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The Zealous Lawyer: Is Winning the Only Thing?

To make its research readily available to a broad audience, the Center for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Center for Philosophy and Public Policy*. Named after the abbreviation for “questions,” *QQ* summarizes and supplements Center books and working papers and features other selected work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Center or its sponsors.

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Famous football coaches have given us proverbs like “Winning’s not the best thing, it’s the only thing” and “Show me a good loser and I’ll show you a loser.” Sports fans are by and large not impressed by the putative distinction between winning and some other sense of “playing well” (as in the lame parental adage “It’s not whether you win or lose but how you play the game”). Playing the game better than the other team is precisely how you win and, more, the team that plays enough better than its opponents to score that extra point deserves to win. “May the better team win” is at some level a tautological wish universally granted, since winning can be thought of as defining the better team. Now, on any given occasion a generally excellent (i.e., winning) team may disgrace itself with sloppy, shoddy playing. But over time the best team will be the team that wins the most. Thus, Vince Lombardi and Woody Hayes have a point when they tell us that nothing else counts.

Lawyers within an adversary system of justice, such as ours, have been thoroughly schooled in the Lombardi-Hayes philosophy of competition. They are steeped in it in law school and held to its standards by their codes of professional obligation. For the cornerstone of the adversary system is the lawyer’s duty of zealous partisanship on behalf of his client. The ABA’s Code of Professional Responsibility dictates, “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.” Murray L. Schwartz, professor of law at UCLA, explains the lawyer’s zeal in this way:

"When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail." Prevail, as in *win*.

To ensure that the lawyer's zeal is undiluted by any personal moral scruples, our legal system also holds, in Schwartz's words, that "a lawyer is neither legally, professionally, nor morally responsible for the means used or the ends achieved" in his adversary representation of the client. Whatever the client's (arguably legal) ends, the lawyer must employ all (arguably legal) means to achieve them. He can't bribe the jury, just as the coach can't bribe the referees. But

We do not think that winning defines legal merit, the way that winning defines excellence in sports. We have an independent standard — imprecise though it may be — which allows us to ask whether the side that did win should have won.

the lawyer can, and on some accounts *should*, dazzle the jury with every dubious trick in a bulging bag of legal shenanigans, from humiliating truthful witnesses under the guise of cross-examination to unleashing a torrent of frivolous objections whenever his opponent tries to address the court. In our legal system, as in Monday night football, playing well is playing to win, and lawyers are not permitted to play any other way.

At least two things disturb us about this analogy between zealous legal advocacy and no-holds-barred athletic competition. First, we do not think that winning defines legal merit, the way that winning defines excellence in sports. We have an independent standard of legal merit and desert—imprecise though it may be—which allows us to ask whether the side that did win *should* have won. The client who *should* prevail is the client with truth and justice on her side, and it disturbs us that lawyers are supposed to defend with equal zeal both deserving and undeserving clients, as if the merits of the client's cause were irrelevant.

Second, legal battles are not games where everybody plays hard for two hours and then goes home to a "real life" unaffected by the results of the competition. People's lives—the lives of actual human beings—can be radically changed by what happens to them in courts of law. People don't usually wind up in court unless something of value to them is at stake. So it matters whether zealous partisanship by adversary attorneys is a good way of uncovering truth, defending legal rights, or upholding human dignity. It matters greatly.

Is zealous advocacy by lawyers on behalf of their clients a good way of serving these goals? What is zealous advocacy good for and what limits, if any, should be placed upon it? In what arenas does the lawyer's zeal serve legal justice? In what arenas is such zeal inappropriate or even destructive of the values our legal system is intended to protect and promote?

Criminal Justice

Most justifications of zealous advocacy center on the defense attorney's properly (we feel) heroic efforts on behalf of the criminal accused. In most criminal cases a lone individual faces an extremely serious charge brought by the impersonal and powerful state that carries with it severe and stigmatizing sanctions. The attorney's zeal may be all that stands between the defendant and a wrongful conviction that will exact irrevocable penalties: to lose one's liberty is to lose a part of one's life. Even where the defendant is guilty, the attorney's zeal may be the only check on the state's abuse of its massive powers in administering justice, and great power, as we all know, is subject to great abuse.

The vast majority of lawyers in our adversary system, however, are not involved in criminal defense, and the vast majority of those who seek legal services are not accused of any crime. Can a justification of zealous advocacy in criminal justice be extended to cover lawyerly zeal applied elsewhere in the legal system?

It seems not. David Luban, Research Associate at the Center for Philosophy and Public Policy, argues that "Criminal justice is a very special case in which the zealous advocate serves atypical social goals. . . . The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us. And so [zealous advocacy] is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government and we have political reasons for wanting this. . . . Criminal defense is an exceptional part of the legal system, one that aims at protection rather than justice."

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These atypical goals of criminal justice are embodied in certain unique features of the criminal trial that create an asymmetry between the two parties—the defense and the prosecution—not found anywhere else in American law. Numerous provisions are designed specifically to curtail the zeal of the prosecution, so that full-steam adversary advocacy is limited to one side. The state must appoint counsel, at its own expense, to assist its opponent in preparing a criminal defense; the defendant is presumed innocent until proved guilty; and the burden of proof placed on the prosecution is the heaviest one found in the law, proof beyond

a reasonable doubt. Moreover, public prosecutors are held to a standard of candor in dealing with their adversaries that is not mirrored in the duties of defense counsel. The prosecuting attorney is required to turn over to the defendant evidence that she has uncovered and does not intend to introduce; the defense has no comparable obligation.

Murray Schwartz concludes, "These functional and structural differences between criminal and civil trials and between the roles of the opposing advocates seriously undermine holding out the criminal defense lawyer as the archetype of the advocate within the adversary system. . . . What emerges from this analysis is the surprising conclusion that the model of the adversary system is significantly different from the very proceeding most often referred to as its prime illustration: criminal trials." A defense of zealous advocacy in other arenas of the law, then, can draw little support from its defense in the very special arena of criminal justice.

Civil Litigation

In civil cases, where one private party brings suit against another, there is no systematic asymmetry in wealth and power between the two parties that would require rules curbing the zeal of one side for the sake

of the other. Furthermore, what one side gains as the outcome of a civil contest the other side loses—every dollar awarded to A comes right out of B's pocket. Thus lawyers for both sides, it seems, should be equally zealous. Does this mean that both lawyers should press their case with zeal unabated? To answer this question, we, again, must look at the ends this area of law is intended to serve.

