycling to take place, so if the drugs are continued over a long period of time they can leave you wiped out, and you will not recover until the brain has had time to make more of the stuff it uses to communicate. That is why they are addictive if you take them for a long time; you need the drug to fight off the withdrawal. Adderall claims that it is so mild as not to be addictive; methamphetamine ("speed"), on the contrary, is ferociously addictive, and in its purest form, a colorless crystal known as "crystal meth," it is ultimately lethal. That should be frightening enough to compel serious regulation, and all amphetamines are supposedly regulated by law. But Americans loathe regulation; a quick survey on the Web uncovered, believe it or not, an easy recipe for crystal meth.

Of more interest to the future are the Ampakines. These are substances that increase the activity of AMPA-type glutamate receptors—that is, they speed up the normal communication from cell to cell in the brain without causing any abnormal production or consumption of normal neurotransmitters. They don't, in short, work like amphetamines, and they are therefore much less likely to cause addiction or nasty side effects. They are just beginning to be tested, but the early results are hopeful. If they work, they might have a good number of applications. They might cure Alzheimer's disease, at least in the early stages, minimize the effects of other sorts of dementia and other mental deficits associated with aging, and also, here we go, enhance memory, alertness, and cognitive abilities generally. They can, as *Time* magazine suggested in January of 2006, make you smarter, help you concentrate, keep you awake, and generally make you appear to be a more interesting person.

These claims should be kept in perspective; caffeine can get most of the same effects. But with the prospect of higher intelligence, greater mental productivity, and protection from memory loss in view, we can expect that these mind-enhancing drugs will be of great interest to Americans, their employers, and their parents.



## 2. A BETTER BRAIN: THE COURSE OF THE DIALOGUE

This section considers the television presentation or DVD of the dialogue on the subject. The recapitulation of the dialogue that follows is not meant to be a word-for-word transcript of the tape, but a summary of the major themes, issues, and opinions that emerged in the conversation. It is for your review, and for use as a resource.

As you read through the dialogue, ask yourself the following questions:

1. Is there a case here for the widespread use of "mind-enhancing" drugs?
2. What is the case for prohibiting or severely limiting their use?
3. When the participants disagree, why is that? From what corner of the field are they coming? Why do they see the problem the way they do?

Moderator: John Hockenberry

Panelists (from left to right on your screen):

John Abramson, M.D., Harvard Medical School; Author, *Overdosed America*

Sally Satel, M.D., Resident Scholar, American Enterprise Institute; Coauthor, *One Nation Under Therapy*

Lawrence Diller, M.D., Author, *Running On Ritalin*

Martha Farah, Ph.D., Director, Center for Cognitive Neuroscience and Professor of Psychology, University of Pennsylvania

Peter A. Lawler, Ph.D., Dana Professor and Chair of the Department of Government and International Studies, Berry College; Member, President's Council on Bioethics

Arthur Caplan, Ph.D., Director, Center for Bioethics, University of Pennsylvania

Michael J. Sandel, Ph.D., Anne T. and Robert M. Bass Professor of Government, Harvard University; Former Member, President's Council on Bioethics

Michael Gazzaniga, Ph.D., Director, SAGE Center for the Study of Mind, University of California, Santa Barbara; Member, President's Council on Bioethics

Antonin Scalia, Associate Justice, United States Supreme Court

Joshua Foer, Freelance Science Journalist

William B. Hurlbut, M.D., Consulting Professor, Neuroscience Institute, Stanford University; Member, President's Council on Bioethics

Gary Lynch, Ph.D., Professor of Psychiatry, University of California, Irvine

Tim Tully, Ph.D., Professor, Cold Spring Harbor Laboratory

## **Part 1. The Wake-Up Pill**

Moderator John Hockenberry starts the dialogue with a high-school science assembly scenario. "Welcome everybody to this very special science assembly here at Albert Einstein High School. We've invited some people who have done studies and work on the brain, to present to us here. And to tell us about some of the exciting things that have gone on in the world of medicine, we have a graduate of Albert Einstein High School, who now works for a company called Hype Pharmaceuticals." The graduate has come to talk about the project she's working on. It's a drug that Hype has developed called Alerta, which allows you to go without sleep for long periods of time.

A woman named Maria in the back row is sitting and listening to this graduate. When she hears "Alerta," it reminds her of this second job that she's taken at a law firm where one of the associates at the law firm said, "You know what? A great way, Maria, to work longer and harder is to take this stuff Alerta."

Hockenberry continues, "So she goes to your office, Dr. Satel, and says, 'You know, I really could use this Alerta stuff.' Do you write her a prescription?"

Dr. Satel does not have an immediate answer, but takes a moment to think about the question: "I don't know if I would, because as clinicians, we treat diseases. And this is not a clinical disease. This is a manipulation that this woman, understandably, would like to have. Personally, though, I believe she should have access to it. And maybe we should have psychiatrists, like we have plastic surgeons, who do cosmetic psycho-pharmacology."

Hockenberry makes it easier. "This drug was developed for narcolepsy which is a devastating disorder, of course. It shows very limited side effects. And you happen to know Maria. Maria is a responsible adult who has this period of time that she really needs this help. She's asking you for the prescription. What do you do?"

"You know, personally," Satel responds, "I would probably do it, especially for a time," a limited time for her to try the drug, to make sure she understands the risks, and Satel would monitor her frequently.

Michael Sandel is unhappy with this course. "I don't understand. There is no disease. The thing that worries me in this case, there's no medical need. The need arises, or the apparent need arises, because of some pressure apparently, to work a second job or pressures to fit into a certain set of competitive pressures. Whether it's kids in school or taking a test or working longer at the law firm, I think the danger is that if we start to use drugs to fit people more neatly and comfortably into the

pressures created by competitive society, we're less likely to critically reflect on whether that's the way we want to organize our society in the first place. That's my worry."

Hockenberry turns to Art Caplan. "Is there a fundamental difference between granting a prescription for narcolepsy and granting a prescription for someone who, for good responsible reasons, wants to stay awake to help her family?"

Yes, but in this case, not one that counts, says Caplan. "I think there's a difference, but it doesn't make the person who wants to enhance or improve or do a better job necessarily wrong to seek that help. You might say, in the case of Maria, she doesn't have a disease. But she does have symptoms. She's getting tired. She's worried she might put somebody else at risk on the job if she goes to sleep. She's worried she might have a car accident if she drives home tired. So she's got problems. And Michael's right. It may be a tough world where you have to have a second job. But it's the world she lives in. She can wait for Michael to fix it. But right now, she's still got to go home and she's driving home late at night. And she needs to stay awake. So I'm thinking, yeah, I'm writing this prescription. Whether it's a disease or not, she's got an issue that she faces. And the pill may help."

"So," asks Hockenberry, "if the pill can be prescribed not just for narcolepsy, but also for Maria, can it be prescribed for all those associates at that law firm who want to stay up all night so they can make partner?"

"Perhaps," says Caplan, "although, there, the fear is that if we keep them up and let them make partner, imagine the damage they'll do to society!"

"Only if they're trial lawyers," Satel puts in.

But it isn't just the damage to the pill-taker himself or herself, Lawrence Diller points out. "The other aspect of giving it to the lawyers to improve their performance or to the athletes to improve their performance or to the students to improve their performance on the SAT is that it puts pressure on everybody else in that competitive field to also take that substance." In many areas, we value the way you got to the goal as much as your success in getting to the goal itself. "So in athletics, it's not just the number of home runs you hit, but how you developed that skill to hit them."

Hockenberry turns to William Hurlbut. "Dr. Hurlbut, what is going on here? She's getting a drug for something that's not a disease. Is this treatment? What is it? How should we think about this?"

Hurlbut considers a situation where Maria, the teacher, tells him that his tenth-grader "needs to be able to stay up longer" in order to finish his homework. Hurlbut wonders, "Would the same rationale hold here? And I think we'd all have a little pause on that. I think we have to be very careful not to convert all of life's challenges or circumstances into medical problems." To be sure, there are times when we use behavior-altering substances. Caffeine, for instance. Red wine, for instance. But we don't call that a medical treatment. "One of the things you have to realize is that biology is a very complex balance. The physicians in this room will know very well that there's no such thing as a drug that does one thing. Look at the list of adverse reactions on any pharmaceutical that gets prescribed for you. We don't use drugs casually. That's why they're regulated. When they're seen to be safe, they sort of make their way out. But even then, I think it's an experiment on your life. And probably even an invasion of your life."

Peter Lawler puts another twist on the story. Suppose Maria's boss comes by her desk, compliments her on doing a "pretty good job," suggests that if she had this drug, "you'd be doing a great job." Not wishing to experiment with her chemistry, Maria says no; so the boss says, "Well, I'll get someone then who will do this." And in all these cases, some kids start to take the drug to stay up to get their homework done. Then the pressure would be on everyone. And so what seems to be a matter of free choice, can actually produce indirect tyrannical pressure."

Maria, he points out, is probably thinking the same thing. "My job will be more secure," she's thinking. "I'll get a raise." And that might be her free choice in a competitive marketplace. But once this is available freely, then the pressure would be on for everyone to do it. And the un-enhanced will be at such a serious disadvantage that in fact they're being tyrannized by it."

Gary Lynch agrees. "Exactly. You're looking at a situation in which what society wants is changing; the general change in society as to what's acceptable and what's not acceptable. The whole idea that somebody would show up at work and say, 'Geez, I'm really doing a great job today because I took my Alerta,' would not have been acceptable 25 years ago."

## **Part 2. The 8-Year-Old Outsider**

The hypothetical changes. "Maria got through her two job episode. Time passed. And now Maria is keeping herself awake at night for a very different reason. It's about her 8-year-old daughter Camilla.

She has no friends. Kids call her "weirdo." She doesn't know what she does that's weird. She eats lunch and is on the playground by herself every single day. A short while back Maria was told by the counselor at her school that there is a medicine she might consider taking, a medicine called Amikind, which was developed to help people with Asperger's syndrome. It's been shown to be effective in helping people to pick up social cues. Now Dr. Abramson, where might the counselor get this idea, that this drug is possibly an appropriate treatment for Camilla here?"

John Abramson thinks he knows where the idea came from. "So much of what the counselor knows about this drug is coming directly from the drug companies, or from the Association for Socially Isolated Girls. But much of the funding for that association may come from the manufacturer of this drug. The manufacturer may well have put on a seminar for guidance counselors about helping children like this. And the guidance counselor is dedicated to his or her job, and wants to do what's best for the child."

Sally Satel adds, "For all we know there's another kid in the class on this drug, who has improved markedly. So the teacher actually has some observational experience with this." Satel admits that there are "problems," but notes that "a lot of patients find this advertising very instructive. This is a hook that a patient can use to approach his physician who is not bound often just by the literature. They have their own experience with these drugs to draw on."

Abramson is not convinced. "Most of our medical studies are now funded privately by the drug industry. The odds are five times greater that the commercially funded research will find that the sponsor's drug is the treatment of choice. Then when the research is done on the same drugs by noncommercial sponsors—"

Satel objects. "In psychiatry, when someone comes in for depression, it's not as though I'm going to be misled into prescribing the wrong drug. There are so many frontline drugs we can choose from. Then we often change along the way, and titrate, and see how the patient responds. It's very empirical and hands-on."

Art Caplan joins the conversation. "Before we resolve the evidence base for this poor little kid, I want to know if anybody's going to talk to the mom and the child about somebody like Bill Gates who might have had these problems in the playgrounds. And apparently he is a person who is not great at picking up social cues. So even though I am not averse to trying out drugs when needed, I might think we want to have a little discussion about people who've been a little socially awkward at 8, and went on to do things."

Hockenberry poses the question to Peter Lawler. "How does a drug like this change our perception of people like Camilla?" Lawler responds that "there's more tyranny there because we see a socially awkward kid who doesn't pick up social cues. You say, 'Well, poor kid.' But there's some good sides to having that kind of personality. But once there's a chemical remedy for this, then there's sort of a duty to give it to the kid, to make the kid pick up the cues better. Do better in school, have more friends, and all of that."

"What's wrong with that?" Hockenberry wants to know. Lawler answers, "Because in fact, the kid might be better off being slow with the social cues. The kid might have the right to his or her moods."

Gary Lynch joins in: The "deep concern is that we're going to build a society that's incredibly homogenous with this kind of thing, homogenous in the sense of let's physically rearrange the way people look. They're too short to play baseball, let's give this kid HGH, human growth hormones. What do you wind up with at the end of the day? And there's a terrible risk to society of reducing its diversity. Just as in a biological population, when you reduce the diversity, you go extinct."

Tim Tully comments: "I don't think it's necessarily true that we'll ever reduce diversity by introducing these kinds of drugs to society. I like your notion about tyranny. But the extrapolation of it is that technology is tyranny. If I'm a Plains Indian in the 1500s trying to run down a buffalo for food, and my buddy goes speeding by on a horse, that's tyranny."

Justice Antonin Scalia wonders if Camilla is really unhappy, or whether she might like being alone on the playground. (Several of the panelists assure him, an 8-year old alone on the playground is unhappy.) Is it up to her parents to give her drugs to make her like everybody else?

Lawrence Diller wonders, "What's wrong with a little unhappiness. It used to be part of the human condition—unhappiness. But I think in the last forty or fifty years there's been a shift away from older values. If we have a child who's feeling badly, the parents feel badly, and they come to me. This kid may be minimally impaired in my view. But he's not feeling good. His self-esteem is down. And they want a treatment. Well, the evidence that self-esteem, or self-image really matter is scant to non-existent. Most of that evidence comes from interviewing CEOs, artists, and criminals. And they all have bad, bad, bad childhoods."

The hypothetical moves along. Martha Farah becomes Maria, and Hockenberry puts it to her that "you have gotten a prescription for Amikind. You're holding it in your hand. You haven't decided what to do. So you turn to your family members. And you have a large family, many people who are willing to guide you. Let's begin with your brother-in-law, Dr. Lawler, and your brother, Art Caplan. Looks more like an uncle but in any case, ask them for guidance."

So Martha tells them the problem: "Camilla has really had a hard year at school. And if it was just a matter of keeping her cheery, keeping her happy, sparing her any disappointment in life, I'd go along with some of these friends of mine who are telling me that happiness is not the be all and end all. That's not the most important thing about somebody's childhood. But I just have the feeling, seeing her when she comes home at the end of the day, that it's more than just, she's not having fun. She's really missing out on the world of people and friendships and connections. What do you think? Is it worth trying to do something to her brain to open up that world of human relationships to her?"

