

## Religion and Morality

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.

### In this issue:

Presidents from Washington to Reagan have argued that morality depends upon religion. What does this mean? Is it true? And what implications can we draw from it for incorporating religion into public life? ..... p. 1

The choice between Mutual Assured Destruction and the Nuclear Use Theorists is a repugnant one—but maybe it’s a choice we don’t have to make ..... p. 5

Judges wield enormous power to make law and to break men and women. What are the standards by which we can judge how this power is exercised? ..... p. 9

Everything is risky today—even, it seems, talking about risk ..... p. 12

Available publications ..... p. 15

America likes to think of itself as a distinctively good country. Our founding is heralded as a great moral advance for mankind; certainly its architects articulated their purpose in rousing moral terms. Ours was the first nation expressly “dedicated to the proposition that all men are created equal,” the first to establish itself on the foundation of inalienable human rights. Despite profound national embarrassments such as slavery and the forcible removal of the Indians, this moral vision of America has proved remarkably resilient, and in recent years “the new patriotism” has taken America’s “moral superiority” as a rallying cry.

It is also a commonplace that America is a religious country. “In God We Trust” is our national motto (although it was chosen only in 1956, two years after “one nation *under God*” was inserted by an Act of Congress into the Pledge of Allegiance). Our most cherished statements of national ideals are couched in religious language, from the Mayflower Compact to Martin Luther King’s “I have a dream.” Recent years have seen as well a resurgence of concern to make this religious dimension of public life more explicit, particularly in the movement to reestablish some form of school prayer.

These two facets of the American self-image may seem to be closely related. It is claimed that America’s character as a moral nation depends on its character as a religious nation—indeed, that morality itself depends on religion. Such a claim was made by the first president in his Farewell Address: “Of all the disposi-

tions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." The same claim is made by the current president: "It is only in . . . faith that sees beyond the here and now, that we find the rationale for our daring notions about the inalienable rights of free men and women. . . . The Western ideas of freedom and democracy spring directly from the Judeo-Christian religious experience."

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*"From the Judeo-Christian tradition come our values, our principles, the animating spirit of our institutions. . . . American history—the fundamental shape of the American experience—cannot be understood without reference to the Judeo-Christian tradition. . . ."*

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The claim that morality depends on religion, however, can mean very different things, and its truth or falsehood varies accordingly. In what ways does morality depend on religion and in what ways does it stand alone or even serve to criticize religion? On what particular "brand" of religion does morality depend? And what implications can we draw from the relation between religion and morality for policy issues such as prayer in public schools?

### The Mount Sinai Summit

One way in which morality might depend on religion is that morality has religion, to some degree, as its origin. Much of our present moral code is derived historically from religious teachings—from the Ten Commandments and Jesus' Sermon on the Mount. This seems to be what President Reagan had in mind when he observed that our ideas of freedom and democracy "spring directly from the Judeo-Christian religious experience." In the words of Secretary of Education William Bennett, "From the Judeo-Christian tradition come our values, our principles, the animating spirit of our institutions. . . . American history—the fundamental shape of the American experience—cannot be understood without reference to the Judeo-Christian tradition, a tradition which gave birth to us and which envelops us."

There seems to be a good deal to be said for such claims, as a matter of historical record. But whatever their truth, they imply little about any present-day connection between morality and religion. As John Stuart Mill pointed out over a century ago, while we may be indebted to Judaism and Christianity for imparting to us various moral truths, the fact remains that they have been imparted: "this benefit, whatever it amounts to,

has been gained. It has become the property of humanity, and cannot now be lost by anything short of a return to primeval barbarism." Mill's position, then, is that we can take the moral truths religion has imparted to us and leave the religion behind.

Certainly many people today seem to have done just that. Despite their differences in theology, religious and secular ethicists agree on a wide range of moral issues. Believers and nonbelievers alike join in affirming kindness, compassion, honesty, and fairness. That we can often agree on moral matters while disagreeing vigorously on religious ones suggests that moral judgments have a life of their own, whatever their long history. Given the amount and extent of religious disagreement in the world, it is fortunate that this is so.

### If God Is Dead, Everything Is Permitted

A deeper claim is that morality finds in religion not only its origin, but its justification. Here the claim isn't that we learn moral truths through religion, but that without religion—without God—there would be no moral truths.

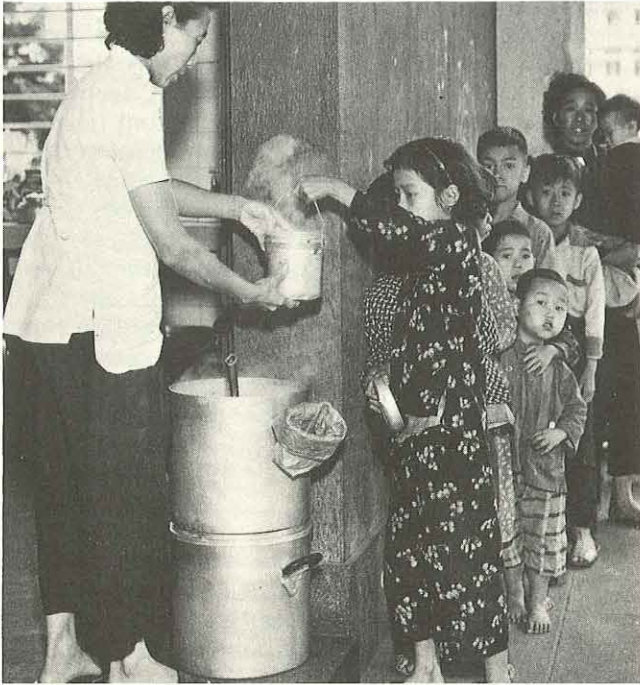
Consider one of the most bedrock moral notions in our political discourse: the idea of fundamental human rights. Secretary Bennett quotes Jefferson's ringing proclamation that all men "are endowed by their Creator with certain unalienable rights." Without a Creator, Bennett asks, "Whence come these rights?" Who endows human beings with rights, if not God? If there is no God, there are no God-given rights, and maybe the notion of natural inalienable rights becomes, as Bentham thought it was, "nonsense on stilts." Similarly, it is asked, how can there be moral commands without a commander? How can there be binding moral rules without some supreme rule giver?