Two of the ends of civil law, certainly, are to uncover the truth and to vindicate legal rights. These are of course not unrelated. As Schwartz points out, "The judicial answer to the question, 'What should now happen?' depends on and is often resolved entirely by the answer to the question, 'What did happen?'" So our question becomes: Is zealous partisanship by two adversary attorneys a good way of achieving truth and justice?

Defenders of zealous advocacy argue that truth is best sought by a wholehearted dialectic of assertion and refutation: if each side attempts to prove its case as energetically as possible, with the other side trying as energetically as possible to assault the steps of the proof, it is more likely that all of the aspects of the situation will be uncovered than in a less adversarial investigation.

However plausible such a theory may be, Luban observes that its empirical validity is, in fact, impossi-



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The New Yorker Magazine, Inc.

"Perhaps you gentlemen would help me assure Mr. Elliot N. Talbert III that although this may not exactly seem to be a 'noble' way of doing business, it is nevertheless a perfectly legal way of doing business."

ble to assess. "One does not, after a trial is over, find the parties coming forth to make a clean breast of it and enlighten the world as to what *really* happened. A trial is not a quiz show with the right answer waiting in a sealed envelope." The arguments for—and against—zealous advocacy as a means to finding out the truth are merely "untested speculations from the armchair."

But Luban doubts whether zealous advocates themselves seriously believe their own justificatory theory. "No trial lawyer believes that the best way to get at the truth is through the clash of opposing points of view. If a lawyer did believe this, the logical way to prepare a case for trial would be to hire two investigators, one taking one side of every issue and one taking the other." Indeed, the rival investigators should be urged to prevent the introduction of evidence unfavorable to their side of the issue, minimize the importance of any unfavorable facts that do come to light, and turn all their rhetorical skill to swaying and preying upon the trial lawyer's sympathies. "That no lawyer would dream of such a crazy procedure should tip us off" that something is amiss with zealous partisanship as an investigative technique.

"Every skill an advocate is taught is bent to winning cases no matter where the legal right lies. If the opponent manages to counter a lawyer's move with a better one, this has precisely nothing to do with legal rights."

Nor have we any reason to think that the clash of two zealous adversaries is the best way to guarantee that a client's legal rights are protected. "Every skill an advocate is taught is bent to winning cases no matter where the legal right lies," Luban reminds us. "If the opponent manages to counter a lawyer's move with a better one, this has precisely nothing to do with legal rights." The wordplay of two fast-talking modern attorneys is hardly more relevant to the establishment of legal rights, on Luban's view, than the swordplay of two fast-stepping medieval duellers sent out to settle suits on behalf of their employers. Luban concludes, "We have no reason at all to believe that when two overkillers slug it out the better case, rather than the better lawyer, wins."

Murray Schwartz recommends that the rules governing the scope and limits of adversary advocacy be revised to circumscribe lawyerly zeal by a greater commitment to finding out the truth, since any determination of legal right must be grounded in the facts of the case. A good start in this direction, he suggests, would be to adopt rules that "would require a lawyer to report to the court and opposing counsel the existence of rele-

vant evidence or witnesses the lawyer does not intend to offer; prevent or, when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any material omissions; and question witnesses with the purpose and design to elicit the whole truth." Such revised rules, he believes, would serve the ends of civil justice better than current exhortations to pursue the client's interest to the farthest legal limits.

Who Is the Client?

Unbridled zeal appears even less justified when we look beyond litigation to other areas of legal practice. In business law, for example, the lawyer's duty of undivided loyalty to the client grows not out of any crusade for truth and justice, but from the less lofty fear that employees may divert some of their zeal to benefitting themselves at the employer's expense. The worry motivating the duty is that agents will compete with their principals, thus defeating the purpose of agency. But the agent competing on behalf of the principal seems bound to keep his competitive zeal within the recognized moral constraints that govern economic competition generally in our society.

In administrative law and public interest law, the problem is not that the lawyer may compete with the client, but that it isn't clear who exactly the client is supposed to be. Attorney Daniel Schwartz, observing the administrative law bar, points out that you can't advance the client's cause until you know who the client is. "For the government attorney, this question may receive a variety of responses. Various candidates for the 'client' role include the agency employing the attorney and/or its administrators, the federal government, or the 'public interest.' . . . In many cases, the lawyer is the client; that is, he or she is at least an initial decision-maker concerning what kind of cases to bring and what issues to raise."

Even lawyers practicing before administrative agencies on behalf of private-sector clients face the same problems to a large extent. Although the client may be clearly defined, the client's interests often are not. Schwartz explains that the "client's perception of its interests may be shaped to a more-than-usual extent by the expert advice of its 'specialist' law firm, whose expertise consists in large part in its ability to 'read' the regulatory climate within the agencies." Thus, "administrative lawyers are not constrained by independent clients; [and] clients are not constrained by the judgment of independent lawyers." Zeal in administrative proceedings is therefore subject to few moderating influences.

Public interest lawyers, who bring litigation aimed at righting institutional wrongs and making far-reaching changes in the law, are also unable to maintain a strictly adversarial role. Like the administrative lawyer, the public interest lawyer cannot take her clients' interests as given and proceed straightforward-

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"Perhaps 'unethical' was the wrong word; I meant sort of complex — legally complex . . ."

ly to further them with zeal. Furthermore, the interests of the parties, once defined, may conflict with one another, and it falls to the lawyer to decide which of the conflicting interests should be represented. Thus, philosopher Andreas Eshete argues, "the [public interest] lawyer cannot sidestep a deliberation on the merits of the interests at stake in the specific institutional wrong he aims to correct."

The best remedy for righting the institutional wrong of racial discrimination in schools, for example, is a matter of deep and divisive controversy, even among its victims. Parents of minority children in some districts would prefer to see the schools improved, rather than integrated—their goal is a decent education for their children, and this may be hindered rather than furthered by disruptive and bitterly contested busing programs. But the interests of future generations of schoolchildren, and the future of American society generally, may not be best served by perpetuating racially divided educational institutions. "Hence, in deciding what institutional reform to advocate," Eshete concludes, "the lawyer does not have ready-made interests to champion. And a responsible lawyer must look beyond the conflicting interests to the underlying public values of the legal system."