Her brother-in-law, Peter Lawler, responds. "Three things. One, have you tried everything else first? Number two, have you really studied up on this drug? And number three, if this decision is made, do not take pressure from the teachers and the bureaucrats and so forth. It's your right to have your kid be an unhappy pain in the ass in class if you think in the long run that's best." Martha doesn't think it's for the teacher's convenience. "I feel like she's missing something in her life."

Art Caplan takes a different tack. "Remember we had that discussion about home schooling? And you said you wanted her to go to meet kids? And become social with others? So I think your values are very important here. And she probably gets some sense from you that you're worried about this.

When I talk to her, she is unhappy. But I'm not sure she's desperately unhappy. I'm not sure she's not picking up some of your anxiety about how she is at school that bothers her." Lawler promptly agrees, giving them at least one point of agreement. Caplan continues: "I think ultimately if you and she agree that she can't take it anymore, I'd give her the pill for a little while and see what happens. But I want to make sure she's not picking it up from you."

Farah agrees, "It's hard to disentangle my wishes for her as a parent and what she really wants from me."

Michael Gazzaniga homes in on that point. "Maria, you're the problem. It's not your daughter; it's you. You've been compulsively managing this child for the last eight years. You've cooked, you fold



the laundry, you do everything. You are enormously controlling. It's not the child. Back off. *You* take the pill."

Tully protests: "Parents have been making these decisions for their kids forever. If we want to expand the conversation to *this*, it's not just about drugs."

Gazzaniga is unrelenting: "I think the problem's with Maria. And this is the thing that's always overlooked in these child-parent interactions, anorexia nervosa, and all the rest of them."

Now Lawrence Diller takes Maria's side: "I think that's unfair to Maria; very much so. And I'm the one prescribing those medicines every day. There are a lot of societal forces pressuring Maria. But the idea that somehow this is just bothering Maria, and not bothering the kid, is a bit unfair."

Hockenberry brings Michael Sandel back into the conversation. What would he do in Maria's shoes? Sandel addresses Maria: "When you say it's shyness that you're going to cure with the drug, is it shyness in the sense of not having an anchor person's bland fluency? Or is it a case of something that we now worry about in the name of shyness? We live in a society where the standards of fluency and competence and efficiency and competitiveness have so been ratcheted up that we have to ask ourselves, are we really treating a disability here? Or are we acting out of a set of pressures, that without our even noticing it really have led us to cast certain ways of being in the world as pathologies, when maybe they're not? Maybe it's the society that's giving rise to these pathologies, not our kids."

Martha Farah brings us back to the case: "You know what? As Camilla's mom, I don't care if she's got a diagnosis that you can find in the diagnostic manual or whether she's just not happy. But the fact that she's suffering, that she's missing out on opportunities, that's what I care about. If there's a way to help her, I want to do that. And you know what, if by my doing that, it ratchets things up a little bit for the other kids in the world, I don't care. She's my kid."

Okay, but Sandel would "worry a little bit." Are you not signaling to your daughter that she's kind of sick, inferior? Well, maybe, says Farah, but "it's no worse than when you took that son of yours, who was having trouble in fifth grade to the tutoring service. That may have given him a self-concept of somebody who isn't quite up to it on their own."

Sandel considers the remark. "I think you're right about that. But precisely because I worry about this. And I even worry that excessive competitive pressures led me to take him to the tutoring

service that he didn't really need. I worried a little bit what he thought I thought of him when I took him there. Even though it wasn't a drug, even though it was low tech."

Let's bring Joshua Foer into the conversation. "Josh, you used to baby sit for Camilla, a while back. You've seen a lot of worry here among the older folks. Any guidance? You're certainly somebody who the family trusts."

Foer quickly constructs a role for himself: "Well, I drove her to her ballet lessons occasionally, and to her speech lessons, and to her structured play times. I've seen that she's actually suffering, and that there's a real tangible unhappiness here. And I hear these abstract concerns about how this will change the nature of your relationship with her, how it might affect the kind of society we would live in if every kid was prescribed these drugs. But I see immediately before my eyes, a tangible unhappiness. And I think you have an obligation to do what you can as a parent to resolve this."

"And that would mean the drug?" asks Hockenberry.

"That means getting these drugs. Yeah."

Let's get Uncle Nino into the discussion. What does Justice Scalia think? "Maria, I am glad that you have finally come to your old Uncle Nino. Frankly, the way I would approach this is to ask the question whether Camilla has a disease. Is it something that has to be medically treated? If it is not a disease, I would let it be. There are people who are more social. There are people who are less social. There are people who are smarter. There are people who are less smart. I would not change the world by giving everyone who is on the bottom end of all of these different characteristics, drugs. That's my advice as a wise, old man who has seen much of the world pass in front of him."

The moderator concludes: "Alright: Maria certainly has plenty of information to make her decision. And we will leave her to make her decision out of our sight and move to a different scene. Welcome to Strivers University everyone. You may have heard of it."

### Part 3. Student Use of Stimulants

John Strivers, Hockenberry informs us, was the Revolutionary-era figure who is forever immortalized for giving Ben Franklin those keys to tie onto the kite that ended up in the famous picture. What would Joshua Foer expect to find out about students and neuropharmacology in this university setting?

Foer recalls that "first of all, you're walking in through a pall of smoke. But once you get in, you might find students saying, 'Well, there are certain drugs out there that a few of my friends on the hall have been prescribed. Like Adderall or maybe it's Alerta.'"

"For what?" asks Hockenberry.

"For their ADHD, or whatever disability they've convinced their psychiatrist they have."

"How do they use them?"

"Well, some of them are using them legitimately, to treat this disability. Some of them are using them once a week, the night before the big exam. Some of them are using them also on Saturday night, so they can stay out later and party. I wrote an article last year where I actually took Adderall for a week to see how it would affect me as a writer."

Would Foer describe his experience? Sure, but "it's hard to say whether there was a placebo effect here. But I felt like I was an immensely more productive writer. I produced more pages. I felt more clear-headed. That urge to check your e-mail every five minutes just, like, vanished. But at the same time I felt maybe a bit less creative; a little bit like I was thinking with blinders on. And in the end I decided this was not a drug I would want to take every day of my life."

Hockenberry reflects: "So I would take this drug if I was studying at Strivers to study for an exam, to stay up late, to help myself get through a midterm week? Is that the idea?"

"Sure," Foer answers, "Absolutely. In fact, if you look at some of these studies, it's about one in five college students [who] are doing this."

What do the professors think? Dr. Farah is cast as a professor, and asked for her impression. "When I talk to my students about this, none of them actually use these drugs themselves. But they all know people who do." (The other panelists are skeptical.) "And just judging from what they tell me about the people that they know who use them, I would say it is quite common. Twenty percent sounds right to me. And my first reaction was 'Oh my God, this is terrible. Drug use: illegal, irresponsible!' But I have to say; the students seem to be using it in a pretty responsible way. They have various tools to help them with their work, new features of their laptops, their BlackBerrys, etc., and at term-paper, and exam time, they have this other tool."

"Dr. Abramson, what do we know about the long-term effects of the use of these drugs on otherwise perfectly normal kids?"

"That's a wonderful question," Abramson acknowledges, "because we don't know the long-term effects. The studies have not been done. So clearly these drugs can benefit some children, adolescents, adults in the short-term; there's no question. But we don't know the long term effects of these drugs."

"We do know," Gary Lynch replies, "from basic principles. We do know that certain classes of drugs used over a long period of time are very likely to be dangerous. They're very likely to create changes in the brain that are going to be detrimental further in life. And certainly the stimulants fall into that category. And that's the danger of what's going on in the colleges, if it's this widespread; and it certainly is. This is a very, very bad idea."

The hypothetical changes a little. It seems that Adderall is part of the old days. "Because today, now, there's something new on campus: Rememberall. Just developed. And this is a spectacular drug. This is something that was developed for Alzheimer's. But in the context of Strivers University, all of a sudden you don't have to take Adderall. You don't have to stay up for the exam. You just study with Rememberall and, wow, the effects are incredible. What's likely to be the usage rate, Josh, at Strivers? Now that we're in the Rememberall era?"

Foer's answer is brief and clear: "If there's anything that you can get that's going to give you an edge over your fellow classmates, you're going to take it. Provided it's safe, a lot of people will think about taking it." Would he, personally, take it? "I don't know," answers Foer. "I think I would try it; possibly. It depends also whether it's illegal."

Peter Lawler comes back with his original objection to all these enhancements: Suddenly everyone has to take Adderall and Rememberall or get left behind; "There are no studies on the interactions between Adderall and Rememberall as far as I know, and once lots of students are doing this, even though they're doing it responsibly, the pressure will be on all of them to do it."

"So what do you do?" asks Hockenberry.

"I don't know that there is much we can do about it. And this is a scary feature of our times."

What does Dr. Hurlbut think? "I agree. It's a scary feature of our times. For all of human history, however long we as a species have been on the planet—100,000 years or more, with a five-million-year background for our genus—we've been shaped by the forces of natural processes to be a balanced kind of organism. We're a general-purpose organism. When you take a laser-beam approach and zap in on one strength, that's not necessarily cognitive enhancement."

Hockenberry asks, "Do you do anything concrete at the school to try to control this or deal with it?"

Hurlbut tells his students at Stanford, "You have Ferrari minds. Why do you want to put buttermilk in the gas tank?"

Hockenberry points out that the students think they're putting Castrol GTX in their brains.

Hurlbut is more serious: "Look, we all know this is a huge experiment. I mean, human beings are stepping up to be potentially poisoned. I don't understand why people would do this in the first place. The more I learned about medicine, the more I learned to stay away from medicines, and use them only for serious purposes. You take something as simple as Tylenol. It changes—up-regulates, or down-regulates hundreds, maybe thousands of genes. We're not talking about a system here that's sorta like the hairstyle. You might say that there are concentric circles of significance in life. There's some areas that we can express ourselves through. But there are others that are the infrastructure of our very being, or our very personality. And if you go fooling around with those, you're going to get things you didn't bargain for. I'm sure of it."

Art Caplan disagrees. "I think that there may be a design from evolution if you want to go there. But what was worked on the plains of Africa, or what helped the iceman cross the Alps, is of no relevance to the kid at Strivers. He knows that his parents began at age 4 to try and figure out what nursery school to get him into. Then they sent him the message that he had to stay after school and do at least 14 different activities in order to get into Strivers. So now he says, 'There's a little boost I can get from taking this. I'm not going to change my fundamental human nature. I'm just going to remember a little better. And every message I've had since I was four said, do better. Why now is everybody having a conniption when I got the message?'"

"But what this suggests," adds Michael Sandel, "is another fact about Strivers, that you forgot to mention, John. That is not only the rate of the use of Remeberall or Adderall but also the rate of use of the antidepressants by these kids."

"And faculty," adds Caplan.

Sandel continues, "I think that's 20 to 25 percent in many places. And I think that's not unrelated to this narrative that we just described."

Never mind the "pressure," suggests Hockenberry. "We've got these drugs that you seem to all think are very dangerous. Yet I don't hear anyone saying that they're actually going to do something about it."

Foer suggests that "if we really think this is a problem, the university can pass a rule in its honor code that says, 'If you took a test on Rememberall, you will be expelled.' I think that would dissuade a lot of students from taking these drugs. There is no such line in the honor code of most universities about Adderall. If there was, I think a lot of students wouldn't take it."

"One quick twist to this story," Hockenberry says. "Justice Scalia. Your son has come home from Strivers. He's in his junior year. You've been worried about him for years. But wow, he comes home with an outstanding report card. And he says, 'You know, Dad, I use Rememberall.' What's your response? What would you say to him?"

Scalia does not hesitate. "I'd tell him that he's crazy to do that. And I'm sorry he did it. And I hope he won't do it next year."

"Fine," says Hockenberry, "talk to Josh. He's your son."

"We're going to have an interesting dinnertime conversation, Dad," says Foer.

Scalia plunges in: "Josh, look it—the most important thing in the world is not to get out of Strivers College with the best grades. That's just not what counts most. What counts is character. I sent you to college not to make you a millionaire, but so that you could understand who you are. That's the main thing I want to get out of your liberal education. You have relatives who didn't even go to college, that you know, who are happy people. Maybe happier than I am, although I went to college. To throw all of that normalcy away in order to take some memory-enhancing or intelligence-enhancing drug seems to me crazy. You are what God made you. And it is enough that you work with the nature that you've been given. I find it offensive to set out to alter your mind. I hope you'll think about that."

Foer answers: "Well, Pops, like most parental advice you give me, it sounds good. But listen! Grades don't matter? Grades do matter! I want to go to Yale Law School. And so I need to get the best grades I possibly can. And then once I'm in Yale Law School I need to get the best possible grades. So I can get a clerkship in my dad's chambers! And without that I'm never going to be a Supreme Court justice like my father. This matters immensely."

Scalia tries again: "When you say, 'The best grades you possibly can,' I mean 'possibly' within what limits? Are you willing to cheat to do it? Are you willing to steal to do it? Of course not. This is just one of the obstacles along the way. And I would advise you to put it on this side of the line. One of the things you don't do to get the best possible grades is to alter your mind."

"Well, says who?" Foer returns. "I mean, I'm not going to cheat. I'm not going to break any rules. If they tell me I can't do this, and it's going to be a violation of an honor code, I'm not going to do it."

"I think you are breaking the rules," Scalia insists. "I think you're breaking, maybe, rule number one. You play the hand you've been dealt."

"You sent me to the Princeton Review prep classes."

"I regretted doing that."

"I'm just not clear, Dad, on why this is so wrong. All the other kids in the class are doing it."

Hockenberry decides it's time to step in. "Well, as touching as this father-son—" But Scalia isn't finished. "Then I have to give my last piece of advice, which is actual advice that I've often given to my kids. The single most important piece of advice I ever gave to my kids. What did I always tell you when you were young? 'You're not everybody else.' [Don't tell me] 'everybody else is doing it.'"

Hockenberry wonders what anyone else thinks about "you play the hand you're dealt." Caplan responds, "Well, since the justice's son was talking to him wearing eye glasses, he wasn't playing quite the hand that he was dealt. He was using some artificial means to do better. We didn't send him off to college and make him leave his computer behind. We didn't send him off to college and say he couldn't turn on his hearing aid. So he looks enhanced to me."

#### **Part 4. Marketing Rememberall**

Hockenberry begins a new scenario. "Rememberall has been on the market for about ten years in our little scenario here. It has not been shown to have side effects in any significant way. Its safety has been proven. Yet there's this tremendous sort of after market, or black market, for the drugs themselves. The board of directors of Hype Pharmaceuticals has assembled to consider the following proposition: should we consider thinking about this as an over-the-counter remedy in some form?"