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The original and still powerful objection to this argument was given by Plato in the *Euthyphro*. In modern dress, it is this. If a given action is right because God requires it, we have then to ask why God has chosen to issue that requirement. Either the reason lies in some morally desirable feature of the act, in which case God's choice depends on an external moral standard rather than itself setting that standard. Or else God's choice is essentially arbitrary—he just happened to feel like saying, "Thou shalt not kill." If the latter, morality hardly has a more secure foundation than when it rested on supposedly arbitrary human desires. Moreover, it is difficult to conceive that if God had happened



*A United Methodist relief project.*

instead to feel like saying, "Thou shalt torture innocent children," that would be our moral law. Torture seems to be wrong because it causes undeserved suffering, not because God said so.

In fact, in one sense religion seems to depend on morality. Part of the way in which we recognize God as a fitting object of worship is by attention to his perfect goodness. If we do not worship God in recognition of his goodness, then, as Kant argued, we bow down to God only as "a mighty lord whom we should have to placate . . . with flattery and incense." An omnipotent being can compel our obedience, but only a supremely good being deserves our worship. But this means, Kant concludes, that "All religion assumes morality, and morality cannot, therefore, be derived from religion."

But if morality doesn't depend on religion, what does it depend on? One answer is that it depends on what human beings collectively have decided are central rules for living together in harmony. These are grounded, not in divine commands, but in human needs, wants, loves, and fears. Compassion, respect, and tolerance are important moral virtues because they are the values that work best to preserve dignity, protect autonomy, enhance security, and make life happier and richer.

Such a foundation does not make moral rules arbitrary and subjective; it does not leave individuals free to make up the moral rules that suit them best. Moral rules are made collectively by human society and are grounded in the reality of the human condition. This is enough to justify our adherence to them. Morality, then, need not depend on religion for its justification.

### **You Better Be Good, You Better Watch Out**

Even if morality doesn't depend on religion for its justification, it might depend on religion as a source of motivation. On the least attractive view of human psychology, people require the fear of future hellfire in order to behave toward each other with tolerable decency. But even on a more benign view of human nature, religion may be an important impetus to moral conduct. Robert Adams, a philosopher at UCLA, notes that most individuals have a plurality of motives for action, some self-interested, some concerned for the well-being of other people, still others concerned with values and ideals more abstractly conceived. Clearly the different springs of motivation may conflict, "but in Judeo-Christian ethics," Adams suggests, beliefs about God's will "are supposed to enable one to *fuse* these motives, so to speak, into one's devotion to God and His will, so that they all pull together." Aside from any narrow regard for one's own salvation, faith in God can make the believer simply want to be good, to please a loving Father.

Looking to society at large, the motivational claim that morality goes hand in hand with religion comes down to a sociological thesis: as religion founders, so will morality as well. But on this the historical record is at best indecisive. For one, the mere fact of correlation between religious and moral decline wouldn't of itself prove that the two were directly connected, nor suggest which way the connection is to be drawn. And while religious institutions have often set a shining example in ministering to the wretched, many have pointed out that religion has as often occasioned war



*Crusaders charging the infidel.*

and bigotry as peace and harmony. Hume puts these sentiments into the mouth of Philo in his *Dialogues Concerning Natural Religion*: "If the religious spirit be ever mentioned in an historical narration, we are sure to meet afterwards with a detail of the miseries, which attend it. And no period of time can be happier or more prosperous, than those in which it is never regarded, or heard of." The Crusades, the Spanish Inquisition, the Salem witch burnings, present-day Iran—all bear no witness to the salutary moral effects of religion.

Robert Fullinwider, Research Associate at the Center for Philosophy and Public Policy, suggests that many who link immorality to a falling away of religious faith make their case chiefly by equating morality with "sexual decorum." William F. Buckley, for example, lambastes the absence of religious training in the schools for "its possible relationship to abandoned moral sanctions." The core of his argument is that "instruction in religion diminishes promiscuous sexual activity." Perhaps. But Fullinwider argues that a nation's morality is not a matter only of its sexual mores, but has to do as well with the development of a humane foreign policy, the decent conduct of economic life, integrity in public service, and a spirit of amiability and generosity in private life.

Nor is it surprising, he maintains, that sexual rectitude should require enforcement by religious sanctions in a way that other areas of morality do not, for while other moral rules—against stealing, killing, lying—arise naturally from human needs and desires, sexual prohibitions seem to go against the grain of human nature. To the extent that religious threats are required to sustain such prohibitions, this may show only that they don't fit comfortably with the rest of our moral framework.

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However, religion may yet play an important role in moral life. The strongest case for this, Fullinwider suggests, begins with the observation that "religious institutions are the only institutions in our society, outside the confines of the family, in which people talk about moral values on a regular basis in a systematic way." Public schools have never rivaled religious institutions as a serious force for sustaining moral culture; it is in Sunday school classes and Sabbath-day sermons that moral issues are most likely to be thoughtfully raised and considered. Since every society must have some institutional mechanism for transmitting moral culture, religion, in fulfilling this function, may be morality's chief ally.

Religion may be an ally of morality in another way as well. Adams raises the possibility that one danger of morality without religion is that morality then becomes a religion—an object of "maximal devotion." While most fear that severing morality from religion may undermine the motivational commitment to morality, a parallel danger is that it may remove any check on that commitment. This can result in an obsessive and oppressive form of moral zeal. Morality itself is "too narrow to be a suitable object of maximal devotion," since it excludes too many human excellences. But since God, for the believer, includes within him all that is true and good and beautiful, religion makes room for a richer view of human flourishing, within which morality can find its proper place.

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#### "Religion" or My Religion?