Beyond Adversariness

We have been asking what zealous advocacy is good for; the answer seems to be that it is good for criminal defense, but that in civil law, business law, administrative law, and public interest law zeal must be tempered by a respect for truth and justice and adversariness must often give way to a thoughtful and sensitive attempt to explore large and difficult questions about where the public interest lies.

Murray Schwartz and Daniel Schwartz both criticize current codes of professional responsibility for holding up adversarial zeal as the dominant standard of lawyerly excellence. They recommend amending the code to show a clearer recognition of the limits of such

zeal. But Eshete asks whether lawyers trained and drilled in adversarial techniques and attitudes will be able to move beyond these to meet the broader demands of the lawyer's role. Education, professional training, and years of practice, on Eshete's view, "must leave their trace on a person"; the adversarial lawyer develops an adversarial character that he cannot shed at will when placed in situations where aggressiveness and combativeness are no longer appropriate.

Robert Condlin, Associate Professor of Law at the University of Maryland Law School, argues that law schools should be conducting a rigorous reexamination of their educational practices. Adversarial skills certainly have their place in law practice, and so students do need to be trained in techniques that will allow them to go out and win cases without agonizing over whether every case should be won. They need to learn how to manipulate clients, witnesses, and decision-makers, how to think on their feet, how to get their clients what they want. But Condlin worries that in law schools today these behaviors are "learned unself-consciously, as a set of disembodied means, not as part of a larger moral system that includes constraints on the use of such means. . . . The problem is one of teaching habits with limited and specific uses as if they were appropriate responses to all legal practice relationships."

Law schools do not and cannot simply teach students law. They inescapably teach their students as well what kind of lawyer they should become, and what kind of person. And it seems that the kind of lawyer they should *not* become is one who wins any case at any cost. For when lawyers like that win, the rest of us lose.

The views of Murray Schwartz, David Luban, Daniel Schwartz, Andreas Eshete, and Robert Condlin are drawn from their essays in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, edited by David Luban, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Allanheld, 1984). To order The Good Lawyer, see page 15.

Tobacco Smoke: The Double Standard

It has long been known that high levels of smoke from factory chimneys could cause illness and death during air pollution episodes and that elevated levels of smoke were epidemiologically implicated in chronic respiratory illness. For this reason, laws such as the Clean Air Act were passed in order to protect human health from the effects of air pollution; Section 112 of the Clean Air Act calls for regulation of airborne pollutants that may reasonably be anticipated to result in "an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Nowhere in the Act is it specified that the pollutant must be an outdoor one. But in the establishment of the National Ambient Air Quality Standards it was explicitly assumed that air external to buildings was the only problem, and that if this could be cleaned up, public health would be protected from the ravages of air pollution.

This assumption is false. The smoke pollution inhaled indirectly from cigarettes, pipes, and cigars indoors is not only chemically related to the smoke from factory chimneys, but routinely occurs at far higher levels indoors than does factory smoke or automobile exhaust outdoors. Controlled experiments and field studies have shown that in buildings where tobacco is smoked, substantial air pollution burdens are inflicted upon nonsmokers, far in excess of those encountered in smoke-free indoor environments, outdoors, or in vehicles on busy commuter highways. Daily exposure to tobacco smoke, it has been found, can cause air pollution levels corresponding to violations of the National Ambient Air Quality Standard for Total Suspended Particulates for exposed office workers (at typical building occupancies and ventilation rates) and amount to the single most important source of exposure of the population to this harmful kind of air pollution.

For many years reports of the Surgeon General have indicted mainstream tobacco smoke as a cause of cancers in many organs; bioassays show that sidestream smoke is more carcinogenic than mainstream smoke. Therefore, there is good reason to believe that nonsmokers might be exposed to the risk of smokers' diseases from routinely breathing indoor air pollution from tobacco smoke. In a pioneering paper published in 1980 in the prestigious *New England Journal of Medicine*, a physiologist and a physician at the University of California at San Diego concluded, after ten years of research on more than 2000 persons,

that long-term exposure to indoor tobacco smoke in the workplace was deleterious to the healthy normal nonsmoker and significantly reduced the functioning of small airways to the same extent as smoking one to ten cigarettes a day! This study was recently confirmed by workers in France.

Nearly a year later, the chief epidemiologist of the National Cancer Center Research Institute in Tokyo, Dr. Takeshi Hirayama, published an electrifying study on lung cancer mortality in 142,857 women, which reported that nonsmoking women with smoking husbands developed lung cancer at a rate nearly double that of women whose husbands did not smoke. These findings were corroborated by a similar study of several hundred Greek women. Research by Lawrence Garfinkel of the American Cancer Society, however, did not uncover a statistically significant correlation between lung cancer in nonsmoking women and their husbands' smoking habits; but Garfinkel's study was not originally designed to detect effects of passive smoking, and his analysis did not control for confounding variables, particularly exposure in the workplace. Recently three more studies of lung cancer and passive smoking have appeared in the United States, Germany, and Hong Kong. The former two are positive; the latter, negative. Thus the balance of the evidence, by a ratio of four to two, indicates that ambient tobacco smoke, like ambient factory emissions, increases the risk of cancer and respiratory disease.

Criteria for Regulation

The provisional policies developed by EPA for identifying, assessing, and regulating airborne substances that may pose a risk of cancer require two basic questions to be answered: What is the probability that the substance is a human carcinogen? What is the extent of human exposure? The scientific evidence cited above now indicts sidestream tobacco smoke as causing cancer in nonsmokers; since the average person spends more than 90 percent of the day indoors, and since one out of three adults smokes, many nonsmokers spend significant fractions of the day in an atmosphere contaminated by tobacco smoke. Ambient tobacco smoke might therefore be considered a prime candidate for listing as a hazardous air pollutant under the Clean Air Act, based solely on the criteria of carcinogenicity and exposure.

Once a hazardous air pollutant has been identified as an airborne carcinogen, the regulatory process calls



for the listed pollutant to undergo quantitative risk assessment. While cancer risk estimation is an imprecise endeavor involving many uncertainties, such estimation can often provide a rough measure of the magnitude of the carcinogenic risk of the substance.