Gary Lynch jumps right in: "I think that's a terrible idea. If the drug is actually enhancing the biochemical mechanisms that lead to memory and encoding the memory, then using it chronically by a normal person is very likely to affect the cognitive structures that they're building. Okay?"



"In other words, when you encode memory, it's just not a simple matter of saying, 'Oh, well, here's a series of numbers I'm sticking this in my head.' If you enhance this bio-chemical processes, you'll change the ways the memories are organized. You'll wind up with almost a different kind of person."

Sounds serious. Hockenberry agrees. But John Abramson takes the part of an aggrieved shareholder. "But as a shareholder involved, I'm going to call for you to be fired. You're not fulfilling your responsibility."

Gary Lynch is not interested in short-term gain right now. "Well, whatever the responsibility is to the shareholder of Hype, five years from now we don't want to have a bunch of people walking around who are now saying, 'Oh my God, I suddenly have different structures in my head. And I'm seeing the world differently. You know, I'm going to hell in a handbasket here. And it's because I've been taking your drug.'"

Tim Tully isn't that worried. "But Gary, your answer is predicated on the expectation that the drug is not safe. I personally would expect that there will be safety issues that emerge. But the real question is, so what happens if in reality there is nothing wrong with this drug. Except you can memorize a verse of Shakespeare in one evening instead of a week?"

Lynch is still concerned. "Okay, the problem is when you say, 'It's been safe for ten years.' It's been safe for ten years for people that have a major memory problem. Alright? When you get into the area of cognitive enhancement, and you move from people that have frank disturbances to normal populations you can't transpose these data safely to those who do not have that condition. I'm worried about people being altered in ways that are not obvious initially, that develop with time."

Hockenberry turns to Art Caplan. "Art, you're on the board. What's the responsibility of the corporation to deal with this sort of 'under-the-table market' kind of situation?"

Caplan isn't sure any downside to the drug is that serious. "I've had ten years of data here. I think we've got something that's more like a sleep aid or something like one of the erectile-dysfunction drugs. It's not that harmful, guys. It's a drug that isn't going to twist your mind into something different. We're not affecting major pathways. We get a little boost. You know how much effect we have in the brain. It's tiny. But it makes a difference."

Gary Lynch points out that Caplan is the non-scientist on the board. Caplan admits that he is, "and has been, by the way, taking the pill for awhile." That makes you the real non-scientist, says Lynch, and goes on: "There are basic neuroscience principles and basic rules. And if you play with these rules, you play with fire."

Caplan replies, "And you know that we got one out of five kids on this drug, right now, in every school in the country. Why aren't we taking advantage of that market? Why should some dealer do it?"

"Because," Lynch concludes, "we have real good reasons to think that there will be consequences down the road. This is a growing problem for pharmaceuticals. If we're going to go in that direction, we've got to commit ourselves to an enormously expensive trial."

Caplan points out that this is nothing new. "I say we've been drugging the body, changing the body, intervening in the body, pouring drugs, all kinds of things, into the body. I keep telling you about the 'natural' stuff they're taking out there that nobody's noticing?"

Abramson rejoins the conversation: "I think we all agree in the end, when we're on our deathbed, that our role with Hype Pharmaceuticals would have been to make the world a better place." ("If you can remember," says Caplan.) "To figure out," Abramson continues, "how to produce better health for less money, and to do it in a way that doesn't expose our kids to danger. And this is going [down] one path, which is quick profits. Yes, absolutely, you'll get quick profits. But will we make the world—will it make our children, healthier and happier?"

Hockenberry remarks that "The angst-filled discussion of what to do about Rememberall comes to a sputtering end at the board, and no decision is made at this time. But the favorite part of all the board meetings begins at this point, when one member of the board raises her hand and asks, 'What do we have coming down the pipeline?'"

## Part 5. In the Future, Forget-All?

"What sort of neuro-enhancement research is going on at our company right now? As we look out 10, 15, 20 years.' Dr. Tully?"

Tully figures we'll have "more drugs that do more specific things: the anti-shyness drug, the happy drug. The get-rid-of-your-depression-in-the-morning drug. The don't-worry-about-the alcohol-you-had-last-night drug. I mean, you can imagine lots of different things becoming somewhat tailored to particular issues that we deal with, with our brain and body every day."

Michael Gazzaniga jumps in with a possibility: "Here's a real possible drug that's right on the cusp. And it's the drug that will selectively erase a memory. So let's say you didn't like the year 1961. All right, you just want that out of your life. Or one guy put it to a colleague of mine, 'I'm trying to forget my ex-wife.' You know, call her name up and take the drug and, boom, delete character. This is being worked on." Tully agrees that such a drug is "actually within the realm of feasibility from what we understand."

Lynch adds some serious possibilities. "I don't think that we're that far removed now, as the science progresses, from looking at compounds that are genuine cognitive enhancers. Not drugs that keep you up longer. Not drugs that let you study longer. Not drugs that simply remember all. But compounds that will literally make it possible for you to do things that human beings cannot normally, cognitively do. We can define the limits of a thought that you can hold right now. I can say, 'You can have this complex a thought and that's the limit. That's as much as you're going to do.' Suppose we thought of drugs that would let you have a larger thought, a more complex thought, a richer thought?"

Michael Sandel isn't so sure. "But there's a bigger problem with cognitive manipulation. That is, that remembering and forgetting are not just cognitive faculties. They're moral faculties. Remembering is bound up with justice. Forgetting is bound up with forgiveness. And striking the balance between them is a moral challenge. The danger of manipulating cognition with drugs, even if it were safe ten years or a hundred years from now, is that it would risk obscuring these fundamental moral aspects of the human capacities to remember and forget. That's the real problem."

Tully points out that "they're obscured already. What we remember, changes with time. We forget things we don't want to. The brain is fluid in this regard; so morality then must be fluid. My point is,

I don't see that affecting how much we remember or how much we forget is any different than the natural condition and consequently doesn't really address the moral issue."

"Think about the truth commissions that wrestled with the balance of remembering and forgetting when there have been great atrocities committed," Sandel replies. Now in some ways you would say what we would ideally want would be a drug so the victims of those atrocities could forget the harrowing vision of their family members being slaughtered in genocide. But then what would become of the moral work and the moral dilemmas of truth and reconciliation commissions where men and women with burdened histories try to sort out the balance between memory and forgetting? That's a moral faculty that's essential to what it means to be a human being. And if you're going to try to deal with that with drugs, you're going to wipe away that important part of what it is to be a human being."

Hockenberry brings the hypothetical back to Hope's pipeline. "But that moral issue was exactly why Hype Pharmaceuticals developed a drug that's coming down the pipe called Traumagone, which basically allows a memory that is associated with trauma to be blunted. You don't forget that the experience happened. Suddenly the option potentially exists to give drugs to traumatized veterans. Would you prescribe a drug like this, Dr. Satel?"

"To me," Satel replies cautiously, "it would be up to the patient. If it was something he was interested in. A lot of people wouldn't. I think Dr. Sandel may overestimate how many people are clamoring for this kind of relief. I've worked with veterans. And a lot of them draw strength and passion from those experiences, trying to affect changes so it doesn't happen again or ordering their life in some way that has meaning, meaning born out of that experience. I don't think people would be popping this right and left. I think some who are horribly tortured and feel it would be helpful to them might try it. I'd really much prefer to leave this up to the person once we know that it's relatively safe."

What would Dr. Lawler think? Peter Lawler is very hesitant about the whole technology. "We don't have the wisdom to know what memories we want to remember and what memories we want to forget." Lacking an ex-wife, he can't comment on that possibility, but whatever he willed to forget, he might very well come to regret the forgetting. "I don't want to be anxiety-free. I don't want to be alienation-free. Otherwise I couldn't understand Johnny Cash anymore."

"There's some kind of designer middle that I think I want. But in order to construct the designer middle, that I think I want, I would actually have to be able to extract myself from myself. So

memory control with happiness and wisdom in mind is absolutely impossible for us. We don't know enough. And just having power over memory doesn't change that fact at all."

Art Caplan objects that if he's to run the center for the victims of torture, or the veterans administration program where 80 percent of the population is alcoholic, or a program for rape victims in Africa where the suicide rate is alarmingly high, "I want that pill handy."

Should the soldier who wants to forget, not his traumas or injuries, but his own actions killing people in battle, get this drug if he wants it? Hockenberry asks Martha Farah.

"Peter says none of us has the wisdom to make that call," replies Farah. "But you do the best you can. There might be some cases where the soldier, or the rape victim, or the person with the difficult ex-wife, makes the wrong choice. But I don't see why that means that most of the time it might not be a good thing."

When asked if he would give the drug, Michael Sandel responds, "I would distinguish between a victim who wants to forget a traumatic event that was done to him or her, and the perpetrator of a heinous act, even on the battlefield."

"That soldier's in battle. He's fighting for you," Hockenberry says.

"I understand. But it's more dangerous for the soldier who wants to forget something in which, even though he had to do it, he was morally culpable. That's not only blunting the memory, but partly cleaning the conscience. And the drug should not be for that. That's why it's different for a victim say of a rape or a crime."

Justice Scalia weighs in: "It is an interesting question whether when you lose your memory you lose the wisdom that came along with that experience. I mean, all of a sudden, the wrinkles you have on your face are worth nothing. Right? All of the experiences that you've had over your life are just washed out. And you become as stupid as you were when you were 18."

But when it comes to the case of the soldier, Scalia says, ". . . unless he were suffering from post-traumatic stress syndrome—I'm not a doctor, so I don't know what the disease is."

Lawrence Diller joins in with the question at the bottom of the whole discussion. We've heard a lot about this distinction, "treating illness versus enhancement. Where's that line? In the extremes it's very easy. But in daily practice I can tell you, it's not that easy."

John Abramson agrees. "We tend to think that [the distinction] has an ontological substance. And it doesn't. Post-traumatic stress syndrome blurs into ordinary events. And because we doctors know how to say it in one breath without grasping for it, doesn't mean it's like a strep throat." Scalia wants it to be very clear, that a burdened conscience is *not* a disease.

Is there no emotional memory suffering that Dr. Hurlbut would not treat with a drug like this? Hurlbut is cautious. "Psychiatrists treat emotional suffering with drugs. But first of all, even if something is defined as a disease, we try not to treat it with anything that invades the system if we can help it."

Hockenberry asks Hurlbut about the soldier coming back from Iraq, who wants to forget the memory of all that killing he did for his country.

"I think there's a more positive way to deal with that. Now I've seen people with post-traumatic stress syndrome, and it's a very disabling condition. You try to get the person back to functioning. I see psychiatric medicines as sort of like the cast around a broken leg. You try and get the personality back so it can heal itself. But I don't like the idea of manipulation of self. By the way, I don't agree with Art Caplan's analogy that the eyeglasses that Judge Scalia wears [Joshua Foer, really] are somehow the same as a drug he takes that goes to the very core of the person. I think there's a big difference in that." The glasses are just a tool. (Scalia is grateful, "'Cause I really need these.") An aid like eyeglasses is not invasive, it helps the person, "but it doesn't in some way violate the person. It doesn't go in and remake the person, reshuffle the person."

Joshua Foer is young enough to imagine going to Iraq. "How would you deal with the soldier situation if you had the opportunity to eliminate suffering like that, would you take it?" asks Hockenberry.

Foer admits the complexity of the question and his own uncertainty. "But we go to great efforts to get rid of physical pain. Why shouldn't we also go to great efforts to get rid of emotional pain? It seems reasonable to me."

Dr. Satel joins in: "I don't believe that this drug you're talking about will exact a kind of surgical excision of the memory, so that there is absolutely no recall at all. You can imagine where the anxiety and the distress surrounding the memory is reduced but the moral distress is still profound. And then when you have someone who is less symptomatic, they may actually be able to make restitution in a much more effective way."

Hockenberry points out that "attached to these complicated molecules that are coming down the pipe, are enormously complicated moral questions. Art Caplan, what are the tools that we need as we go forward to think about how these moral judgments will be made responsibly as these new technologies emerge?"

Caplan points out that he and Hurlbut have not agreed on this matter. It seems to him that "you do need to have some sense of what you believe about human nature. We have to talk more about who we are, and what make us who we are. I think it is important to do that."

"I think we need two other kinds of tools as well. Some of what's coming is the opportunity to shape us to a social system that we live in, or change the social system rather than continuing to wail away at ourselves with drugs or technologies to make us fit. That's a tough political question. We never asked the politicians to answer it. I mean we may ask each other here. But we haven't really put that on the agenda to say, 'If truck drivers have to take pills to stay awake 48 hours, shouldn't they be told they can only drive 24?' The last I would suggest, you really have to start getting younger people to talk about this in the schools. They're going to be taking the pills, not us. We'll be just dim memories that they probably tried to forget by taking some kind of trauma-removal drug. But that's where the future is in this battle. So the more we can raise it into their consciousness, I think it would be to the good."

### 3. SYNTHESIS AND DISCUSSION

Despite the fact that certain central concerns (like the concern for safety in the long run) trace themselves through all four scenarios given here, the changes in the moral dimensions as we move from one to another makes it useful to consider them separately.

#### A. Maria

Maria needs to work two jobs—one of them very late at night—is having trouble staying awake, and wants a stimulant to keep her awake. I am sympathetic. I know many Marias. The first question is, Why should she not just simply have it? Why must she go through some runaround with doctors and psychiatrists just in order to get a simple stimulant? The answer brings in the principle that we shall be dealing with in all the other scenarios: even legally, we are not really, completely, our own. The state has a responsibility to keep us from harm. That requires it to keep harmful or potentially harmful stuff off the market, or carefully regulate it so that people cannot use it wrongly ("abuse" it). That's why we require prescriptions for drugs we don't know much about.

In many cases, the value of the *welfare* of the citizens must be balanced with the *autonomy* of the individual to make choices that may not be the best. Are stimulants possibly harmful? We may note first, that they do not work very well when you most want them to: Dexedrine, or Ritalin, will not forever override the body's on-off consciousness switch. If you're exhausted, you will lose consciousness. The drug may mask the sleepiness, but not fend off the sleep which may set in at very bad moments. The second question is, Should she try to get a prescription for it or just try to make do with her own strength? It is useless and cruel to fantasize a world for Maria where she does not have to work two jobs; she is the victim here, and should not be blamed. It is hypocritical to deny her access to the drug because we are worried about the "safety" of the drug. Driving when exhausted is just as dangerous, and that's right now. Safety concerns for using the drug relate to the future, a future that we won't reach if we fall asleep and jump the median tonight. There are strong arguments for providing her with the drug.