The last two arguments give reasons to value religion for the contribution it makes to society. Do they give a reason for explicitly incorporating religion in some way into public life—perhaps by amending the Constitution to include some provision for school prayer?

The central fear involved in incorporating "religion" into public life is that religion almost inevitably comes to be narrowly identified with the religion of the dominant group. It is easy for "We are a religious nation" to slide into "This is a Christian nation," as one U.S. representative recently declared on the floor of the House—prompting Rep. Barney Frank, who was chairing the wee-hours session, to retort, "If this is a Christian nation, how come some poor Jew has to get up at 5:30 in the morning to preside over the House of Representatives?" Mr. Thwackum in Henry Fields's *Tom Jones* stipulated, "When I mean religion I mean the Christian religion; and not only the Christian religion but the Protestant religion; and not only the Protestant religion, but the Church of England." The Thwackums of this country mean by "religion" Protestantism of a fundamentalist and evangelical stripe.

President Reagan and Secretary Bennett may see themselves as protecting "religion-in-general," but it is not clear that there is any such thing. The much-cited "Judeo-Christian tradition" does not represent "religion-in-general" to Buddhists, Hindus, or Moslems—nor to Jews, who resent seeing their religious heritage treated as an "Old Testament" prelude to Christianity. Within Christianity itself, Protestants and Catholics read the Bible in different translations, even say the Lord's Prayer—often viewed as a lowest-common-denominator Christian text—in different versions. And

Protestants differ among themselves on how to view Christ's command to pray only in private, making no outward, public show of one's piety. Religion-in-general would have to be so bland and contentless that it is hard to see how it could count as religion at all.

### Conclusion

In his August 1985 address to the Knights of Columbus, Secretary Bennett argues that "neutrality to religion turns out to bring with it a neutrality to the values that issue from religion." The choice, as the Secretary presents it, is this: either we put religion in the classroom, or we take morality out. Either we post the Ten Commandments on classroom bulletin boards, or we are left with nothing but "values clarification"—a kind of moral relativism which places all values on a par, none more right or wrong than any other. But if moral truths are truths in their own right, not just corollar-

ies of religious principles, if some values *are* better than others, independent of any religious pedigree, then the Secretary's dichotomy is a false one. We can argue directly for our moral beliefs and urge our children to adopt them, whatever our religious convictions. We can pray to different gods—or to no god—and still work together to revitalize our shared moral life.

Sources for preparing this article not identified in the text include: John Stuart Mill, *Nature, the Utility of Religion, Theism, Being Three Essays on Religion*; Immanuel Kant, *Religion Within the Limits of Reason Alone*; Robert Merrihew Adams, "A Modified Divine Command Theory of Ethical Wrongness," in *Religion and Morality*, edited by Gene Outka and John P. Reeder, Jr. (New York: Anchor Books/Doubleday, 1973); Adams, "Saints," *Journal of Philosophy*, vol. 81, no. 7 (July 1984); William J. Bennett, Address to the Supreme Council Meeting of the Knights of Columbus, Washington, D.C., August 7, 1985; William F. Buckley, Jr., "... And Religion," *Washington Post*, April 9, 1986; and interviews with Robert K. Fullinwider.

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## Buy Like a MADman, Use Like a NUT

When theoreticians think about nuclear deterrence, often they focus on a nasty choice between two rival package deals. The two have gone by various names over the years, but let me take the paired epithets: MAD (Mutual Assured Destruction) versus NUTS (Nuclear Use Theorists). Each package is a bundle of policies: centrally, policies for the procurement of strategic nuclear forces and conditional intentions about how to use those forces in case of war. I think we can break up the packages and keep only part of each. What we get may be in some sense MAD and in some sense NUTS—for the terms are elastic—but I hope it is the better half of both.

In a debate between MAD and NUTS, each side may say that the other's policies involve a twofold risk: a grave moral risk of committing massacres and a grave prudential risk of inviting and undergoing massacres. If they say so, they are right. The contest between these two repugnant alternatives gives nuclear deterrence itself a bad name. How does the very idea of nuclear deterrence turn into the nasty choice between MAD and NUTS? Does it have to happen? Is there no way around it?

### MAD: If You Can't Be Credible, Be Dreadful

To trace the reasoning that drives us MAD, start with a simple conception of nuclear deterrence. We deter the enemy from doing X by threatening that if he does, then we will punish him by doing Y. But the enemy

might notice that if he does X, we will then have no good reason to do Y. What's more, he may be able to give us a reason not to: he may threaten that if we do Y, then he will punish us by doing Z. Of course we may threaten that if he does Z then we will . . . but he might doubt that as well. In short we have a credibility problem: our deterrence is apt to fail because our threats are not believed.

How to solve it? One way is to make the threatened retaliation very, very severe. Then even if the enemy thinks we would have excellent reason not to retaliate, still he would not dare to call our bluff. If he evaluates risks as he should, multiplying the magnitude of the harm by the probability, we can make up in the first factor for what is lacking in the second. We can threaten a vast nuclear massacre, on an altogether different scale from the ordinary horrors of war. Destruction on this dreadful scale needn't be credible to deter. Although it could serve no good purpose to fulfill the threat, the risk that we might do so in blind anger suffices.

The MADman thinks it obvious that deterrence requires a solution to the credibility problem, and obvious that the only solution is to find a threat so dreadful that it needn't be credible; and he expects the enemy not to overlook the obvious. Therefore he thinks that for the enemy, as for us, an assured capacity to destroy cities will be seen as the *sine qua non* of nuclear deterrence. Further, he thinks it would take no great effort for the enemy to counteract any steps we might take

to protect our cities. Therefore he thinks such steps would be, at best, costly and futile. We buy the means to reduce the enemy's strategic forces by counterforce warfare; the enemy buys enough more missiles to assure himself that enough of them will survive. We buy expensive defenses, the enemy buys enough more missiles to assure himself that enough of them will get through. We spend money, he spends money. Afterward there are many more nuclear weapons in the world, and each of them is one more place where an accident could happen. In case of war, not only does the world get fallout and smoke from the destroyed cities, but also it gets fallout (and smoke and dust) from preliminary counterforce attacks and intercepted warheads. And still our cities are subject to vast and intolerable destruction. What have we gained?