A rough estimate of the magnitude of the risk from passive smoking can be obtained from Hirayama's 1981 study, which found that passive smoking by nonsmoking Japanese women whose husbands smoked on average increased their lung cancer death rate by about 8 cases per 100,000 population per year in the age group at risk of lung cancer. This comes out to an average of 3,700 annual lung cancer deaths per million U.S. residents, taken over all age groups, including those not at risk.

How does such a risk compare to other risks faced by the U.S. population? The average risk of death by tornado, for example, is 44 per million; by pregnancy, childbirth, and abortion, 220 per million; by firearm accidents, 1,100 per million; by drowning, 3,600 per million; by accidental falls, 8,500 per million; by homicide, 10,600 per million; and by motor vehicle accidents, 27,000 per million. This comparison indicates that the estimated risk of passive smoking is considerably in excess of many other involuntary risks and appears to be far from trivial.

Is the level of risk from passive smoking acceptable? Fatal risks greater than 10^{-2} (1 in a 100 chance of dying) are generally unacceptable to society; the risks of death from cancer and heart disease are in this range, and society maintains extremely expensive preventive and therapeutic medical institutions to mitigate them. Risks below 10^{-11} (1 in a hundred billion chance of dying) are below the threshold of concern. Risks below 10^{-6} (1 in a million) are often considered acceptable

by most individuals and tend to be below the societal threshold of risk aversion, with the exception of certain catastrophic risks that have generated public fear. The Environmental Protection Agency has regarded cancer risks of the order of 10^{-5} to 10^{-6} per year as an approximate guideline for the regulation of carcinogenic hazardous air pollutants; the Nuclear Regulatory Commission has proposed guidelines for acceptable cancer mortality risks from reactor accidents of the order of 10^{-6} per year.

The risk from passive smoking is in the range of 10^{-4} , or a 1 in 10,000 chance of death. Judged by these guidelines of societal acceptability for carcinogenic risks, an involuntary lung cancer risk of nearly 10^{-4} per year from passive smoking would appear to warrant social concern.

Society is sometimes willing to accept certain levels of risk greater than 10^{-6} because the costs of further reduction outweigh the benefits. This is typical for the air pollution risks associated with many industrial activities, which are perceived to be essential in some degree to society. But when the risks of passive smoking are balanced against the costs of controlling them, regulation seems clearly called for. First, the risks of passive smoking are evident; second, nonsmokers derive no evident benefit from others' smoke, and what benefits smokers derive from smoking are hardly comparable to the benefits society gains from retaining certain polluting industries; finally, the costs of reducing the risks to nonsmokers are not very burdensome.

Solutions

In public areas such as restaurants, measurements indicate that simply providing separate sections for

smokers and nonsmokers can halve the risk to nonsmokers at very small social expense. This solution can be considered "reasonably achievable control technology," although it does not eliminate the risk, as would a complete ban. In the workplace, the most promising solution is to use the "best available control technology": complete bans on smoking on the premises. As a number of studies have shown, this solution not only protects nonsmokers but results in dollar savings to employers as well, as the higher sick-leave and housekeeping costs caused by smokers disappear.

If ambient tobacco smoke were emitted from a polluting industry into the outdoor air, it would be judged to be both a toxic and a carcinogenic pollutant, subject to national hazardous air pollutant emission controls.

An increasing number of industries are successfully trying this approach. A survey of 3000 U.S. corporations in 1979 reported that 42 percent of blue-collar companies surveyed permitted smoking only in designated areas, and another 28 percent prohibited smoking completely. The corresponding percentages for white-collar companies were lower, 15 percent and 11 percent respectively. Thus 70 percent of the blue-collar companies and 26 percent of the white-collar companies have found restrictive control measures to be a practical solution. Recently, a city ordinance was passed in San Francisco requiring employers to make reasonable provision for clean air in the workplace, either by banning smoking altogether, or by segregating smokers and nonsmokers. A key provision mandates that if nonsmokers are dissatisfied by the seating arrangements, the employer has to ban smoking completely. A similar but stronger law was passed in Palo Alto, and similar laws are being considered in Los Angeles and the District of Columbia.

Conclusion

To sum up: if ambient tobacco smoke were emitted from a polluting industry into the outdoor air, it would be judged to be both a toxic and a carcinogenic pollutant, subject to national hazardous air pollutant emission controls. Thus a double standard is in existence that judges indoor air pollution from tobacco smoke differently from outdoor air pollution from diesel buses or coke ovens. Given the similarities of indoor air pollution from tobacco smoke to outdoor air pollution from other combustion sources, for which society has taken risk-averse action in the interest of public health, should smokers have an untrammelled right to pollute an indoor space such as a public building, workplace, or residence without the consent of the nonsmokers who must breathe the pollution?

At the least, if society yields smokers the right to smoke in public indoor spaces, including workplaces, it should require vastly increased ventilation or air cleaning measures in such buildings, using the same logic used to limit air pollution from factory smokestacks and automobiles. Just as it controls carcinogenic air pollutants from chemical plants, it should require self-extinguishing cigarettes, control of cigarette additives, and limitation on sidestream tar and nicotine content. The time has come to treat ambient tobacco smoke as the air pollutant it is and to subject the tobacco industry to the same sort of controls that *all* other polluting industry must bear.

It is increasingly difficult to argue that smokers have the moral right to cause harm in the form of physical irritation or carcinogenic risk to nonsmokers. Smokers who want to make this argument are invited to consider the following proposition: suppose that individual nonsmokers, in defense of their asserted right to breathe smoke-free indoor air, were to release a gas into indoor spaces where they were forced to breathe tobacco smoke. Suppose further that when sucked through the burning cone of a cigarette, pipe, or cigar this gas decomposed into irritating byproducts that caused moderate to intense discomfort to the smoker, much the way ambient tobacco smoke affects the nonsmoker. Would smokers feel that they had a right to gas-free air?

The time has come to treat ambient tobacco smoke as the air pollutant it is and to subject the tobacco industry to the same sort of controls that all other polluting industry must bear.