#### B. Camilla

For poor Camilla, different principles apply. I certainly knew some Camillas, too. I was one of them. One reaction to Camilla's case I am prepared to dismiss out of hand. It is not so that "she'll outgrow this, that it will go away, and she'll forget about this period" when she's older. She will never forget,



and the pain will not go away. If there's anything that we can do for her now, we ought to do it. Two possibilities present themselves: We can educate the other children to be more tolerant of Camilla, or we can help Camilla be more "normal," meaning in this case more adept at picking up social cues. Training can help Camilla—role-playing, non-intensive psychotherapy, group exercises, adult direction in selected group settings, practice. Girl Scouts? Soccer? Camilla's is not a new problem, and in small settings, we have developed non-drug ways of dealing with it. What if the other methods don't work? What if we don't have time? What's wrong with the drug?

We have it as a moral principle that when we see a real problem in the lives of our children, we must address it. We can't be sweeping things under the rug. But when we openly confront Camilla's problem, we stigmatize her in her own mind. The only relief from the stigmatization is remedy, cure, the doing away with the problem that has been identified. If it's a sickness, and there's a medicine to prove that, then the whole thing isn't her fault. But on the other hand, if we produce a substance, a drug, to handle the problem, we have taught a terrible lesson—there is a medication for every unhappiness, and all life's problems dissolve in the bottom of the bottle—of pills. We also introduce that perpetual anxiety, the bane of all teenagers, of not measuring up, not satisfying the society's standards. This is why (at least one of the reasons why) teenage girls suffer from anorexia nervosa, a desire to be thin that is so powerful that it undermines normal eating and can, eventually, kill the girl from malnutrition. The theme is sounded over and over again in the dialogue: "You made me want to achieve, win, be rich, smart, thin, and successful; what's wrong with drugs to help me be all these things?" "You" is probably the parents, but that theme is powerfully reinforced by the society.

### **C. My Students**

Drugs, stimulants—Amikind, Adderall, Rememberall—will help us adapt to the demands of our society, to succeed in meeting society's unlimited demands. Yes, say the reformers, and that's what's wrong with the society. We should change human society to fit the human frame, not flog the human to get up to speed with an insane society. But as Caplan points out, we live in the present world, not the world we would prefer, and in this our world sometimes people have to hold second jobs, third-graders have to get along with bullies—and college students have to pass my courses. More troubling is Lawler's point, that "enhancement" may serve the interests of the first person who obtains it. For that person, there is a comprehensible risk-benefit calculation, risking the side effects down the road but benefiting from the effects of the enhancement. But then, as others realize they have to compete with that first person, everyone has to take it: now there is no benefit for anyone in taking the drug (although there is disadvantage if they stop), but everyone is at risk for the ultimate effects. This is hardly an improvement on the original situation.

### **D. The Soldier**

Should there be a drug to cure unhappiness, a drug to wipe out unpleasant memories, a drug to make the human condition seem sunnier? When in the history of the human race would the answer to that question not have been a resounding yes? But now that the possibility is upon us, we hesitate. How much of the personality, of the person, hangs on the streaks of pain and regret that scar the personal history? I wouldn't mind wiping out all of mine; but I would be a different person at the end of the wiping. Maybe a nicer one? Ethics is divided on Sandel's assertion that people are morally bound to suffer all the pain they can because of the evil they have done. For one thing, we're divided on what's evil: if the soldier had to shoot the enemy to save his men or his mission, then he is not morally culpable. For another, we wonder what real good that pain is doing: if it motivates him to work for peace, good; if it cripples him so he can't do anything, not so good.

### **E. The Overarching Question**

The last, and most prevalent question that runs through all of these scenarios, is the appropriate role of the medical profession in all these transactions. Is neuro-enhancement the practice of medicine? On the one hand, no, certainly it is not. The "patient" had nothing "wrong" with him to begin with (unless you count the parent's anxiety about the son getting into a good college as a disease—but then maybe the parents should have been taking the pills). On the other hand, the practice of medicine has long gone beyond the confines of "trying to make sick people better." Cosmetic surgery has always been with us, and no complaints were raised against it on ethical grounds until very recently. Cosmetic pharmacology is certainly as respectable as cosmetic surgery has been. What's wrong with cognitive enhancement? In the opinion of many physicians, the risks of enhancement outweigh the benefits unless there is an "impairment" or disease of some sort. But when everyone else is better, you become worse by comparison; when universal enhancement raises the bar of "normal," everyone below that bar is now "impaired." Is there any way to bring this treadmill to a halt?

### **QUESTIONS FOR YOUR REFLECTION**

1. Go to your dictionaries and encyclopedias (hard copy or online) and find as many meanings as you can for "natural" and "normal." How do different senses of these words share the two meanings of "what usually is" and "what ought to be"?

2. What role in this dispute is played by the pharmaceutical industry? Is the marketing of pills that modify your brain any different from the marketing of pills that help your heartburn? Is it any different from marketing cosmetics or acne remedies? How? Should it be? How?

3. Suppose we found a "smart gene" that governs the production of proteins that act as the amphetamines or amphetamines do, only more reliably? People with this gene would need no more than four hours of sleep at night, would be able to do highly complex mathematics problems in their heads without errors, and would never lose concentration at work. Should we permit the company that discovered the gene to market it to prospective parents? Why or why not?

#### 4. SUGGESTIONS FOR FURTHER READING

In the nature of the subject, almost anything in print will be obsolete before you read it. The following sources, however, may have much that is of value.

##### Special Supplementary Text

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## CHAPTER 8

### **RISK, REWARD, RESPONSIBILITY** **Ethics in Business**

#### QUESTIONS TO KEEP IN MIND AS YOU READ THE CHAPTER

1. Does it make any sense to say that business, or maybe just big corporations, are good or bad in general? The next time you see such broad claims, try to break them down into claims of utility, justice, freedom or duty.
2. What is the role of the national boundary and national citizenship? Do the managers of corporations have a higher obligation to American workers than to workers abroad?
3. How should a large corporation handle uncertainty in product safety areas?

#### **1. THE PHILOSOPHICAL JUSTIFICATION OF BUSINESS AS WE KNOW IT**

##### **A. Business as a Moral Enterprise**

Most of the elements of an ethic of business came together in the Protestant Reformation. What we know as the "work ethic" had grown in the monasteries since St. Benedict, as monks of noble background practiced manual labor as part of their "vocation" from God, to teach them humility. Martin Luther (1483–1546), an ex-monk, preached that every person had a vocation from God, to work honestly, to produce excellent products, to earn a living in the sweat of his brow in the way for which he was best fitted. A practical, middle-class religion, Lutheranism made enormous strides in the commerce-oriented cities. Freed from the domain of the prevailing church, philosophers also tried to capture the new spirit of Renaissance, Reason, and Enlightenment. One of the best of them echoed perfectly the practical calculations of the merchants. This was Jeremy Bentham (1748–1832), the founder of utilitarianism.

Writing about half a century after John Locke (1632–1704) had established the moral priority of private property (and the value of representative government) on a foundation of natural rights, Bentham taught *hedonism*, the belief that pleasure is the only good and pain the only evil. People are their own best judges on what is pleasurable or not, so all you have to do is ask them what they like and what they don't like and you'll know what's good and bad for them, and if you have any concern for their welfare, what's right and wrong for you to do.

By the *common good* we mean no more than the sum of individual goods. To see if a proposed piece of legislation will serve the common good, then, all you need to do is adopt a single unit of pleasure (say, one hour of pleasurable consciousness for one citizen) and apply the felicific calculus (a technique of adding units of pleasure and subtracting units of pain to come up with a happiness bottom line) to get a sum that will tell you not only whether, on balance, the legislation will serve the common good, but also if it will do so better than any alternative.

The moral philosopher and economist Adam Smith (1723–90) proceeded to apply Bentham's assumptions to the marketplace. Let us assume, said Smith, that Bentham is right; that apart from short and rarely significant bursts of altruism, people are selfish. Most people, most of the time, want to find pleasure and avoid pain for themselves. In the marketplace, that disposition translates into a determined effort to advance one's own interests—to become wealthier, in terms of money, goods, and enjoyments. The fundamental "capitalist act" (Robert Nozick's enlightening term) on this assumption is the self-interested voluntary exchange, the willing trade with another for the purpose of advancing one's own interests: two adults, of sound mind and clear purposes, meet in the market place, to which each goes in order to satisfy some felt need. They discover that each has that which will satisfy the other's need—the housewife needs flour, the miller needs cash—and they exchange, at a price such that the exchange furthers the interest of each. The utility (the increase in wealth brought about by this exchange) to the participant in the free market of the thing acquired must exceed that of the thing traded, or else why would he make the deal? So each party to the voluntary exchange walks away from it richer.

Adding to the value of the exchange is the competition of dealers and buyers; because there are many purveyors of each good, the customer is not forced to pay exorbitant prices for things needed (it is a sad fact of economics, that to the starving man, the marginal value of a loaf of bread is very large, and a single merchant could become unjustly rich). In the same way, competition among the customers (as in an auction) makes sure that the available goods end in the hands of those to whom they are worth the most. So at the end of the market day, not only does everyone go home richer (in real terms) than when he came, but also, as rich as he could possibly be, since he had available all possible options of goods or services to buy and all possible purchasers of his goods or services for sale.

If they are to win the competition, sellers and buyers must strive for high efficiency (the ratio of quantity and quality of production to the costs of production), through producing the best-quality goods at the lowest possible price, or through allotting their scarce resources toward the most valuable of the choices presented to them. They must keep the cost of goods for sale as low as possible while keeping the quality as high as possible. Adam Smith's most memorable accomplishment was to recognize that the general effect of all this self-interested scrambling would be to make the most possible goods of the best possible quality available at the lowest possible price.

Meanwhile, sellers and buyers alike must keep an eye on the market as a whole, adjusting production and purchasing to take advantage of fluctuations in supply and demand. Short supply will make goods more valuable, raising the price, so the producers will make money; and that will bring more suppliers into the market, whose competition will lower the price, to just above the cost of manufacture for the most efficient producers. Increased demand for any reason will have the same effect. Should demand exceed supply, the price will rise until only as many buyers as there are products will be able to afford them. Should supply exceed demand, the price will fall to a point where the goods will be bought. Putting this all together, Smith realized that in a system of free enterprise, you have demonstrably the best possible chance of finding for sale what you want, in good quantity and quality, at a reasonable price. We do not need benevolent monarchs ordering things for our good, he suggested; in this system we are led as by an "invisible hand" to serve the common good even as we think we are being most selfish.

Adam Smith pointed out that the free-market system will not work at all unless the participants are honest in word and deed. That is, they tell the truth, especially about the invisible properties of their products for sale, they pay their debts, and honor their contracts. The conclusion was not original with Smith: in the first book of Plato's *Republic*, the businessman Cephalos sums up the meaning of *justice* for his life as simply telling the truth and paying your debts (see Plato, *Republic*, book 1). The capitalism that Smith describes also requires Aristotelian virtue; it will not work for very long unless the participants are rational (for these purposes, just that they know what their own interests are and are not often subject to emotional outbursts that interfere with acting on them), prudent (foresighted, able to set aside present gratification for long term profit), industrious (hard-working, not lazy), temperate (moderate in their demands, not greedy), thrifty (strongly disposed to save money; a kind of prudence), and, for the most part, in possession of some saleable skill that they can use to make a living. Above all, they must be responsible: willing to follow up on their commitments and keep their contracts, making sure that their goods are as described and do no harm to anyone, and taking a full and active part to protect the community that underlies their own and their neighbors' business endeavors.

Adam Smith's theory of economic enterprise and the "wealth of nations" came from a combination of the natural-law tradition of the seventeenth and eighteenth century (exemplified by John Locke [see Locke, *Two Treatises of Civil Government*, part 3]); and the empirical tradition represented by Jeremy Bentham (see Bentham, *Principles of Morals and Legislation*). Locke was needed to establish the sanctity of private property and voluntary contract; Bentham to establish the priority of self-interest in human relations. Smith translated the conclusions as so many elaborations of the natural law: the law of supply and demand, which links supply, demand, and price; the law that links efficiency with success; and ultimately, the laws that link the absolute freedom of the market with the absolute growth of the wealth of the free market country (see Smith, *Wealth of Nations*).

It was the businessmen who started the American Revolution, men like John Hancock who found British taxation cutting severely into their profits. But the ethic of American business had been laid down forty years previously, in the widely read issues of *Poor Richard's Almanack* by Benjamin Franklin (1706–90). Franklin provides a strong restatement of the work ethic, along with assurances that work will provide prosperity. "Keep thy shop, & thy shop will keep thee," he advised. He had no use for laziness: "Employ thy time well, if thou meanest to gain leisure," "Be always asham'd to catch thy self idle," and he was sure that honest toil would always yield prosperity. The time invested in apprenticeship was well worth it; "He that hath a Trade, hath an Estate." In such proverbs, aphorisms, and sage advice on a multitude of subjects Franklin addresses the small farmers and businessmen who were assumed to make up the population of America, urging prudence, industriousness, honesty, and lapsing repeatedly into simple praise for profitable trade.

So business in America started out as a moral enterprise, specifically as the embodiment of that "pursuit of happiness" to which Thomas Jefferson, in the Declaration of Independence, assured us we had a right; the best and only way to promote the general prosperity, one of the purposes (according to the Preamble to the American Constitution) of the founding of this country; and a teacher of virtue, as Benjamin Franklin would have it. The virtue that sums up Franklin's tradesman is responsibility: he owns and is in full charge of his farm or shop, freely exercising rational choice in the decisions for the expenditure of resources (including his own time and effort) in accordance with the dictates of prudence, making commitments appropriate to the flourishing of the business and his family, following up on the commitments, making sure that all work that he does is done right, representing it truthfully and billing only for what was done. With the highest stake in the continuing good order of the community, this tradesman is also the best candidate for holding office in its government, and is the basis for democracy. No wonder Herbert Hoover could assert so confidently that "The business of America—is Business."

## **B. Business as Arena of Moral Dilemmas**

Why, then, is it so much fun to talk about "business ethics" as a "contradiction in terms"? Where did we get the images of business as a cruel exploiter of its employees, fat cats fiddling while the public be damned, the purveyor of cheap goods of which the buyer should beware? Business was not perceived as a villain in the United States until the nineteenth century—the age of the limited liability corporation, the industrial revolution, and the civilization of the factory.