The MADman boasts that his goals for deterrence are "finite." If each side can count on having enough surviving weapons to meet the standard of assured destruction, that is all that either side has reason to want. Neither side has an incentive to expand or improve his forces, for all that would happen is that the balance would be reestablished at increased cost, increased risk, and increased danger to the rest of the world.

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*The NUT proposes instead to run grave risks so that a somewhat less dreadful threat can be made very credible.*

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Thus the MADman's policy for procurement of nuclear weapons is as moderate and benign as can be, short of renouncing nuclear deterrence altogether. But his policy for conduct of nuclear war is quite the opposite. What is the Commander-in-Chief supposed to do if deterrence fails? He is not supposed to do anything to protect the country entrusted to his care; he cannot, since it was thought futile to provide the means for limiting damage. Rather he is supposed to fulfill the threat to destroy cities—a vast massacre, serving no good purpose whatever. There is nothing else he can do. Thus MADness carries a grave moral risk. According to MADness, anything that can be seen to raise the chance of retaliation is all to the good. But it is all to the bad if deterrence fails: for what is raised is the chance of the most wicked act that it is possible for anyone in our time to perform.

#### **NUTS: The Credible Warning**

To trace the reasoning that drives us NUTS, we start as before. The NUT agrees with the MADman that it is essential to solve the credibility problem, but he favors a different solution. His plan is to find some sort of nuclear attack that would not only be a retaliation,

but also would serve some vital purpose. Our threat would be credible because we would have, and we would be seen to have, a compelling reason to fulfill it. The retaliation we could have compelling reason to deliver is counterforce warfare. It is worthwhile to destroy the enemy's forces, especially his strategic nuclear weapons. This reduces the risk to ourselves and our allies if war continues.

Thus we solve the credibility problem, and thereby we make it possible to succeed in nuclear deterrence—so says the NUT. But note a consequence of his argument: it has to be ambitious counterforce. If we want a highly credible warning that we would resort to counterforce warfare, there has to be little doubt that we expect its gains to be worth its risks.

But the drawbacks of an excellent counterforce capacity are these. First, and worst, an excellent counterforce capacity demands preemption. If our excellent counterforce capacity has been attacked, it may still be some sort of counterforce capacity, but it will no longer be excellent. The highly credible warning is, alas, not a warning of retaliation, but of preemption. Further, it gives the enemy his own incentive to preempt. His forces are under the gun: use them or lose them. Whatever use he may have in mind had better be done before it is too late.

This pressure to preempt is probably the gravest risk that the NUT embraces in his quest for credibility. But it is not the only one. Besides short-term instability in times of crisis, there is a second, long-term instability. The MADman could boast that his goals for deterrence are finite. Not so for the NUT. If we need enough capacity for counterforce warfare that we can credibly warn of our strong incentive to undertake it, then what we need is an increasing function of what the enemy has. In fact, we need superiority. For reasons the MADman has already given, a risk of arms racing is indeed a grave risk, both moral and prudential.

The third grave risk, this one primarily a moral risk, concerns the collateral damage from ambitious counterforce warfare. Given the proximity of missile fields to Moscow, for example, it makes little difference whether we target the population of Moscow per se, and so the NUT runs a grave moral risk of committing vast massacres, just as the MADman does. Not an equally grave risk: the MADman's attack is useless, whereas the NUT's is meant to destroy weapons that menace us. Further, the NUT's attack kills many fewer people. Too many people live downwind from the enemy's missiles, but not as many as live in the enemy's cities. Yet though the numbers that measure the NUT's moral risk are much better than those that measure the MADman's, even the better numbers are far from good.

The MADman proposes to run grave moral and prudential risks so that a none-too-credible threat can be made very dreadful. The NUT proposes instead to run grave risks so that a somewhat less dreadful threat can be made very credible. His risks are different—most importantly, lesser massacres but more chance of inadvertent war—but no less grave overall.

### Existential Deterrence

But what else can we do? How could the enemy be very powerfully deterred by a none-too-credible threat of a none-too-dreadful outcome?

This is how. Compare two ways a burglar might be deterred from trying his luck at the house of a man who keeps a tiger. The burglar might think: "I could do *this*, and then the tiger would do *that*, and then I could do *so-and-so*, and then the tiger would do *such-and-such*, and then. . . ." If all such plans turn out too low in their expected payoff, then he will be deterred. But if he is a somewhat sensible burglar, his thoughts will take a different turn. "*You don't tangle with tigers*. Especially when you've never tried it before. Not even if someone (someone you don't trust) claims that these tigers have somehow been tamed. Not even if you carry what the salesman claimed was a sure-fire tiger stopper. You just never know what might happen."

The hypothesis of existential deterrence is that it is through thoughts like these that our nuclear arsenal deters our somewhat sensible enemy. Existentialism says that the credibility problem more or less solves itself. Given an enemy who, like ourselves, is risk averse, pessimistic, skeptical, and conservative, deterrence is easy. To deter such an enemy, it is our military capacities that matter, not our intentions or incentives or declarations. If we have the weapons, the worst case is that somehow—and never mind why—we use them in whatever way he likes least. Of course he is not at all sure that the worst case will come about. But he mistrusts arguments to the contrary, being skeptical; and

he magnifies the probability of the worst case, being pessimistic; and he weighs it in deliberation out of proportion to the probability he gives it, being averse to risk. In short: he will be deterred by the *existence* of weapons that are *capable* of inflicting great destruction. And we are the same way.

If existentialism is true, then the package deals of MAD and NUTS fall apart. We can borrow ideas from the MADman and the NUT and have the best of both. But we can leave behind the parts of their reasoning that require us to run grave risks in order to solve the credibility problem.