Smokers are on the same moral ground as were spit-terers around the turn of the century when public health laws restricted spitting in public buildings. The nonsmokers' pursuit of healthful breathing air does not infringe upon the health of smokers (in fact, it may improve it to the extent that it forces them to cut down or quit the habit). The smokers' pollution does infringe upon the health of the nonsmokers. As the awareness of passive smoking risks grows, smokers will be increasingly, and accurately, viewed as playing Russian Roulette with non-smokers' health, a practice that can only invite increasing confrontation and social dissension.

—James Repace

This article is substantially condensed and adapted from "Risks of Passive Smoking," by James Repace, Center for Philosophy and Public Policy Working Paper RC-4 (College Park, Md.: Center for Philosophy and Public Policy, 1983), written for a Center research project on risk and consent funded by the National Science Foundation.

Deregulating the Electronic Media

One is bound to have mixed feelings about the role of the mass media in our society. On the one hand, a strong and independent press is crucial to a well-functioning democratic society; it is a cornerstone of the American political system. The press provides access to information citizens need to make informed choices about the formation of public policy; it allows them to influence and participate in the decision-making process. On the other hand, the power of modern mass communications—to persuade or propagandize, to grant or deny access to the ear of America—makes them potentially dangerous and gives us some reason to fear them. We are led to conclude that, at the same time as we need protections *for* the press, in the late twentieth century we may need protections *from* them as well.

No one doubts that radio and television count as “press” and that they are forums for speech and expression. But the electronic media have never enjoyed the extensive first amendment protection afforded newspapers and other print media. Radio and television stations are licensed at the discretion of the Federal Communications Commission; and they are subject to a variety of regulations, including equal time rules and the Fairness Doctrine, which requires that they devote a reasonable amount of broadcast time to controversial issues of importance to the public, and that they offer “reasonable opportunity for opposing viewpoints.” In addition, the “Seven Station” rule forbids a company from owning more than a certain number of television or radio stations. No such requirements fall on newspapers or other print media, and any suggestion that they should is taken by many people as inconsistent with fundamental first amendment principles.

What explains the deeply entrenched asymmetry between the government’s treatment of print and broadcast media? The standard explanation is that opportunities for broadcasting are—or at least were in the years when communications policy was being formulated—scarce in a way that opportunities for expression through print are not. The electromagnetic spectrum is limited not only in the sense that there are more who wish to use it than there is space, but also because the total absence of regulation must result in electromagnetic chaos, so that no one can succeed in communicating. And so, it seems, just as the chairperson of a town meeting can, consistent with first amendment freedoms, set some limits on participants’ speech, government too may and indeed must make decisions about who can broadcast, and when and where, on the spectrum.

In the 1980s, however, new communications technology—cable television, satellite broadcasting, videodiscs, and so on—make opportunities for electronic broadcasting less scarce and less expensive. Not only can cable bring a hundred channels to the ordinary household, but increasingly that same household is served by only one newspaper. The printed word, it seems, is scarcer nowadays than the broadcast word. Calls for the deregulation of broadcasting have accordingly become common in the last few years.

Yet the inference that the electronic media are ripe for deregulation proceeds too quickly. From the premise that opportunities for expression in the electronic media are no more scarce than in print media, we may conclude that electronic and print media ought to be treated alike. But should we abandon regulation for broadcasting, or impose it on newspapers? The symmetry argument does not by itself tell us.

Scarcity aside, there may be other differences between print and electronic media that provide grounds for different treatment. Even though cable television can easily provide many channels, nevertheless the cable operator must be granted, by a municipality or other local government, the privilege of laying cable through public property. That alone seems to have implications for the requirements it is legitimate to impose on cable operators. Cable companies necessarily depend on public decisions and on the public’s granting of privileges; newspapers do not. It is important to remember also that the cable operator owns the cable; despite the multitude of channels, without regulation it is entirely his decision what goes over the wire. The mere existence of a hundred channels does not by itself ensure either variety or quality.

Another important question relevant to mass media regulatory policy is whether there are important differences in the “products” of the electronic and print media. Both, of course, produce news (among other things), but it is obvious that they do this differently. Perhaps the nature of the news products of television and newspapers has a bearing on the regulations appropriate to each.

Making and Taking the News

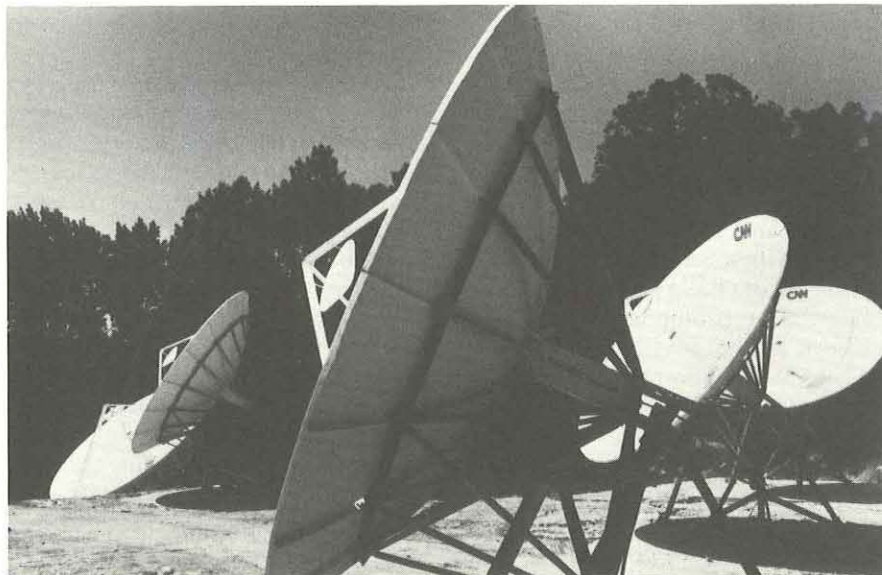
In 1984 (written in 1948, during the infancy of television), George Orwell created a powerful emblem of the future: the telescreen. The telescreen existed in every Party member’s house (and everywhere else a Party member might go), and it enabled Big Brother to watch you. People sometimes compare today’s real-life, nearly omnipresent television with Orwell’s telescreen. Yet

such comparisons seem to misfire. That is partly because there is no Big Brother. But it is also for a less happy reason. A lesson of modern communications technology may be that Big Brother doesn't *have* to watch us, as long as we are watching him.