A for-profit corporation, the kind with which this chapter is primarily concerned, is a venture financed by investors (the people who put their money into the venture, at the outset or later on) for the purpose of making more money, of getting a return on investment (ROI) as great or greater than they could get in any other allotment of their money. Once launched in business, a corporation is legally a fictional person—as chief justice of the Supreme Court John Marshall put it in 1819, "an artificial being, invisible, intangible, and existing only in the contemplation of the law." Intangible or



not, it is a real thing, that outlives all its members, that can sue and be sued and make contracts like any individual. It is the status of Exxon or PepsiCo or General Motors as a legal individual that has us assuming that they can have moral rights and obligations like any one of us.

Why would you form a corporation to carry on a business? The answer lies in a curious point of legal history. Historically, corporations have been chartered by the state and granted by the state the privilege of limited liability; that is, the members of the corporation, the investors, are financially liable for corporate debts only to the extent of their investments. They can lose the money they put in, but the creditors of the corporation can't come after their personal funds to satisfy the corporation's debts. From the sketch above of the enterprises that created international trade, you can see why commercial corporations were formed. Each trip to the East put the investors terribly in debt, and, if the boat were lost, as many were, the creditors could come after the owners' personal funds, houses, and possibly their persons (remember that Shylock in Shakespeare's *The Merchant of Venice* nearly lost a pound of flesh nearest the heart!). The East India Company, established in 1600 by Queen Elizabeth I just to undertake the commercial exploitation of Asia, was one of the earliest and largest corporations. The Massachusetts Bay Company, formed to undertake the similar exploitation of the American colonies, was another.

Before Adam Smith, the rulers of the nations of early modern Europe assumed that all economic dealings within their borders (or across them) should be monitored for the public good, and that it was part of the prerogative and duty of the state to charter only those corporations that would serve the national interest. Naturally, the officers of the state in charge of deciding who deserved a corporate charter tended to favor friends and party members, and the entire approval process became cumbersome and corrupt. After Adam Smith, the defenders of free enterprise pointed out that it was also entirely unnecessary. Let people make their own economic arrangements, they argued, and the public good will be served. Furthermore, in the name of liberty, especially liberty of association, there should be no reason why any group of persons should not be able to form a corporation if that is what they wanted to do. So, in the nineteenth century, the process was streamlined; now all it takes to form a corporation is a form that any lawyer can supply, a fee for the state, and a few signatures.

Corporations come in many varieties, not all for the purpose of making a profit. Charities, hospitals, and universities are also incorporated. For the moment, let us leave the non-profit sector alone and concentrate on the "private sector" corporation, formed for the primary purpose of returning money to its investors—to take advantage of corporate freedom to carry on business, to maximize the chances of personal profit and to limit investor liability while minimizing personal risks. Corporations enjoy most of the freedoms available to humans (including free speech and participation in political campaigns). Then can they be held morally responsible—requested to honor moral duties of (for instance) helping the poor or supporting the arts, required to control harmful emissions from the factories even beyond the level required by law, urged not to fire those

who really need the jobs? Here a real problem arises. To understand the structure of the problem, let us look for a moment at the structure of the corporation.

The investors own the corporation. Its name and all its assets and all the product of its activity are their property. They can do what they (collectively) like with it and with the return it yields—save it, reinvest it, give it away. Let's suppose a company was started by ten investors; each would have a one-tenth share in the company (or one-tenth of the stock of the company), and presumably all decisions about what the company should do would be made by a majority vote among those ten. If the local fishermen asked the corporation to install equipment or change their formulae so their toxic waste water wouldn't flow into the river (changes not required by law), or the local library needed money and came to the corporation asking for a corporate contribution, the ten could take a vote among themselves on whether to make the changes or contribute to the library. If they decided to spend the money, fine. It's their money and their right.

Shareholders generally have other business to attend to, so they hire a manager to run the corporation in their absence. The manager has none of the rights of ownership. The owners are the principals in this engagement (strictly speaking, the owners collectively are the corporation, and the corporation is the principal), the manager is the agent of the corporation, and in this agency relationship, the manager has a *fiduciary obligation* to the corporation to advance its interests. (The principal is the decision maker and initiator of the relationship; the agent is one who acts on behalf of another, not for himself; and a fiduciary relationship obligates the fiduciary to act for the interests of the beneficiary, the persons or institution for which he is the agent.) He can do only what he is instructed to do by the owners, and the owners have told him to run the business profitably, deduct his costs and salary, and send them the profits (the higher the better) as dividends, as a return on their investment. The owners have also, of course, told him to run the business in strict compliance with the law, because going afoul of the law can be very expensive; in the worst case, the whole business might be shut down and all the investment lost. So he'll spend the money needed for compliance. But if the town asks for control of runoff into the river beyond the letter of the law, or the library asks him for money for a new children's room, he really should do nothing until he's had the opportunity to ask the owners. If they are far away, that may be difficult to do. If he cannot consult them, he may just have to continue doing what he was told, which is to increase the shareholders' wealth. After all, it's not his money.

The situation becomes more confused (for the river and the library) if the original owners decide not only to sell their shares to other parties, splitting them several ways as they do so, but also to issue more stock, selling it to the public at large, in order to raise capital. (Their small factory has been doing so well that they decide to build two more, and need a lot of money, more than they could borrow from a bank, to start building.) By this time the corporation will have assumed its contemporary form, run not by the shareholders directly but by a board of directors, elected by them, whose charge it is to further shareholder interests—in short, to increase their wealth by

directing the managers to follow policies that will raise the value of the stock in the market for stock, the stock exchange. By the time several new issues of stock have been sold, there will be many thousands, ultimately millions, of shares of company stock outstanding, owned by the public, and the manager is never going to be able to get hold of all the owners. Since on the stock exchange the shares can be traded (ownership can change) every day, the idea of contacting the shareholders for advice about the river or the library rapidly becomes absurd.

Still, there are works of charity and community spirit that managers have assumed the shareholders would want to support, and the river and the library might be among them. The shareholders, however many and anonymous they were, were at least individual human beings who could be presumed to want the community fishermen and library patrons to think well of the company, and to possess at least a passing interest in the natural environment and the community education. Throughout most of the twentieth century, corporations could assume at least some responsibility for community support and protection beyond the letter of the law. More recently, even that presumption has faded.

Now the structure of ownership has changed. For almost a century we have had mutual funds, investment pools that give the small investor with neither the time nor the skill to manage his own investments the opportunity to participate in the stock market with an experienced manager to make the investment decisions. Since the 1930s, college endowments, workers' pensions, and many other projects have been provided for by similar funds, money pooled and saved for special purposes, run by fund managers whose job it is to make sure that the fund is properly administered—invested in ways that will make sure that it is there when it is needed and that it will grow as much as possible. Those public funds generally stayed out of stocks—they bought corporate or municipal bonds (loans to corporations or cities), because they seemed so much safer. Once the fund managers of these large public funds, endowment, and pension funds, realized that stocks were relatively safe, and that the return on stocks was much higher than that on bonds, they started putting their funds into shares of the corporations publicly traded on the stock exchanges. By now, up to 80 percent of our large corporations are owned by these funds.

It becomes impossible to poll the shareholders when there are 50 million shares of stock outstanding, to ask them to give up some of their ROI to donate to the library or cut back on emissions. But at least in theory, that might be what individual shareholders want to do, and if the cause is very good, the manager may be justified in assuming that they do want to do that. With the funds as the owners, much of the corporation manager's freedom disappears. The fund managers have no more right than the corporate managers to authorize charity, or public-spirited expenses beyond the letter of the law. They were appointed to run their pension fund or endowment fund in such a way as to increase its monetary value for the sake of the retirees or the college. They cannot give to charity from the fund's money, and it is difficult to see how they could authorize one of the

companies in which the fund is invested to give the money due the fund in dividends away as charity, or spend it unnecessarily on community benefits.

Who owns the corporation? The 50,000 teachers in the public schools of a state, let us say, pool their pension money and hire an administrator to manage that money for their benefit. The teachers, from whose salaries the pension money came, are collectively the principal, the fund manager is the agent, with a fiduciary obligation to the teachers, to increase the amount of money they'll have to retire on. The fund buys stock in a major U.S. company. Now the fund owns part of the company, and it becomes an owner-principal of the corporation. The corporate manager is now essentially the agent of the teachers' pension fund and all the other funds. *No one in this picture* has any right to install environmental equipment, contribute to the library, or undertake any action at all beyond the requirements of law in the name of the corporation. In this bizarre case in the history of private property, no one who knows whose money that is has any power to spend it, while the actual principals—the schoolteachers—have no idea that they are owners of that or any corporation. The money does not belong to anyone who can do anything with it. It is its own. It has developed an engine of its own, and a single direction—to make more money.

Must business then be unethical by definition? No, but business is limited. By our understanding of the duties of the faithful agent, the corporation is not supposed to do rivers and libraries. Its job is to make money for investors, and if Adam Smith is right, that must eventually be good. Milton Friedman, an influential University of Chicago economist, has argued for decades that the only "social responsibility" of business is to make profits. If the society disagrees, the society can make laws restricting the activities of business, and the manager, ever compliant, will make sure that those laws are obeyed.

Not all managers agree with Friedman. Contrary to the logic of agency, spelled out above, managers of publicly held corporations still give money to the poor, to local charities, and to the library—and occasionally clean up the air and the water. At almost every annual meeting of these corporations, a stockholder motion will be placed on the floor, demanding that such contributions be stopped and the money distributed to the investors. But it will be roundly defeated. In the end, corporate managers have to live in their communities, and contributions are good public relations for the firm. So the corporation continues to live as an uneasy citizen in its community, caught between the logic of profit and the needs of the world. Some of that ambivalence is reflected in the dialogue that follows.

## **2. RISK, REWARD AND RESPONSIBILITY: THE COURSE OF THE DIALOGUE**

This section considers the television presentation or DVD. The recapitulation of the dialogue that follows is not meant to be a word-for-word transcript of the tape, but a summary of the major

themes, issues, and opinions that emerged in the conversation. It is for your review, and for use as a resource.

As you read through the dialogue, ask yourself the following questions:

1. To what extent should national policy favor the retention of jobs in America? To what extent should the policy of each corporation favor keeping jobs in America? If jobs must be outsourced or off-shored, what is the responsibility of the corporation to make sure that U.S. standards are followed abroad?
2. How should we calculate the balance of risks and benefits of any new product? If the risks materialize, what is the responsibility of the corporation?
3. To what extent are we obligated to ensure that human rights (civil rights in the U.S.) are practiced in the countries in which we do business? What should we do if we find that a country, in which our corporations have branches, is systematically violating the moral bases of our business community—freedom of communication, private property, sanctity of contract, prohibition of slave or child labor?

Moderator: Jake Tapper

Panelists (from left to right on your screen):

Paul Krugman, Columnist, *New York Times*; Professor, Economics and International Affairs, Princeton University

Joe Queenan, Author; Columnist, *Smart Money* and *Chief Executive*; Former Editor, *Forbes Magazine*

Leslie H. Lowe, Program Director, Energy and Environment, Interfaith Center on Corporate Responsibility

Fred L. Smith Jr., President and Founder, Competitive Enterprise Institute

William J. McDonough, Vice Chairman and Special Advisor to the Chairman, Merrill Lynch

Betsy Atkins, CEO, Baja Corp

John Abele, Founder and Former Chairman and CEO, Boston Scientific Corporation

Ben W. Heineman, Harvard Law School and GE's Senior Vice President for Law and Public Affairs

Nell Minow, Editor and Founder of Board Analyst

Senator Paul Sarbanes, United States Senator (D-MD)

Lewis Kaden, Vice Chairman and Chief Administrative Officer, Citigroup

Joanne Ciulla, Professor, Leadership and Ethics, University of Richmond

William H. Donaldson, Former Chairman, U.S. Securities and Exchange Commission

## **Part 1. Stripping Asbestos in Novastan**

Moderator Jake Tapper introduces the first hypothetical. It seems that "Casablanca Cruise Lines has purchased two majestic ocean liners. They are retrofitting them to create a luxury playground on the seas, for active seniors and anyone else who might enjoy a return to yesteryear on the ocean."

Betsy Atkins is invited to be the CEO of Casablanca Cruise Lines. Happy about the prospect? Yes, so far, says Betsy cautiously. Tapper continues: There's a problem. The ships have asbestos in them; it's got to be removed. Now, "in the United States you can have the two ships stripped of asbestos for 100 million dollars. Or there's this country, Novastan, an impoverished former Soviet Republic on the Black Sea. And they will do it for 20 million dollars. In order to make your numbers, you need to do it for less than 30 million dollars." But the quality of the work is the same. Why the price difference?

Betsy thinks there may be different labor costs. "There may be a different regulatory environment, but you said that it was an equivalent standard."

Bill McDonough thinks "the issue is, are there some concerns that we should have about the effect on Novastan [not the U.S.] of doing the work there?"

Atkins adds, we need to know "if there's any danger to those people, and that we understand what it is. Perhaps with our 10 million dollars, the difference between the 20 million dollars and the budget that we have of 30 million dollars, we can . . . use that to bring up a standard if it's necessary."

Tapper addresses their concerns. According to the health regulations of Novastan, "workers have to wear boots. They have to wear gloves. They have to wear overalls. They have to wear masks. And all those are supplied. In the United States there is much more high-tech equipment. Negative airflow ventilation system. Personal ventilation system. So there is a clear difference in terms of the workers."

The case is not really hypothetical. Paul Krugman draws the analogy: "This is very close to another example, the ship-breaking industry in Alang, India. Which is, in fact, cheaper: much cheaper to break up a ship in India than it is to do it in Baltimore or in Rotterdam. It costs substantially less because the wages are much lower and because the protections for the workers are much worse. But the moral case for saying it's okay to do that is, what would the workers in Alang be doing otherwise? India's a very poor country. These are opportunities. And this is a case where you can in good conscience, being a full humanitarian, say, 'Look, if you insist that they be working under first-world standards, they're not going to have any export industry at all.'"

Betsy Atkins wants to poll her constituency. Should we go forward with this endeavor to Novastan, or not? Panelists agree, so we go. But there are others out there.

Tapper puts it to Leslie Lowe of the ICCR (Interfaith Center on Corporate Responsibility): "You're the head of an NGO [non-governmental organization], that's focused on the environment. You know Betsy, just because your kids go to the same school. You've heard about this Novastan deal going through, and you have concerns about this."

Lowe jumps in. "My concern with what Paul just said is it isn't just the workers. Asbestos generalized in the environment is a very, very dangerous substance. And unless there are those protections, I'd say that your company might be setting itself up for a big problem."

Atkins agrees, but goes on. "Well, I think that it's important to take what's been learned, and transfer it to the environment to minimize any negative damage. But at the end of the day, we do need to make a product. And get it to market in timely fashion. We compete with many other cruise lines. And we can't not go to market."