### Buy Like a MADman, Use Like a NUT

The MADman's policy for procurement of weapons was as moderate and benign as can be. The forces he requires are comparatively small and cheap. He creates no temptation to preempt. His standards of adequacy are finite, in the sense that both sides at once can meet them. We could be well content—if it were not for his abominable policy about what to do in case of war. But if existentialism is true, we can buy like a MADman if we like, but that implies nothing about what we ought to do in case of war, or what we ought to intend beforehand. We needn't strive to give some credibility to our dreadful threat to destroy the enemy's cities. We needn't threaten it at all. We have weapons and war plans which give us the assured capacity to do it, and their very existence is deterrent enough.

So far, so good; but a big question remains. What if we buy the MADman's finite deterrent, but it lets us

Drawing by Ed Arno; © 1983  
The New Yorker Magazine, Inc.



"Damn it, Eddie! If you don't believe in nuclear war  
and you don't believe in conventional war,  
what the hell kind of war do you believe in?"



down? What if deterrence fails after all, and in a big way? In that case, I say, we ought to use like a NUT. We ought to engage in counterforce warfare with what remains of our forces, hoping thereby to limit further damage to us and to our allies. We should not retaliate by destroying cities; on the contrary, we should compromise the efficacy of our attacks so as to reduce collateral death and destruction. We should proceed as if we valued the lives of the enemy's civilians and soldiers—simply because we *should* value those lives—but less than we value the lives of those on whose behalf we are fighting.

If we use like a NUT, but with nothing more than what remains of a MADman's forces, then our aims in counterforce warfare cannot be too ambitious. We cannot hope to reduce the enemy's remaining forces to the point where he no longer has the capacity to do dreadful damage to whatever remains of our population and our resources for recovery. But the numbers count; they are not infinite, and not incomparable. If tens of millions are already dead, doubtless that is quite enough to exhaust our stock of adjectives and saturate our capacity to feel horror. But that is no reason why it is not worthwhile to save the lives of tens of millions more.

Limitation of further damage is worthwhile. Counterforce warfare, even of a modest sort, is a way to limit further damage. Therefore using our remaining nuclear weapons for counterforce warfare is the right thing to do. It is, of course, a better thing to do than destroying the enemy's cities. That alternative is easy to beat. But also, I say, it is a better choice than doing nothing, and waiting to see what sort of follow-on attack we suffer from the enemy's remaining forces.

It may be objected that it seems senseless to build forces designed for one mission when all the while we intend to use them only for another. If we buy like a MADman, we buy a force that is just right for retaliating against cities; but if the time comes to use like a NUT, we will wish the forces had been made more suitable for their only truly intended use: modest, second-strike counterforce warfare with avoidance of collateral damage.

Now it is the NUT's turn to have his package deal broken up. His policy about what to do in case of war—counterforce warfare meant to limit damage—is comparatively moderate and benign, at any rate compared to the MADman's. We could be well content—if it were not for his dangerous policy for procurement of weapons. Because he wants damage limitation not only for its own sake but for the sake of credibility, he requires weapons capable of meeting ambitious goals. Then the very same strength that supports the credible warning makes dangerous incentives to preemption in the short term and arms racing in the long term. Our solution is to buy suitable weapons, but limit their numbers.

Even a MADman's finite deterrent gives some significant capacity for counterforce. But all agree that the MADman's forces create little temptation to preemption or arms racing. They are not yet above the danger

line. Then let them set a benchmark: let us have forces suited for counterforce warfare, but let us have only enough of them to match the counterforce capacity of the MADman's finite deterrent. In that case, they should be no more destabilizing.

For finite counterforce, whatever enhances second-strike capacity without enhancing first-strike capacity is all to the good. Excellent post-attack command and control, for example, would be extremely advantageous. But it would not increase first-strike counterforce capacity in the least—because peacetime command and control is already excellent. Likewise, any improvement which holds capacity fixed while reducing collateral death and destruction is all to the good. If we aim our warheads more accurately and reduce their explosive yield (a trend that is already well under way), we can hold capacity fixed while we reduce the fallout, both local and global. And improved accuracy can mean that we need fewer warheads altogether.

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If we trade numbers for accuracy, this reduces our capacity to destroy cities. Of course we do not have reason to want to destroy cities, but we do want the enemy to be deterred by the thought that somehow we might anyway. If the capacity is what deters, dare we reduce the capacity? I suggest that we can reduce it a lot without making existential deterrence any less robust. Any second-strike force that could accomplish something worthwhile in counterforce warfare, even with lower yields than we use today, would a fortiori be capable of enormous destruction.

### Conclusion

As theoreticians, we want an understanding of nuclear deterrence that is neither MAD nor NUTS. We don't want to be committed to wickedness, and we don't want to fuss over credibility. We don't want deterrence through damage limitation—we want damage limitation for its own sake, and deterrence can look after itself. We don't want to think that damage limitation is worthless unless it is wonderful. We don't want to put adjectives in place of numbers, shirking the responsibility to save tens of millions of lives just because the outcome is dreadful either way.

—David Lewis

David Lewis is professor of philosophy at Princeton University. This article is substantially condensed and adapted from his paper "Finite Counterforce," which will appear in *The Shadow of the Bomb: Extended Deterrence and Moral Constraint*, edited by Henry Shue, in preparation.

# Judging Judges

Judges fascinate our political imaginations. Opinion polls show that no profession in the United States has higher prestige than the judiciary; at the same time, no branch of government seems to arouse so much antagonism and suspicion. This public concern is reflected in the intense scrutiny currently given to judicial appointments. The judiciary seems, in our highest hopes, to be our public philosopher and political conscience; it seems, in our worst fears, to govern by decree.

Consider two cases.