We have reason to be concerned about the economic and political power of the mass media. But what is perhaps more disturbing is their ability to influence public opinion—if they do not tell us what to think, one writer has said, they at least tell us what to think *about*. The relevant questions here are questions of human psychology. Does exposure to television affect people differently from exposure to print, thereby justifying the different treatment of print and electronic media? Widespread concern about this problem seems

ferently on television and newspapers. Even leaving aside considerations of "telegenicity," which clearly affect what goes on television, the severe constraints of time and space under which television operates must make its reporting more partial than what is possible in a newspaper. Of course, all reporting, in every medium, is a matter of selection and adaptation from the indefinitely many happenings in the world that might on some view be considered important. Indeed, this realization might be said to mark the beginning of the end of the naive belief that the press can bring us "all the news that's fit," and that there is a way that is, in Walter Cronkite's phrase, "the way it is." To what extent is this process of selection and adaptation influenced by the nature of reporting itself?

Photo credit Cable News Network



to date only from the age of television, suggesting that electronic media have greater manipulative power. Certainly the sheer pervasiveness of television—compared with newspapers—in most Americans' lives is cause for concern. But the issues are complex.

On the one hand, seeing violence on television has an immediacy print cannot achieve. Some people attribute the strength of the Vietnam anti-war movement to the nightly exposure of the American public to scenes of war. Yet exposure to violence may also have the opposite effect; it almost inevitably seems stylized, and we get used to it. Does television make things seem more real, or less?

Another difference between print and electronic media that has been thought relevant to their different treatment is the extent to which the television audience is captive. The viewer can, of course, turn the machine off; but if he doesn't, he is more subject to what passes before him than the reader of a newspaper, who must actively and continually pursue information.

Finally, limitations of time and space impinge dif-

To what extent is it influenced by the nature of a given medium? How we answer these questions will influence our view of the regulations appropriate to different media.

Freedom of the Press

It's interesting to note that both advocates and opponents of deregulation of the electronic media invoke the first amendment and the ideal of a free press. Advocates of deregulation argue that the original rationale for government control, scarcity, no longer holds, and so electronic media should get the same extensive first amendment protection as newspapers. They understand freedom of the press to mean that government has no business interfering with one's freedom to speak or publish. Freedom of the press is the press's freedom from interference.

But those who defend regulation of the electronic media also rely on the ideal of a free press. They focus on a different aspect of that ideal: not the absence of government interference, but the multiplication of

voices, the ability of as many as possible to express their opinions and have those opinions heard by as wide an audience as possible. The fulfillment of this ideal might sometimes require not governmental restraint, but governmental insistence on someone's right to speak and be heard.

How can we decide between these two strands in the doctrine of freedom of the press? Is there a genuine conflict between them? Perhaps a better understanding of the justification of a free press will clarify what freedom of the press is, and what it requires.

A standard justification for a free press appeals to the metaphor of "the marketplace of ideas." In the unfettered competition of conflicting views, it is said, truth will more likely emerge victorious. In a democratic society, the best government is one based on informed choices; the electorate must therefore have access to information, and freedom of the press is the best way to ensure it. This argument justifies freedom of the press in terms of its assumed beneficial effects: a free press is a means to certain desirable ends.

Although such reasoning is perfectly familiar in this context, it seems at odds with another standard justification of constitutional protections: that freedom of speech or expression is a personal *right*. The significance of the difference seems clear: if the justification for a free press is in terms of public benefits, then if it is more beneficial to society to regulate (or deregulate), so be it; if the justification is in terms of rights, then our policies will have to reflect the ideal of freedom of the press that best fulfills these rights. We need, then, to look more closely at what these rights are.

Why, one might ask, should people have a right to self-expression? There seem to be two reasons. One is that a person's beliefs are integral to him; to refuse to allow a person to express those beliefs is to cut him off from himself and others and to deny his political worth. But this idea would probably not convince us of a right of self-expression if we did not at the same time believe that in some sense speech is innocuous. If words alone *could* break your bones, rights of free speech would be problematic; we have no patience with someone who says *he* expresses *himself* by cutting off other people's ears. But this seems paradoxical: freedom of speech and press are rooted in the importance of words, but also in their harmlessness.

So far we have been focusing on the rights of speakers to express themselves, rather than the rights of audiences or of "society" to have available a variety of voices and opinions. Analysts usually assume that public benefit justifications focus on audiences or society at large; justifications in terms of rights focus on speakers.

This assumption is challenged in the claim, heard increasingly often, that "the public has a right to know." When stated in this bald and unqualified way, it seems naive and implausible to think the public has any such right. There are personal and private matters in which it seems the public has no business sticking its nose.

Certainly the public cannot have a right to know everything (whatever that would mean). Perhaps, though, it has the right to know the sorts of things that are relevant to the proper and effective functioning of a democratic society. Now, if the public has a right to know something, then someone has an obligation to tell it, or at least has an obligation not to stand in the way of its being told. The latter seems the more plausible formulation in the case of the public's right to know.

Isn't it likely, however, that something stronger is at work than the public's *right* to know or hear? Doesn't the public in a democratic society sometimes have an *obligation* to know or hear minority viewpoints or nonstandard interpretations whether it likes it or not? While a right to express oneself would not by itself imply a right of access to a public forum, like a newspaper or television station, a public right—not to mention an obligation—to hear minority viewpoints and nonstandard interpretations might imply such a right of access.

The primary argument against such rights of access to the mass media seems to be that implementing them requires government intervention, and that this is itself an infringement of freedom of the press. The model

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of government interference on which this argument relies is censorship. The wrongness of censorship can be argued on several grounds: it deprives a person of the right of self-expression; it deprives the public of important information or opinions; it undermines the press's watchdog function. But it is not clear why in principle these arguments should stand in the way of the government's regulating the press only to the extent of ensuring that more voices and opinions are heard.

The founding fathers framed the first amendment before the advent of the modern newspaper; today newspapers are often relegated to the status of antiques. To decide the constitutional, political, economic, and moral issues raised by the new communications technology we will have to look at freedom of the press in correspondingly new ways; we will have to answer questions the founders would not have been able even to ask.

—Judith Lichtenberg

This article is drawn from "Voices of America: News, the Mass Media, and Democratic Values," by Judith Lichtenberg, Research Associate at the Center for Philosophy and Public Policy.