Lowe is sympathetic, but tries to appeal to the CEOs' long-term interests. "You don't want Greenpeace or some of those other NGOs to start coming after you about the Death Ship. That might really ruin your business plan." Yes, but what is the moral status of the protests? Fred Smith

points out that it is important to recognize that while Greenpeace generally has a very strong moral position, believing that the environmental standards in Novastan, or anywhere else, should be exactly the same as they are in the United States. Still, the other moral position that Paul Krugman articulated suggest that, in fact, we would be obscenely immoral if we basically tried to suppress their ability to escape poverty. Leslie Lowe is not happy.

Bill McDonough suggests a compromise. "I think we can bridge this gap by being responsible, by taking the 20-million-dollar deal, but investigating whether it would not be possible for us to have the contractor do the business in a somewhat different way, which would lessen our possible both moral and legal risk." How? "If they would have asbestos-laden clothing, that they would be required to take it off at the end of the day, shower, get themselves cleaned up before they go home to their families. We could do something at not great expense to ourselves." Well, how much are you willing to spend? Bill Donaldson answers: "10 million dollars. We got 10 million dollars to spend." Atkins agrees with that.

Ben Heineman has a slightly different perspective. "I think they've said it backwards. You shouldn't look at the 10 million dollars. You should look at the comparative health risks. That's the issue. Can you change the comparative health risks so that the workers in Novastan are not facing death from cancer? I mean, asbestos is not—it's not like child labor. It's not where you can have an argument where 14-year-olds can work because that's the cultural norm. And they can get some income assuming the conditions are okay. Asbestos kills people. Exposure kills people. So you have to determine first the comparative health risk. And what it would cost to make sure that the risk that the Novastan workers were facing would not kill them."

Paul Sarbanes agrees. "Ben's onto a very important point. I think you have to ask the question, how much harm is going to be done to the workers in Novastan as you do this analysis? It seems to me that regardless of the conditions in Novastan, if your project is going to kill the workers, you should not do it."

Paul Krugman objects that you're not going to know that, or if you do, you don't do it at all. Sarbanes agrees. Heineman concludes that we must find out how much the workers are being exposed in the Novastan project, and what must be done to get to the point of reasonable safety.

Tapper takes us back to the office, where Lowe and Atkins continue in conversation. What would allay Lowe's concerns? First, safety: To raise the safety standards as high as is reasonable, as Heineman said. "Even though those workers are getting wages, the rest of the people in Novastan who might be exposed to that asbestos did not touch that wage. So they're getting a risk without any



of the benefits." Second, transparency: set out everything you're doing for the shareholders and environmental NGOs alike.

Tapper brings Nell Minow, an investor, into the conversation. Presumably she wants to make money on the investment? Yes, and she has high hopes, because Betsy Atkins is a great CEO. "But," Minow continues, "I also am concerned about liability, whether it's a reputational hit or whether it's any other kind of liability. I would encourage Betsy to go and sit down with the prime minister of Novastan. I guarantee you if you're willing to spend 20 million dollars in a country you can get his attention. And talk with him about what they can do to get U.S. business."

Bill McDonough agrees that "we need to protect the good name of our company in the eyes of a responsible, sensible investor like Nell. Because if we endanger the good name of the company, that's a cost that we simply cannot afford."

Fred Smith worries about the risk of bringing in the NGOs, who tend to make accusations and assume guilt in the absence of any proof. Leslie Lowe responds that that's why transparency is so important.

Atkins points out that transparency has its limits. "But it's important to realize that how you run and operate a corporation—you don't show all your competitors and the outside world your decision process. You do that with sound advisors, with good fact-finding. But you don't transparently disgorge every decision you do."

Tapper informs us that we're going ahead with the project. Casablanca has put in more money to make sure that not only are the strict regulations of Novastan adhered to, but also extra precautions are taken to make the workers and their families safer. All right?

Betsy Atkins wants to be sure that those are real health risks we're mitigating. Fred Smith is put in charge of compliance. The first thing Fred finds out is that while all the equipment is in place, the men doing the work won't wear the masks. Fred remarks that they don't wear them in the United States, either. Should he simply stop the work?

Nell Minow, the investor, answers first. "You stop. Stop the process."

Tapper explains that in Novastan all the men wear beards, for religious reasons. Betsy Atkins is unmoved. "There's plenty of workers in Novastan. If you won't comply with Fred's compliance, we'll find another subcontractor."

But, Tapper insists, the Novastani government knows the workers aren't wearing masks, the inspector comes, he drinks coffee with us. It is fine. You're abiding by Novastani regulations. Atkins stands her ground. "No, it isn't fine. We're the customer. It's our contract. And we will cease the contract until you comply with our compliance regulation. And I'm sorry that it makes your beard itch." She won't pull out, but she will replace the contractor. The next contractor can't make them wear the masks either. But it's all right, the government approves, want to talk to the officials? No, she'll find a contractor, or two, who will comply, and the work will go on.

Fred Smith wants to put this problem in perspective. "The question is whether or not we're going to offer safety. I know Leslie wants the world to be safe, but there's no way to make the world safe. There are ways of making the world safer. And right now what we're offering with our corporation is the chance for the Novastani people to have an increment of risk reduction. This risk has to be put in perspective with other risks. And poverty is a risk of Novastan. Not asbestosis." Minow is still for shutting it down immediately. Bill Donaldson points out that we still have to get the asbestos out of the ship, but agrees that the operation as presently going should be shut down.

Bill McDonough thinks a touch of firmness is required. "I think you have to say to the foreman, in whatever accent one wants, 'Put the masks on. And get the workers busy.' And he would say, 'Yes, sir.'"

That worked. Atkins follows up: "And if the masks come off, then you're relieved. And we'll find an alternative person who will comply and wear the masks. Because we know that there's a plethora of workers. And not a lot of high-paying jobs in Novastan."

Tapper appoints Bill McDonough as chief executive at Casablanca. "Your daughter, Joanne, comes home from grad school with a copy of *Bleeding Heart* magazine. Ah, you hate it when she brings that home. And in it is a very lengthy investigative piece on third-world workers. And there are pictures of Casablanca-subcontracted employees in Novastan. And, without the masks, it's pretty clear some of them are teenagers. Joanne, talk to your dad."

Joanne Ciulla moves to the attack. "Well, Dad. First of all, I'm really disappointed about this. I understand that you need to give these people jobs. But it looks like you're not enforcing your rules very well there. I want to know what your company's doing. It's one thing to have a good plan to protect people against asbestos. It's another thing to have a good plan to make sure there's compliance to that."

McDonough is grateful for the credit for protecting the workers' health, "because those scurrilous pictures that were taken, were taken during that brief period before we cracked down and made sure that they wore the masks. I'm glad that you noticed that."

Does the employment of teenagers bother Lowe, who has a 14-year-old daughter? It certainly does. Lowe talks to Atkins: "Betsy . . . really, this is toxic work. And you're employing young people who in Novastan's life expectancy could live another twenty or thirty years, which is enough to develop asbestos-related diseases. And this just really, I mean, morally speaking? I just think you really stepped off the deep end here."

"It's important to separate your social and moral and business ethical issues," Atkins replies. "The role of a corporation is to stay in business, to make profits for the long term, while being a good business ethical world citizen. We are doing that. And there are social conditions that we can't control."

Lowe disagrees. "I don't think you can separate moral sensibilities from business sensibilities. At least, not in the current world. We are linked by the Internet. It's a global economy. There is global information. So if you're not taking good care of those workers in Novastan, it's going to come right back at you."

Fred Smith points out the positive half of the operation: "But we're trying to find ways of helping some of the Novastani citizens, whose lifestyle is improving. Whose kids for the first time are able to say, go to school—who can do some health care, tell their stories. And we're beginning to try to find ways of letting the Novastani people say, 'Don't crucify us on a cross of American standards. Which will kill us much faster than working conditions do.'"

Krugman points out that the attempt is to reach a balance. "It's not an either/or decision. Should we have no jobs, or must the jobs be, you know, paying the minimum possible, the working conditions as bad as possible. This is a case where the company's interests are served by appeasing the community of NGOs who want things to be better. The NGOs do a useful service as long as they

don't actually cut off the jobs. You know, it's not going to be U.S. standards. It's not going to be Western European standards. But it can be better. Pressure is good." In the short term, he points out, at least someone has a job at better pay than he'd find elsewhere.

"Is it possible," Tapper wants to know, "that American companies would demand health-worker safety regulations so high that it wouldn't actually be cheaper to actually take the jobs to Novastan?"

Lew Kaden replies that "the Novastanis are going to have to decide what level of standards they establish. But I think just as fundamental, Casablanca and companies like it, have to decide what their global practices are going to be. And that's why it's so difficult. Because there's no simple answer. I don't think it's satisfactory to say, you follow whatever Novastani government officials decide. Nor can you say I'm only going to follow the standards that are applicable in the U.S., and try to spread them throughout the world. Betsy and her colleagues are going to have to decide, what do they want to stand for? And I don't know where you come out on the 14-year-olds. But if there were 8-year-olds compelled to work in that shipping operation, I suspect Betsy and her colleagues would decide they're not prepared to put their ship in the service of those workers." Could we get into a race for the bottom? "I would hope," Kaden concludes that, "one would hope that at some point there are standards that companies interested in following good business practices, establish. And that over time, governments come to the point of adopting those standards. But in the short run, each company's going to have to decide for itself what practices it can tolerate."

Nell Minow returns to the conversation. "I'm an investor. I buy low. I sell high. I bought into this company because I want it to make money. And I have every expectation that it will. But I do not make a distinction between business decisions and moral decisions. I think all decisions have moral consequences. But as this hypothetical shows, there are a lot of competing moral concerns. It's navigating that—that can be the challenge. But, you know, we're talking about a high-end consumer product that has a brand. And if you want to try to sell that product, you better make sure that you're not going to go out sailing while children die because of the way that we removed the asbestos. So you want to have some kind of very clear, very transparent standards. That is not your 'strategy.' That is part of your *brand*."

Bill Donaldson isn't so sure. "I don't think you can set worldwide standards for how old your workers are going to be. Our concern here is getting the job done. And not causing death getting it done."

Minow agrees that you can't set worldwide standards across the board. "But you can have worldwide floors. I think we can all agree that 6 is too young. We can all agree that 7 is too young. And I think

that businesses have to get together and agree to a set of principles that they're going to establish around the world."

Fred Smith wants to concentrate on the results. "Nell, this is the problem with that. If we set a standard for our company (and I think our company does need some policies here), I think our policies ought to be, Is our involvement in Novastan going to make the Novastani citizenry better off? Healthier? Wealthier? And that may differ. The actual implementation may turn out to be different in Novastan than it's going to be in India. And so forth. But we do not want to set a floor. Because their floor may be so much lower than that."

Krugman objects that the floor should be at least, that we are "making a substantial improvement in the lives of people there. Substantial."

Atkins wants to bring it back to business. "I'd like to challenge on one point. We should, if I heard you right, be improving the quality of the life of those people. And as a public corporation for profit, we have to develop a set of business principles, and business ethics. But we're not in business philosophically to raise social standards. We're in business to have business that makes profit for our owners. And the way to do that for the long term is to have good business ethics in all your various constituencies, not to be a social cause."

Yes, and that's why, Krugman points out gleefully, "NGOs are so useful. Because they turn having social ethics into also a good business decision. Because they will make your life hell if you make really bad ones."

Atkins sticks to her point. "We do need a business-ethics standard that we have developed. That's the right long term strategy. But to say that part of our business mission is to raise social standards is wrong. That is not part of our goal."

## **Part 2. The MaxiMile**

The hypothetical changes. Tapper explains that we are now back in the United States, where, he says, "these ethical issues are so much more clear cut." John Abele is appointed CEO of a private corporation called Maxicorp. "Your group of brilliant engineers has developed a product that is amazing. It's called the MaxiMile. You attach it to a car's engine. It doubles the mileage. It's a huge technological breakthrough. It's a wonderful business opportunity. You're excited about this, right?" Abele is. "You are located in the Mid-Atlantic state of Centralia. Senator Sarbanes is your senator. Lew Kaden is your number two. Ben Heineman is your chief counsel. Already one U.S. auto

manufacturer has developed an environmentally friendly car called the I-Care Car. The MaxiMile is a huge part of the I-Care Car. The I-Care Car was introduced two years ago. They've already sold 950,000 of them. It's just a great time for you. Until Mr. Heineman, one day you get a letter—from a trial attorney. You knew it was a trial attorney, didn't you? An I-Care Car with a MaxiMile was doing 85 miles per hour on the highway. And it stalled. It was rear-ended. The driver was killed. The family is threatening to sue I-Care Car and MaxiMile. Is there anything you're going to do?"

Ben Heineman will go talk to the product-quality people "who are going to be able to reverse engineer. Go back. Look at it. Think about it. Test it. We have to know whether this incident is one in a million, or one in 100 million."

Tapper answers some of the questions. Of the 950,000 cars, there have been five incidents like this, but still only one fatality. Heineman finds the numbers very disconcerting, notes that we have to find out what's going wrong. Tapper, acting as head engineer, offers to run some tests on the MaxiMile. That won't quite do it, says Heineman. "You're going to want a third party at this stage. You're not going to leave it to your own company. You're going to get a third party who's going to either work with your engineers or do the work themselves, but is going to provide some check on the credibility of what the engineer says."

Abele takes over: "Here's what we want to know. We've got what appears to be a rare incident, but a devastating incident. And we want to know whether, in fact, this is something that is related to the product we've got. Or is just an incident. One in a million is probably what any car has in terms of rear-enders."

The hypothetical advances. "Their tests are going on. Oh, I forgot to tell you," says Tapper, "a different auto manufacturer, the Sunbolt Car Company, is expecting a shipment of MaxiMiles in four days. The testing is going on, but it's going to take at least three weeks."

Heineman quickly distinguishes between "forward and back." For the MaxiMiles that are already in cars on the road, "It's a very tough question of how many incidents have to occur within that population [of cars] before you do something. Notice. Recall. Whatever it is. Going forward it seems pretty clear as counsel that you would not do it until you had determined, given the severity of the injury, . . . whether you have a defect."

Atkins continues: "But assuming we haven't yet proven that this is our product's problem, I think we should begin to do our worst case scenario planning immediately, so we aren't caught behind the power curve. And we have our thinking together."

What do you do about the Sunbolt Car Company? Minow answers immediately: "Then what we do is we call them. And we say, we will be happy to deliver them to you. But we want to alert you that we are having this problem. We've had one problem out of 950,000 cars. And we felt that it was our obligation to tell you about it right away. We're also calling in the National Highway Transportation Safety Board. To let them know that this claim has been made."