I. In 1971 the mother of a fifteen-year-old girl went before Judge Harold D. Stump in DeKalb County, Indiana. Her daughter, she stated, was mildly retarded; now she was beginning to date and had stayed out all night. The alarmed mother asked Judge Stump to order the tubal ligation of her daughter, and he entered the order the same day. The daughter was told that she needed an appendectomy, and six days after the order the tubal ligation was performed. Two years later the daughter married; when she and her husband were unable to conceive a child, medical tests were undertaken, and she learned what had been done to her. She sued Judge Stump (among others). Eventually the case went to the U.S. Supreme Court, which found that Judge Stump enjoyed absolute immunity from tort-claims from judicial acts.

II. Ten years earlier, a remarkable group of Fifth Circuit judges played a crucial role in implementing the desegregation of southern schools in the face of enormous white hostility. In one dramatic example, in 1960 Judge J. Skelly Wright single-handedly faced down the organized resistance of the New Orleans school board and the governments of New Orleans and Louisiana. Among the dozens of hastily enacted segregationist laws and decrees whose enforcement Wright enjoined in the space of a few days was a statute ordering the arrest of any federal judge attempting to enforce the Supreme Court's *Brown* decision—a statute presumably directed at Wright himself. Along with similar actions of other Fifth Circuit judges, Wright's interventions have been praised by many as among the most remarkable exercises in judicial—not to say physical—courage in the annals of American law.

Both cases illustrate the tremendous discretionary power exercised by judges. Along with such power goes a high ethical responsibility to exercise it wisely and well. Most people would cite Judge Stump's order as a flagrant violation of this high responsibility; and, though the violent passions surrounding the Fifth Cir-

cuit's fashioning of the modern civil rights injunction have not yet subsided, the common view is that it marked the federal judiciary's finest hour. But what are the standards by which such assessments can be made? How are we to define the ethical responsibilities of judges?

## Issues in Judicial Ethics

To look at the variety and complexity of ethical issues that arise at all levels of the judiciary, let us follow a civil case through the judicial process. Even before the litigation process is under way, the judge must decide whether he must recuse himself because of too great association (familial, professional, or financial) with one of the parties.

In the litigation proper, judges exercise tremendous leeway in exerting the power of the bench to encourage the parties to settle, and the Federal Rules of Civil Procedures encourage judges to use this power. It is often assumed—given the crowded dockets of most American courts and the expense and fractiousness of the trial process—that it is better to settle cases out of court than to try them. But some cases raise issues of public concern that transcend the interests of the parties to the litigation; such cases ought to be heard by a court to provide order and development in the law governing these matters. How can judges reconcile the conflicting demands for speedy disposition of cases before them and the use of their courts to improve the law?

In the conduct of a trial a judge must make innumerable small decisions that can affect the outcome. He must decide when to intervene in the conduct of the trial, when to discipline attorneys who attempt to delay proceedings, when to invite outsiders in as *amici curiae*, when to certify or decertify a class in a class action. In a jury trial his behavior toward the litigants can significantly influence the jury's perception of the case. His instructions to the jury about the law and about their own responsibilities will often shape if not determine the outcome of the trial.

Significant also is how the judge uses his law-making and law-interpreting power. There are two questions of judicial responsibility here. The first concerns conflicts between the law and morality. How should judges decide cases that they believe are legally clear-cut but in which the legally correct result is morally abhorrent? Should judges enforce immoral laws? Or should the judge bend the law when applying it in a straightforward way leads to an unjust outcome? The second

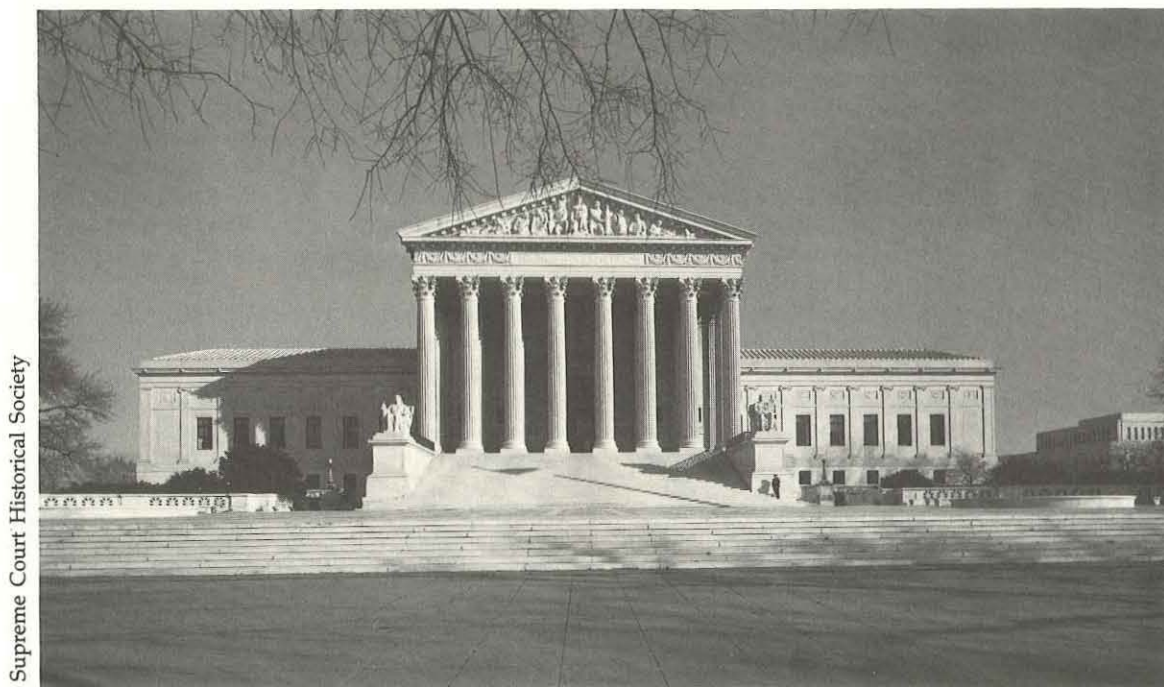
question concerns conflicts between enunciating useful and wise general rules and meeting the demands of justice in particular cases. Should the judge see it as his responsibility to lay down a test or rule that other judges will find useful in deciding future cases, even if it does not lead to the best outcome in the case before him?