Theology and Public Policy: An Interview with Rev. J. Bryan Hehir

In previous issues QQ has examined several aspects of the enterprise of combining philosophy and public policy. (See "Teaching Philosophy and Public Policy," Spring 1982; "Polymaking Philosophers," Winter 1983; and "The Public Life of the Humanities," Spring 1983.) In this issue we look at the parallel project of combining theology and public policy, in an interview with one of its most successful practitioners.

Rev. J. Bryan Hehir, a Jesuit priest who holds a Th.D. in Applied Theology from Harvard Divinity School, is the Director of the Office of International Justice and Peace of the U.S. Catholic Conference, where he is actively involved

in helping to formulate the church's stance on such current policy issues as human rights in U.S. foreign policy, world hunger, and the nuclear arms race. Recently he was instrumental in drafting the U.S. Catholic Bishops' controversial and influential Pastoral Letter on U.S. policies of nuclear deterrence. Father Hehir also teaches a weekly seminar at St. John's Seminary in Brighton, Massachusetts, in addition to serving as an assistant priest in St. Anthony's Parish in Falls Church, Virginia. In what follows, Father Hehir talks to QQ about his work synthesizing theology and public policy, its intellectual challenges, and its personal satisfactions.

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QQ: Throughout your career you've combined what might seem to be the two very different fields of theology and public policy. What are some of the challenges you've found in bringing those two different arenas together in your work?

BH: Well, our first task is to understand the moral thrust of the Catholic tradition and so we have to make sure that we have a handle on both what the tradition has been and what its developing trends are today. Secondly, doing this as part of the National Conference of Catholic Bishops we take a framework that belongs to the Universal Church and then have to make it applicable to the situation in the United States. So that on the one hand you're looking at the tradition and on the second hand you are trying to make that tradition live theologically and philosophically, and then, thirdly, you relate it to the public policy debate in the United States. It's an ongoing task of taking major themes from the philosophical and theological tradition and looking at how those themes intersect with given issues in the American public policy debate and then trying to bring those themes to bear upon the shape of the public debate in order, hopefully, to illuminate moral dimensions of public policy choices. That's the kind of thing we do.

QQ: Do you find that studying the particular policy issues also sheds light back on the tradition?

BH: It's a dialectical kind of process. We think the moral tradition, as it is developed, has a way of illuminating the public discussion; it is also true that

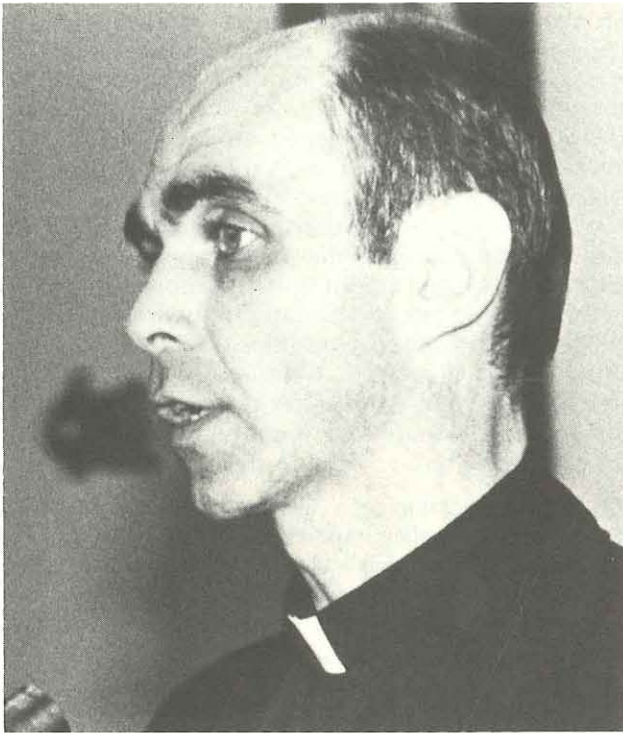
there will always be new questions or at least new forms of questions coming up and they in turn stretch the tradition.

There is no better example of that than deterrence. The deterrence question doesn't fit easily within anybody's moral framework. The deterrence argument in a sense breaks open what has been the classical linkage between strategy and politics. The argument has always been that strategy and the actual use of force is an extension of politics; well, that presumed that force could be used within a reasonable, rational, and moral framework. The nuclear age questioned in a radical way the continuum between war and politics, in the sense that you are faced with a weapon or weapons whose very nature threatened the rational structure of politics. So rather than war being an extension of politics, war became a threat to the whole set of political values that you are trying to defend. Bernard Brody said in 1946, "Until now it has been the fashion of nations to raise armies so that they can be used. In the nuclear age we will raise armies so that they will never be used." That's like a transvaluation of values.

Well, then, what do you do with the weapons? We have them, we threaten to use them, and we don't want to use them. What kind of moral problem is that?—particularly when what you're threatening to use may, in fact, be unusable within a moral framework. That's a case that really tests the principle.

QQ: Do you feel that some of these paradoxes of deterrence also raise some doubts about just war doc-

Photo credit U.S. Catholic Conference



Rev. J. Bryan Hehir

trine? For example, the cornerstone of Catholic just war theory is that one should not harm the innocent. But if you have a deterrence strategy that rules out the targeting of missiles against civilian populations you are left with a counterforce strategy that some people feel actually makes fighting a nuclear war more likely. By holding fast to the principle of not harming the innocent you may end up with a more deadly kind of strategy than you would have had otherwise.

BH: I think what happens is that there is really no good answer to deterrence. I mean, no good answer in the sense that it's totally coherent, it solves all the relevant questions, and is still an effective theory of deterrence. Everybody's theory in a sense breaks down at some point and so the political paradox becomes a moral paradox also, and that's always the way we've talked about it here. And indeed still do in the Pastoral Letter. The Letter's judgment on deterrence is what it calls strictly conditioned moral acceptance, and so it is acceptance rather than condemnation, but the "strictly conditioned" means two things: one, that part of the idea of the legitimization of deterrence is tied to the idea that it gives you a framework which you are to work out of. And, second, if the real moral function of deterrence is that it prevents the use of these weapons, then in fact one ought to shape the character of the deterrent in such a way that it makes use less likely. Strictly conditioned moral acceptance does not mean that any deterrence theory is acceptable. Specifically, the deterrence theory that is aimed at cities as its primary focus is not acceptable.