What does Ben Heineman think of calling the NHTSB? "There will be a standard in which you absolutely have to call them in. And then the question will be, if you're short of that standard, do you still want to call them in to get them involved so that you've got [some cover]?"

Minow says it's always better to tell them; Heineman continues. "So you have a third party involved. The NTSB, your engineers, looking at the problem."

"Ben, don't you think that trial attorney has already let them know that he thinks there's a problem?" Minow asks. Heineman answers, maybe not, because he doesn't want the other trial attorneys getting in on the case.

Atkins agrees. "I agree with you. It's better to come forward early. And let them know you're investigating it, what your process is, what your diligence is going to be. Invite them in. Don't try and hide."

Bill Donaldson wonders "what sort of liability there would be if we don't do anything [differently] for the next three weeks?"

Heineman responds, "I wouldn't ship because you don't want them incurring the cost of manufacturing the car when you knew there was a potential defect. There are a lot of damages as they build the cars and then you say, 'Whoops. You have to retrofit or do something else. So I would not ship. As I said, distinguish forward from what's happened.'" The contract may have penalties for non-delivery, but you just have to talk to them, work it out; it's a new product, you want to be really clear that it's safe.

The hypothetical becomes more complicated. It seems that the lawyer is on the phone again. He thinks the family would be willing to settle. Will Heineman suggest settling? Not now, but the tests should be continued. Abele agrees. The first job is to find out what happened. Then talk about settling.

Meanwhile, the data have changed. By now there have been ten accidents, two fatalities including the first one. In all those cases, the driver was speeding. Does this change anything? Well, Abele wants to know, what have the engineers found?

"Let me tell you," Tapper says, "I'm the engineer. Everything is within the specs. There was this one engine that was hooked up to a MaxiMile—we ran it at 85 miles an hour, which of course is above the speed limit—for 60,000 straight miles. And there was a little bit of metal fatigue. It was still within the specs. I want to do some more testing."

Abele is very concerned. "I would absolutely convene a panel of our top people. Probably a few outsiders that are trusted, honest brokers in the process. And I'd say, 'Look, what's the exposure? What is the likelihood? And what is the severity? If this is something that can happen in one in even a hundred thousand cars, that is a high risk.'"

Bill McDonough joins the meeting. "Mr. Chairman, here's my recommendation, especially since you have decided wisely, in my view, that as a minimum, we're going to stall the lawyer who wants to settle at some expense to us. The story will become public very quickly. Part of our fact base is, this has happened only at speeds of 85 miles an hour, which happens to be above the speed limit. I recommend that we preempt the bad story we're going to have and say, 'There may be a difficulty if you're driving at 85 miles an hour, which you shouldn't be doing anyway.' And therefore, we warn all people who've had this product, don't speed." A press release, telling people not to speed?

Abele is not happy. "Bill, with all due respect, you know, we just can't do that. First of all, there are a lot of highways now where you can get rear ended when you're driving 85 miles an hour. So even though that's outside of the legal limit, it's certainly a risk that we can not countenance."

Heineman also opposes the press release, for a different reason. "You haven't completed the testing. If you put something out like that, then you're asked the question, 'Well, what about under other conditions? What's going on? What kind of testing are you doing? What's the situation?' You can't, I



don't think, answer those questions at this point. So until you're prepared, I think, to give a report that fairly states the conditions under which it has to be recalled or changed or whatever. [Otherwise] you will make a terrible mistake and probably get yourself into all kinds of legal liability."

Nell Minow points out that all this waiting for data is delaying the day of warning. "How many fatalities are you risking during that waiting period?" Heineman protests that he was just disagreeing with the wording of the press release, because the message was incomplete.

Fred Smith, on the other hand, is annoyed at the delay in shipping. "How are we ever going to be able to address this problem, if every time a trial lawyer writes us a thing, we tell all of our customers we're going to wait three weeks. We'll never sell anything in that condition."

Lew Kaden joins in. "The reason they pay us so much is that it's part of our job to gather facts, assess risks, and make a judgment. We're conducting these tests. We're going to get all the factors we want. The world is not perfect. And then we're going to assess what our course of action is. Should we stop shipping the product? Should we withdraw the products that are on the market already? That's going to depend on the statistical evidence, the engineering data, from all the sources we can get." Questions fly. How long will this take? Kaden again: "If we can do it in 24 hours, we'll do it. If it takes us three weeks, it'll take us three weeks. And in the meantime, it's up to us to make a judgment, whether the evidence justifies stopping shipments during that testing period." Shouldn't someone warn the public, Minow and Krugman want to know, if there's a chance that someone might get hurt in the next three weeks?

Joe Queenan points out that when it gets in the papers, along with the story of the three-week delay, there's a cloud of suspicion right there. "The public is more scared by a tiny number—two out of a million scares them more than 600,000. Look, because it's going to be them. So the longer you delay letting the public know that, the more the press will be all over that story."

Fred Smith still wants to tell the positive story: "We're talking about saving half the energy of the automobile sector. We're talking about reducing American vulnerability to energy and security issues. We've got a tremendous positive story that we should have been telling, so that when this attack occurs, we say, one in a million versus war in Iraq? We didn't do that enough, and we should have."

Is Joe Queenan going to write this story? "Yes. The story is that something is going on. First of all, I didn't know 85 was speeding. It's not in Jersey, New Mexico, or Arizona. So you better raise the number. I mean, nobody told me. This is a story that the public just loves because the public doesn't trust the car industry. People live in cars. It's the scariest thing in the world for them, especially if they find out they're going to be going 85 and that's dangerous now. So of course you're going to do the story. You'd be an idiot not to do the story."

Minow agrees. "Joe is absolutely right, that people are interested in that story. That is a story they want to read. And that is a story they will respond to, whereas if you said, 'Yeah, but we're helping the war in Iraq by buying the cars,' no one cares about that."

Tapper wants to ask some drivers who use the car. "Paul and Leslie, you're married. And you guys love your I-Care Car. You love it. You love zooming by those long lines of SUVs at the gas station. ("Tell them to slow down!" Lowe interjects.) As you zoom by the gas stations, you love filling up once or twice a month. Do you want Joe to write this story?"

Krugman says sure, "Because I'm a weird guy and I actually understand statistics. And therefore, I'm not going to react like normal people."

"I will," says Lowe. "You tell me there's a tiny possibility of a catastrophic event, then I'm going to be like most people and say, 'Oh, my God, that could be me.'"

You use the car to drive your kids to school. That's not a large problem for Lowe.

"Are you going to drive your kids to school at 85 miles an hour like a maniac?" Tapper asks Krugman.

"Yeah, probably," says Krugman cheerfully. Lowe's not going to sleep at night. She'll keep driving it, but feels worse about putting the kids in it. "If it were just the car that Paul takes to work, he can have it."

It's okay for her husband, but not the kids? "Well, and it's his fault that he drives 85 miles an hour," Lowe responds.

Let's bring in another couple. "Fred, if you're an investor and you're married to Joanne, this story is now—Joe's written the story. Are you worried at all that your kids are in this car?"

Ciulla responds first. "I would look at the numbers and say, 'You know, this is worrisome. I want to see what's going to happen.' I'm not going to go 85 miles an hour. But I'm certainly probably still going to use the car."

Will she sell her stocks? "Well, depending on how they handled it," answers Lowe. "I think that's the key issue. That's the interesting thing about taking the ethical stand, is that it's always risky. And you've got to decide which way you want to go, because it's risky not to take the ethical stand. And you know, nobody guarantees that being ethical is going to make you money. But I think we do have some examples where it does."

Heineman sums up the problem: "There is always going to be a very gray moment when we don't know. If we knew that, say, you know, one or two in a million caused fatalities, then you might publicize it and recall it if you knew. And there's always going to be a very awkward moment when you've got some incidents, you don't know whether it was the driver or whether it was the manufacturer or what the problem is. In good faith, I mean, we're acting in good faith here. We're not just trying to make a buck. You don't want to tank the company because a lot of people have jobs. There's a good, a great technology, that can help America. You could set it all back. So there's this gray moment when we have to go as fast as we can to establish whether there's a problem."

Minow points out that he's already said he knew enough not to ship the next batch. Bill Donaldson and Betsy Atkins remind us that we've already agreed not to ship, to share the problem with our customers, to get out in front of the story with a press release, and to call for third-party help. We want to be the ones telling the story, not the hostiles.

Fred Smith sees another problem. "We should recognize, we're in a period like we were in the 1890s where every businessman is considered to be a crook, a scoundrel or an embezzler of some sort. We need to relegitimize the positive elements of a free society. The challenge though is to recognize that a world which sees every business act and every unexpected finding of a risk as an example of some

immorality or criminal liability is a society that'll never go into the future. We've got to find ways of immunizing our system."

Sarbanes adds, "You don't seek to immunize the system by doing something that puts a blanket of immunity over everybody. Because then, that covers the bad actors. And there are a fair number of bad actors. No one has a greater interest, in cleaning out these bad actors, than the good actors in the business community." Minow agrees.

Lowe has another spin: "What Fred just referred to is the delegitimization of business is because business executives have acted like scoundrels."

No, no, Smith protests. Not every business is going to be run by an honest person.

"That's why you need oversight," answers Lowe.

"No, we don't," insists Smith. "What we do need is, since you know you're going to be attacked sooner or later, you should have some ability to have Joe write a story that says, 'Well, on the one hand, there was one in a million. And on the other hand, no more war in Iraq.'"

Lowe doesn't buy that. "I don't think that washes anymore. I think that, you know, coming back to the auto-safety issue, if I read the story and it said, 'Well, it is saving all the energy that we need to save to make America energy independent and reduce global warming'—which is a subject very dear to my heart—I would have to say, 'Whoa.' But it's at the risk of my kids' safety."

So are air bags, Tapper points out, but for the greater good we keep air bags. "Paul, how does society weigh a finite number of deaths versus a larger benefit to the society?"

"We actually do that," responds Krugman. "There are actually calculations made. Some people die from air bags. But more people will be saved. But, of course, what makes that a little easier is that being a decision being made by government regulators who can be accused of a lot of things, but they're not a profit-making corporation. But the point is that we have a problem, a potential problem here. We are trying to serve the public interest. We are not saying, 'Gee, you know, if we could hide this, you know, keep it quiet for a few months longer, we can make more sales.' No, we

have to stop that right now, now that we know there's a potential problem. Because we, you know, society does in fact make those kinds of decisions."

"Society makes these decisions very inconsistently and very badly," says Minow. After all, we let teenagers drive cars, and SUVs, which is worse. Joe Queenan points out that inconsistent and all, it all looks awful in the press, which is not going to be fair.

### **Part 3. Wowie Info in Jaigunda**

We have to move on, Tapper tells us. "As wonderful as the MaxiMile may have been, there is more than one way to save the earth. One of the ways that you can save the planet is through the spread of information. [Lew] Kaden, you are the CEO of a publicly held company called Wowie Info.

"It provides maps, information, e-mail, blogging, telephones through the Internet. It is a huge success. You and your college roommate Bill McDonough put this together. You guys now dominate the Internet marketplace in the U.S. and in Europe. Is there anywhere else you maybe want to look to expand your operation?"

Asia is suggested; Tapper directs them to Jaigunda and appoints himself the Jaigundan ambassador to the U.S. "We are a rapidly industrializing country. We have a population approaching a half a billion people. Highly educated. Eighty million Internet users. That's more than anywhere except for the United States and China. And we are about to open our country to Internet companies such as yours to come in and offer your services. Great market opportunity?" Kaden sounds positive about the company.

Tapper continues. "As you know, we are not apologetic about preserving social harmony. Anyone found to be encouraging civil disharmony is dealt with appropriately. So anyone who comes in to Jaigunda has to sign a pledge promising that their business will practice self-regulation and business ethics. That sounds okay to you, right?" Now Kaden wants to know a little more about it, specific rules, and how they would affect business. Tapper continues. "Well, we monitor the Internet in Jaigunda. There are things we don't dig, like democracy, certain spiritual cults, people who report on police brutality, criticism of the government. I would be remiss if I didn't mention pornography of course. But that's not what the Jaigundan people want. They want freedom that the Internet can provide."

McDonough knows where he stands immediately. "We should go into the country only with the condition that we be allowed to distribute information which we believe is responsible. We are not going to accept a government filter either formal or informal."

Kaden is more moderate. "I'm not sure I would go quite as far as Bill. I think we need to go there. Send people there. Show them our product, how it works. Understand their restrictions. What are they going to do to it? And so forth, in detail. And then, see whether there's a set of principles that we can live with."

Tapper responds to them both: "Let me just say as the ambassador from Jaigunda, look, you can't turn Jaigunda into the United States like that. It's going to be a process. You guys can be a part of that process. That's the first thing I want to tell you. The second thing I want to tell you is your competitors are on the other line. With me."

Atkins backs him up. "And this is the largest emerging high-growth market. And if we don't go into it as a for-profit public company, what is our response to our shareholders when we've ceded 29 percent of the world's market?"

Are you going to sign the pledge? Kaden responds, "What I'm interested in is moving this service into your country according to a set of principles that meet our business practices. If your concern is pornography, I think there's probably a way for us to do business. If it's something else, then we have to take a look at it."

Who's willing to sign the pledge? Betsy Atkins will, but not McDonough, and probably not Kaden. "Okay," says Tapper cheerily, "you two are fired. Betsy, you're in charge of the company. I'm sorry, but it's a public company. It's a publicly held company and there are stockholders who want to make money and want to expand into Jaigunda. So you've signed the pledge."

"My two competitors are in there," says Atkins. "It's the largest growing market. And I believe over time, I can have some amount of incremental change and get better public information flow. But I'm a practical business person. I'm a for-profit public company. I disdain the business ethics or the principles that I had to sign on the pledge to filter and control information. But yes, I am going to sign the pledge."

Anyone else with us? Fred Smith is. "You know, we've been doing some historical research. We found out one of my ancestors was a printing press manufacturer in the early period of the middle ages. And the Catholic church banned a bunch of books. But we still opened up an outlet in Italy because we decided printing some books at least gave the Italian public a chance, you know. Betsy, you know, we're opening up a window. We're not opening up the window as big as we want to see. But Betsy, I'm convinced if we open up there, it's going to be a freer country in ten years. It'll be faster because [it is] us, rather than a second rate company; Wowie Info is good."