The most notorious issue concerning the conduct of judges is that of "judicial activism." This term actually describes two distinct practices: interpreting the law broadly and using very far-reaching remedies (as Judge Wright did during the New Orleans school crisis, or as Federal Judge Frank Johnson did in virtually taking

of the role of the judge in a democratic society. The two aspects cannot be separated in the study of professional ethics, for the moral obligations of professionals derive from their institutional roles. For judges especially, we cannot hope to understand ethical duties without addressing issues in democratic theory.

#### **A Framework for Analysis**

Two prejudices have prevented the development of a satisfactory theoretical framework for addressing these questions: these are realism and legalism, the dominant assumptions of American jurisprudence. Roughly, realism says that the law is whatever the judge



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over the operation of the Alabama prison system). Often people who are upset by the latter practice mistakenly believe that judges have engaged in the former; but only confusion can result from blurring the distinction, since the two practices have little to do with each other.

The use of far-reaching remedies raises very important questions of judicial ethics. Should judges intervene so directly in political decisions? Is judicial activism simply the imposition of the judge's political ideology on that of officials responsible for these institutions? Do judges have the wisdom or expertise to assume such broad supervisory powers over society?

All of these are ethical issues with a public or political dimension. They are ethical because they concern principles governing the exercise of personal discretion by judges; they are political because the justification of such principles must come from an understanding

says it is, while legalism says that the most secure way to resolve normative disputes is by appealing to well-defined procedural rules.

Because of realism, what judges do is taken as the yardstick of justice, not as something itself to be measured. And legalism steers us away from ethical inquiry into a study of the procedural rules hedging the judicial process. Realism and legalism combine to make their adherents generally uninterested in the questions of political morality that must be addressed if we are to understand and evaluate the judge's responsibilities.

Realism nevertheless contains within it the raw materials for a better analytical framework than it itself provides. The realists may have said that the law is whatever the judge says it is, but they did not mean it. They would have ruled out the pronouncements of judges who were (for example) bribed, drunk, or clinically insane. However, once one has started down the

path of sorting judges normatively into those whose pronouncements count and those whose pronouncements do not, it is hard to stop. What about a judge who would have ruled differently had she only known a certain precedent but for hasty research? Or who would have ruled differently had she deliberated longer? Once we move from "the law is whatever the judge says it is" to "the law is whatever the judge *would have said it is if only* . . ." we are led inexorably to complete the sentence with factors derived from a normative theory of judgment. Crucial issues of judicial ethics therefore turn on a correct understanding of the human "faculty of judgment."

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Consider, once again, the question: should judges enforce morally iniquitous laws? The strongest argument in favor of judges enforcing such laws is often thought to be that for a judge to do otherwise is to substitute his own "personal morality" (as it is often called) for the law.

This argument, however, presupposes that the judge's moral beliefs rest on purely private or personal convictions. This will be true, for example, if the judge derives his personal morality from an experience of religious revelation. In such a case we can see what is wrong with the judge refusing to enforce (what he takes to be) immoral laws: his standard of morality comes from revelation, and he is then in effect legislating religion.

But do all moral beliefs rest only on private convictions? Many philosophers have thought not. Aristotle, for example, argued that the standard of judgment (or what he called "practical wisdom") was a public standard of appropriateness and not a personal inner conviction. Kant claimed that judgment is exercised by examining the thing to be judged from several representative points of view; judgment based on personal conviction is unreliable. Hannah Arendt argued that judgment is cultivated by thinking from the points of view of other people. All of these philosophers see judgment as a "situation sense" that derives from pluralistically representing community outlooks and standards within oneself. On this view, the conflict between law and morality is in reality a conflict between what past legislators have done and what the community really stands for. The judge, then, is correcting a defect in legislative representation by—so to speak—judicial representation.

If this view of moral judgment is correct, it leads us to consider the political role of the judge, for it makes us ask how representative the judge's function should be, and who the judge is supposed to represent.

The realists operated on the assumption that a court should function mainly as a dispute-resolution mechanism to provide conflicting interests with an alternative to force. Because of this assumption, they ignored the question of whether courts also have a role as "public philosopher," articulating public or community values rather than simply reconciling private interests.

This assumption is open to question. According to Yale Law School Professor Owen Fiss, for example, the dispute-resolution model is based on a faulty sociology which views contemporary society as a "state of nature" containing individualized private interests interacting in a void. Instead, Fiss argues, we must realize that in a "high-density" society such as ours private disputes have public significance, so that the courts must formulate and realize public values in adjudicating ostensibly private cases. If Fiss is right, we must examine anew the way in which judicial formulation of public values is able to represent paradigmatic standpoints within society rather than simply imposing the judge's own particularistic political views.

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## Conclusion

Right now the federal courts are being explicitly politicized, with the Justice Department using ideological litmus tests to screen judicial appointments. This is an unfortunate legacy of realism. At their most simplistic, the realists believed that the law is just "whatever the judge ate for breakfast." Current ideological screening of judges assumes that the answers to hard legal questions should turn on whether judges have liberal or conservative breakfasts. This cynical understanding of the rule of law, however, can only cheapen it. More complex questions need to be asked to determine what, besides location on the left/right continuum, goes toward making a wise judge.

—David Luban

David Luban is a Research Associate at the Center for Philosophy and Public Policy and Associate Professor at the University of Maryland School of Law. He is the editor of *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, N.J.: Rowman and Allanheld, 1983).

# The Risk of Talking About Risk

Contemporary discussions of risk contain a fruitful possibility. Addressing ways in which the broader effects of industrial production can damage environmental quality and endanger people's health and safety, such inquiries approach one of the most important questions that face modern society: are there justifiable limits to the application of today's scientific technology? But this promise will be difficult to realize, for the very introduction of risk as a common way of defining policy issues is far from a neutral development. Self-conscious risk assessment adds a distinctively conservative influence to public policy debate. It seems to me that under any foreseeable conditions in which this new art will be practiced, its primary effect will be to delay, complicate, and befuddle issues in a way that will sustain an industrial status quo relatively free of socially enforced limits.