QQ: Even if it seems more successful?

BH: Even if it seems more successful doesn't mean it's right. The principle that governs our position that you can never directly attack civilian centers is exactly the same principle that we use on abortion—in both instances, it says direct attack on innocent life is always wrong.

QQ: How would you respond to the claim that in targeting the weapons at civilians we don't really intend to harm them at all; we're threatening to harm them only to reduce the chance of having to do the thing we're threatening?

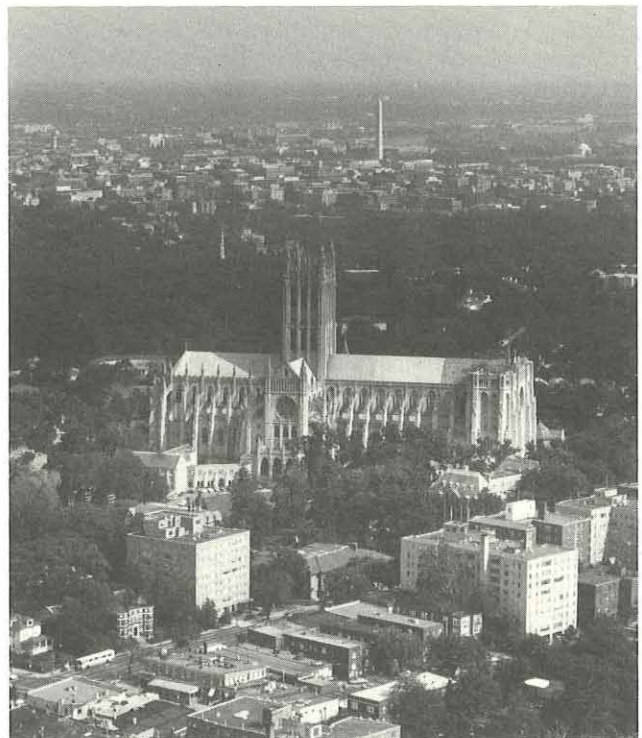
BH: Well, you find out what you do intend by finding out what your targeting doctrine is. Your intention has something to do with how you are structured for action.

QQ: The Pastoral Letter generated a good deal of controversy when it came out last year, both about American deterrence policy and about what role the church should play in influencing public policy in a secular society. Could you say something more about this?

BH: I think essentially the way you answer that question is on two levels. The one is the "in principle," what I would call the constitutional, answer; the other is the question of the style in which one participates in the public debate.

At the level of what in principle is the legitimate role for the churches or for religious bodies in the United

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Washington National Cathedral

States, I think it's pretty straightforward. The political meaning of the doctrine of the separation of church and state which is embodied in the first amendment is that religious organizations as religious should expect neither favoritism nor discrimination in the exercise of their civic responsibilities. I think that's an entirely acceptable principle and we ought to build on it.

The second thing to say is that it is central to our political tradition to distinguish the role of the state from the larger reality of the society, so to say that the church should be separate from the state should not be translated into saying that the church should be separate from the society. That's something I don't think any church can accept because it reduces the role of religion to a purely privatized function. So I agree with the separation of church and state; I don't agree with the separation of the church from the society.

The proper role of the churches in the American public policy process is that we are to participate in the public discussions just as any other voluntary association is, expecting neither favoritism nor discrimination, and presumably bring to bear upon the public discussion our religious and moral insights.

The third point is the legitimate role of the religious organizations in a society. And once again I would draw upon our own political tradition: central to a democratic political tradition is the idea of voluntary associations. In the American constitutional framework, religious organizations are precisely voluntary associations. And so the proper role of the churches in the American public policy process is that we are to participate in the public discussions just as any other voluntary association is, expecting neither favoritism nor discrimination, and presumably bring to bear upon the public discussion our religious and moral insights.

Now, to come to the second question, which is the style of our presence in fulfilling that role, my argument would be that the churches ought to be tested by standards of competence, rationality, and reasonableness. My difficulty with some of the things that are done from what you might call the Christian right is not that they're speaking on the issues; I think they entirely have the right to speak and ought to speak. But sometimes I think they make direct transpositions from Biblical text into very complicated problems and they don't make clear why and how they find the Biblical text providing a definitive answer to a public policy problem. So it's a question of how you do it, but there really is no question of your right to do it.

QQ: Do you find a particular challenge in constructing philosophical arguments and analyses within the framework of the Catholic tradition?

BH: Well, I think obviously there is both a benefit and a burden in working in a structured tradition. The benefit of it is that usually you find a fair amount of coherence over a long period of time in a tradition. Ideas get refined and developed and used in many different ways, and, indeed, as you know, some of the insights that are today used by philosophers in the ethic of war were really situated first of all in a religious tradition. The burden is that obviously you do work within a structured tradition that is not only a normative tradition but, particularly in the Catholic context, also an authoritative tradition, and therefore you cannot simply dispell the tradition. Now, it's much more flexible, I think, than most people think from the outside; there is more than one philosophical insight that can find a home within a Catholic ambit.

QQ: A final question on a different note: in your own life you work on policy issues here at the Catholic Conference, but you're also a parish priest working with individual parishioners and their problems. How have you struck the balance that you have between these two tasks?

BH: Again, it's like working within a tradition. I hit on it partly because I was assigned here; I am assigned here on the Bishops' Conference, so that means I can't have anything like a full-time parish assignment at all. I have a well-defined narrow set of functions that I fulfill in the parish, which are structured precisely to make it possible for me to have the time necessary to do the other work I have to do. But the schedule is tight, there's no question about that.

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I find the interaction very positive in many different ways. I find that I tend to get renewed by doing different things; I've always worked in the area of moral theology and ethics, teaching and policy work. I find them complementary rather than contradictory.

The confessional in the Catholic tradition, for example, is where people come with their personal problems to talk about them and to be absolved and to seek moral guidance. I've always found the confessional a kind of laboratory for viewing wider issues—you tend to find out how an issue becomes crystallized in a person's life. You get certain kinds of cases that force you to use your moral principles in a way to help other people.

QQ: Thank you.

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