"Welcome to Jaigunda," says Tapper. "Thank you very much. We're very excited. A couple of months go by. And tens of thousands of Jaigundans are signing up. They love Wowie Info. They love the fact that you promised confidentiality and you're dedicated to your users. Listen, Jaigundans expect censorship. It's not like they were in Indiana and then they woke up in Jaigunda. Right? They are excited about consumer information. They're excited about the fact that they can share information with each other about movies and horticulture and education and health care. It's a fantastic success. One day, a government official comes to you, Ben—you're the counsel—and says, 'Somebody has been using Wowie Info to e-mail and sell child pornography. That is a violation of the Jaigundan law against distributing criminal materials. We need you to give us his identity.'"

Ben Heineman doesn't remember revealing people's identity as part of the initial deal. Betsy Atkins points out that the pledge said nothing about revealing confidential material. "And we have a policy globally as part of our business ethics that we protect the identity of our users. And it would compromise our business and corporate reputation and it would impact our stock."

Heineman is not sure that is required by law; they will obey the law. Smith points out that they knew this was a risk when they signed on. Now they have to find some way within the system to protect the privacy of their customers. Heineman is unsympathetic to Smith's dilemma. "You've already compromised your principles in being here in the first place."

"I don't think so," says Smith.

"You have," answers Heineman as they argue back and forth.

At this point Bill McDonough decides that since he and Kaden are still major shareholders, they're calling a meeting. The dilemma, as Heineman points out, is that unless you comply with this invasive law, you're going to be shut down. Is it worth it?

Tapper turns to Joe Queenan: "Joe, what do you think would happen if the FBI asked Wowie Info for information about child pornography?"

"They'd get it. In the United States? They'd get it. They wouldn't have any trouble getting the information about child pornographers." Well, then Tapper doesn't understand the problem. Why not do in Jaigunda what they'd do in the United States? It's a child pornographer!

Fred Smith volunteers that they'd surely kick him off their system. Yes, but the Jaigundans want to know who he is. Fred Smith says that they should "find out without compromising the ability of us to provide secure financial and economic and information privacy to the vast majority of people who are not abusing that privilege."

Kaden is unimpressed. "With respect, that's nonsense. As Ben said, you go into a country, whether it's the U.S. or Jaigunda. You operate under the rules and procedures of that country. And if proper process is used to make a request to you to respond with information under your control, no promise or no contract of confidentiality can overcome that."

Betsy Atkins agrees that if there is a proper process, and it is followed, then she's going to have to turn over the pornographer. John Abele tells her that she knows what's going to happen, and she agrees; it's a slippery slope. Ben Heineman argues that "we're not going to obey every law of Jaigunda. We're going to obey this law because this law doesn't sort of offend western or global sensibilities or standards. But in terms of our reputation, there may be laws in Jaigunda that they'll ask us to obey," that we can't. Like the "political harmony" law, says Atkins. We'll have to choose whether or not to obey the other laws.

Tapper takes up the story. "The child pornographer has been turned over. Months go by. Everything is still going great. Wowie Info is building up market share. Government official comes to you again, Ben. Somebody else has been breaking the law, distributing criminal materials. We need his name too. Can we have it?"

Heineman wants to know what kind of criminal materials. This time it turns out to be a blogger writing about police brutality. Now what? Heineman reiterates, "Well, I think by going in the way we have gone in, we have accepted the fact that there's going to be a compromise of free speech over Internet. And that's the decision made going in. So that is not inconsistent with that decision if we



made the right decision in the first place." Atkins agrees. Probably all the Jaigundans signed on to that too.

Minow says pointedly, "And you made that clear to your Jaigundan customers, too. When they signed up, they scrolled down through that long, long page with all the little letters on it that said—and clicked on the "I agree," saying I have absolutely no privacy rights because I live in Jaigunda."

That's more than Fred Smith can take. "No, no, no. We can't have an information society if government can intervene at will. It can under very circumscribed circumstances pull a piece of information out. But it better be [justified] . . ."

Minow pounces. "You agreed to that going in. Betsy was the first one to raise her hand. That's how she got the job as CEO."

"But it was content control—it was content control not information sharing that we gave," answers Smith.

"So you're willing to conceal a crime by protecting the privacy of your customers?" Lowe asks.

"You don't think it's our job to be the government police force," Smith retorts. "It is our job to provide a liberating information service. If they've got crimes, let the police do their job."

While someone is muttering about subpoenas, Tapper advances the hypothetical. "While you're talking, I have to give you some information. Your servers in Jaigunda have gone down. The government knows nothing about it, of course. We're waiting for the name of this blogger and you haven't given it to us. Your servers are down. Your competitors are getting all sorts of people to sign up." Now what are you going to do?

Heineman is the first to speak: "Look, we made a pact with the devil to begin with. On the broad theory, well, on the broad theory that it was better to be there than not be there. If you're going to be there in a totalitarian or authoritarian society, you know, you are going to do certain things consistent with the original decision. There will come a point when you have to get out. Now, whether that point is when they ask for someone who was politically protesting as opposed to child

pornography or it's not unsurprising sometimes they ask for the religious affiliations [or tax records, Smith suggests] of your employees, things like that," adds Heineman. "Then you may just say *no mas*. Goodbye. Not now."

Time to pull out, Tapper wonders. Atkins replies, again cautiously, "I think we have to be mindful of where we cross that line. And when they ask for everybody in Mongolia who, you know, went to visit the Dalai Lama, because they want to execute them, then maybe that's well beyond our line."

Now Lowe jumps in. "And how much of your shareholders' money did you sink in Jaigunda?"

Atkins defends the move. "Well, it was always cost effective. In fact, we couldn't have afforded as a public company not to go to the largest growth market in the world. That would have been hugely irresponsible by us, where our other competitors were already there. So that was a business decision. And maybe you know, we at this point call up our fellow competitors and speak to the other two large Internet companies and ask them if we can get some agreement as a consortium of how we want to do business. Or what rules we want to create. Since there isn't a regulatory body to protect us, perhaps it's time to have an industry association and look at how we solve it."

Paul Krugman comes back in with his generally unpopular message, "This is where, again, the NGOs, aroused citizen groups, can be your friends. Because they can say, 'Look, we are going to urge people to boycott companies that go along with the Jaigundan government in this stuff.' It's actually a good thing if we can have a political process or a quasi-political process on this end to make it easier for companies to behave well."

Joe Queenan is unforgiving. "But it's inconceivable that you went into this country, Jaigunda, without knowing that the servers were going to go down. You knew that. It's inconceivable that you didn't know that you weren't in Indiana. Or even Illinois. But your original agreement actually dealt with this. Your original agreement was, yeah, we'll play by your rules. And your rules are not great rules. So you knew, of course, they're going to ask for the names of the bloggers. Absolutely. And of course, the bloggers knew that, too. I mean, the bloggers are guys who like to get attention. And now they got it. And so, you've already kind of dealt with the problem by saying, 'Yeah, we've made a deal with the devil.'"

"But you can change," says Paul Krugman. "Here's a parallel. There was a time when U.S. companies blithely went around bribing officials in countries where bribery of officials is normal.

Rules were passed saying you can't do that." Joe Queenan quips, "Except in Louisiana." Krugman continues: "The fact that a U.S. company signed an agreement to go ahead with whatever horrible things they do in Jaigunda doesn't mean that the aroused U.S. populace can't demand that U.S. companies stop doing that."

Back to Joe Queenan, journalist. Is this a story? Yes.

Tapper pushes on. "Do the American people care?"

"No, I don't think so," answers Queenan.

Lowe insists that she cares, and she's an American. Queenan is underwhelmed. Why isn't Wowie Info having problems with its American and European customers because of its doings in Jaigunda? Queenan's answer is simplicity itself: "Every American accepts that the rules in Jaigunda or the rules in many of these other countries are going to be different. Where the company would run into problems would be if it said in advance, we're not the kind of company that does that. But you are the kind of company that does that."

Lowe agrees, "Exactly. That's why I raised it. How can you promise your customers confidentiality if you're in Jaigunda? You can't."

Fred Smith isn't so sure that we can promise it in America, but "we do the best we can." And we try not to do evil.

Leslie Lowe has a final comment: "Part of the promise of globalization, and I hear it all the time, is that ultimately, the market economy is going to bring freedom to people. Well, I always say, 'Tell that to the enslaved Africans who toiled in capitalist America.' It doesn't necessarily bring freedom to anybody. And I think we're kind of in the situation we were with child labor in the nineteenth century. It's a race to the bottom unless somebody says, 'Stop.' And you get enough people along with you to agree to that. And that's why I think Betsy's idea of an industry standard would be the way to go." Fred Smith growls that it would stop economic growth to put on these restrictions.

Lowe returns, "Child labor is necessary for economic growth? We're in trouble."

Smith is still convinced that prosperity will make us free. "Wealth is healthier; wealth is cleaner; wealthier eventually leads to more freedom. We're not going to change the world tomorrow. But American corporations and corporations more generally start the process."

Lowe allows that "we're not in complete disagreement. What I'm just saying is that the American start to the freedom that is going to ultimately lift people in these countries has to be the kind of start that says, 'No, there is a floor here. There are certain things we will not do, notwithstanding the emerging market and the lure of dollars.'"

Would Nell, as a shareholder, favor turning over the blogger? "Um, as I said, they signed an agreement going in. Once they've made the decision to go in with Jaigunda and they signed agreements with all the Jaigundan customers saying that this was what they intended to do . . . I think that they must turn them over."

Betsy Atkins sums up. "Well, there's pain in any of these gray moral difficult decisions. And although you have set a standard and you've made a business decision that it was the right thing for your investors and your shareholders to enter a major market, that doesn't make it less painful when you're faced with dealing with some of the actual realities. But in the end, you have to swallow hard and weigh the good, the bad, the value that you're bringing to the actual country and the citizens of Jaigunda, the competitive global market, the hope that you can change and influence things with your colleagues, perhaps use the NGOs to help raise awareness and pressure." (A final affirmation for Krugman!) "I mean, it's not a perfect world. And it's painful when you're facing the fact that you're going to do harm to an individual's life." Tapper wants to know if this is the kind of decision that as a CEO would keep you up at night.

Atkins soberly agrees, "It would keep you up at night, but you'd have to make the decision."

### **3. SYNTHESIS AND DISCUSSION**

Should Casablanca send the asbestos-stripping work abroad? The problem with which we are faced has to do with the health and safety of the company's (indirect) employees overseas. Note the principles to which the panelists appeal in the course of their dialogue. Our duty to the workers is expressed deontologically: we ought not to cooperate in a business scheme that allows workers to endanger their health, or that employs underage workers, because it is morally wrong

to be part of such schemes. On the other hand, the reasons for staying with this plan are expressed teleologically, on utilitarian grounds: however bad off these workers may be, working for us, they are much better off than they would have been without us, for we are providing the only real employment for an impoverished people.

How do we resolve such disputes? In an active and well-informed democracy, such health issues are voted on by those we have elected to govern. Would you rather risk your future health for the sake of employment now, or would you rather have regulations in place that limit employment for the sake of safety? Note, the workers may vote for present employment, but in the light of experience, we the people, through our representatives, may decide that there are choices people ought not to be given—whether or not to inject heroin, for instance, or smoke crack cocaine. It's an odd thing to admit, in this our individualistic society, but progress and prosperity have often evolved from limiting the choices we allow competent adults to make, primarily through health and safety legislation, the exercise of the police power of the state.

Trade-offs abound in the field of product safety, and the conundrums confronting the makers of the MaxiMile are absolutely typical. The product is successful, the enormous investment is on the way to paying off, the investors are optimistic, the environmentalists are planning the next three projects, and now someone dies. Which is more important: to advance the technology and benefit millions (potentially billions, as China joins the automobile market) by reducing greenhouse gases and oil consumption, an advance that will be seriously slowed by some dumb "safety" glitch that may not even be the technology's fault; or to protect the consumers of this or any allied technology from the bugs of the first generation? It isn't clear to the panelists, nor would it be clear to any in the ethics profession. Ultimately it becomes a combination of their concern about the company's reputation and economic well-being—lawsuits are an added consideration, their obligation to the auto companies who are buying their device, to the customer driving the car, and finally their own ethical considerations.

You can never talk about just one thing, it has been said. What is the MaxiMile scenario all about? A lot of it has to do with the price of oil, one commodity that we cannot control because, relative to the world's supply, we control so little of it. But the oil connection is toxic. It has put our environment, our economy, our country at risk. Furthermore, American consumption of oil not only strengthens those noxious regimes that control the oil but also those terrorist groups receiving large amounts of money from these oil-rich Middle-Eastern nations. From the pump the money flows to the oil companies, to the nations of the Middle East, to the terrorists; the only sure way to fight terrorism, to improve our environment and economy is to cut back, way back, on our consumption of oil. The MaxiMile is a vital tool in the war against terrorism, as are all other attempts at conservation and the development of alternative sources of energy. It is not some widget, some hula hoop, that can be simply taken off the market if problems appear. This device has geopolitical

implications; we need it. This fact, and the political support it will engender, confounds the "product safety" discussion.

Should Wowie Info stay in Jaigunda? Again the compromise noted above: In terms of moral duties, moral standards, deontological reasoning, Wowie Info should proudly assert its identity as the bearer of the value of free speech and confidentiality, and should exit the country to make a point. From the consequentialist perspective, the good that Wowie Info, however compromised, can do in Jaigunda, far outweighs the hassles that the Jaigundan government can put in front of it. The balance and the outcomes are clear: as long as the company is really doing good in the country, it should stay—up exactly to that point where it ceases to be the company that it is. Ultimately, this is a burden that only the CEO of Wowie Info can bear; as Atkins pointed out at the very end, there are decisions that keep you awake at night, but you still have to make them in the morning.

#### QUESTIONS FOR YOUR REFLECTION

1. How do you set the priorities among the conflicting sets of principles at play in this discussion of economic globalization? To what extent should the interests of American citizens, especially American workers, trump economic considerations?
2. Are we really responsible for the health and welfare of the workers of Novastan? They have a government to protect them, don't they? As an "indirect" employer, what responsibility does Casablanca really have to "protect" them from their own negligence? Once Novastan has determined that it really wants the business (and it does), haven't we exhausted our duties?
3. Whose interests take priority in the MaxiMile scenario (or any similar one): Customers (past, present, future)? Investors? The public at large (consider the potential for fatal accident on the freeway)? Is the natural environment a stakeholder in any sense of the word?
4. We are responsible for getting the truth before the American electorate, so that it may make responsible decisions. In a country like Jaigunda, where the electorate does not make decisions, does the same obligation apply?

## 4. SUGGESTIONS FOR FURTHER READING

### Special Supplementary Text

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