## Risks vs. Hazards

With the rise of risk assessment in the 1970s, questions that had previously been talked about in such terms as the "environmental crisis," "dangerous side effects," "health hazards," and the like were gradually redefined as questions of "risk." The difference is of no small importance.

If we declare ourselves to be identifying, studying, and remedying hazards, our orientation to the problem is clear. First, we can assume that given adequate evidence, the hazards to health and safety are fairly easily known. Second, when hazards of this kind are revealed, agreement on what to do about them is readily available among all reasonable people. Thus, if we notice that a deep, open pit stands along a path where children walk to school, it seems wise to insist that the responsible party, be it a private person or public agency, either fill the pit or put a fence around it. Similarly, if we have good reason to believe that an industrial polluter is endangering our health or harming the quality of the land, air, or water around us, it seems reasonable to insist that the pollution cease or be strongly curtailed.

If, on the other hand, we declare that we are interested in assessing risks, a number of changes tend to occur in the way one proceeds. What otherwise might be seen as a fairly obvious link between cause and effect, e.g., air pollution and cancer, now becomes something fraught with uncertainty. What is the rela-

tive size of that risk, that chance of harm? And what is the magnitude of the harm when it does take place? In answering these questions, the risk assessor is constrained to acknowledge what are often highly uncertain findings of the best available research. Prudence becomes not a matter of acting effectively to remedy a suspected source of injury, but of waiting for better research findings. Although toxic chemicals themselves may have been disposed of in reckless fashion, scientific studies on the consequences must be done with scrupulous care. Action tends to be postponed indefinitely.

Frequently augmenting these uncertainties about cause and effect are the risk assessor's calculations on costs and benefits. How much is it reasonable to spend in order to reduce a particular risk? Is the cost warranted as compared to the benefit received? Informed about the ways that the cost of reducing environmental risks is likely to affect consumer prices, taxes, industrial productivity, and the like, the desire to act decisively with respect to any particular risk has to be weighed against other economic priorities.

A willingness to balance relative costs and benefits is present in the very adoption of the concept of risk to describe one's situation. In contrast, this disposition to weigh and compare is not announced by the concepts of danger, peril, hazard, and threat. Such terms do not presuppose that the source of possible injury is also a source of benefits. What does one do with a risk? Sometimes one decides to take it. What, by comparison, does one do with a hazard? Usually one seeks to avoid it or eliminate it.

The use of the concept of risk in business dealings, sports, and gambling reveals how closely it is linked to the sense of voluntary undertakings. An investor risks his capital in the hope of making a financial gain. A football team in a close game takes a risk when it decides to run on fourth down and a yard to go. A bettor at a Las Vegas blackjack table risks her money on the chance of a big payoff. In contrast to the concepts of danger, hazard, or peril, the notion of risk tends to imply that the chance of harm in question is accepted willingly in the expectation of gain.

Noticing that everyday life is filled with risky situations of various kinds, contemporary risk assessment has focused upon a set of psychological complications that further compound the difficulties offered by sci-

entific uncertainty and the calculations of risk/cost/benefit analysis. Do people accurately estimate the risks they actually face? How well are they able to compare and evaluate such risks? And why do they decide to focus upon some risks rather than others? Psychological research tends to show that people have a fairly fuzzy comprehension of the relative chance of harm involved in their everyday activities.

This research is often used to discredit the claims of those who focus upon the chance of harm from some particular source. Why should a person who drives an automobile, a notorious cause of injury and death, be worried about nuclear power or the level of air pollution? Invidious comparisons of this kind are sometimes employed to show that people's fears about technological hazards are completely irrational.

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This drift in some scholarly writings on risk assessment finds its complement in the advocacy advertising of corporations in the oil, chemical, and electric power industries. A typical advertisement from Mobil Oil's "Observations" series illustrates the way in which popularized risk psychology and risk/cost/benefit analysis can work in harmony with corporate goals. "Risky business," the ad announces. "Lawn mowers . . . vacuum cleaners . . . bathtubs . . . stairs . . . all parts of everyday life and all hazardous to your health. The Consumer Product Safety Commission says these household necessities caused almost a million accidents last year, yet most people accept the potential risks because of the proven benefits. . . . Risk in other words, is part of life." Its text goes on to evoke a string of psychological associations linked to the experience of risk in economic enterprise. "Cold feet. What America does need are more companies willing to take business risks, especially on energy, where the risks are high. . . . We're gamblers. . . . Taking risks: it's the best way to keep America rolling . . . and growing." Poker anyone?

There is a deep-seated tendency in our culture to appreciate risk taking in economic activity as a badge of courage. People who have qualms about occasional side effects of economic wheeling and dealing can easily be portrayed as cowardly and weak-spirited, namby-pambies just not up to the rigors of the marketplace. Our culture embraces risk taking as one of the warrior virtues. Those who do not possess this virtue should, it would seem, please not stand in the way of those who do.

### Avoiding the Risk Debate

The risk debate is one, then, that certain kinds of social interests can expect to lose by the very act of entering. Deliberations about risk are bound to have a strongly conservative drift. The conservatism to which I refer is one that upholds that status quo of production and consumption in our industrial, market-oriented society, a status quo supported by a long history of economic development in which countless new technological applications were introduced with scant regard to the possibility they might cause harm. Because industrial practices acceptable in the past have become yardsticks for thinking about what will be acceptable now and in the future, attempts to achieve a cleaner, healthier environment face an uphill battle.

One path through the mass of issues that characterize the risk debate is to take each one separately in its own right. For example, one might question how reasonable it is to apply the very strict standards of certainty used in scientific research to questions that have a strong social or moral component. Must our judgments on possible harms and the origins of those harms have only a 5 percent chance of being wrong? Doesn't the use of that significance level mean that possibly dangerous practices are "innocent until proven guilty"?

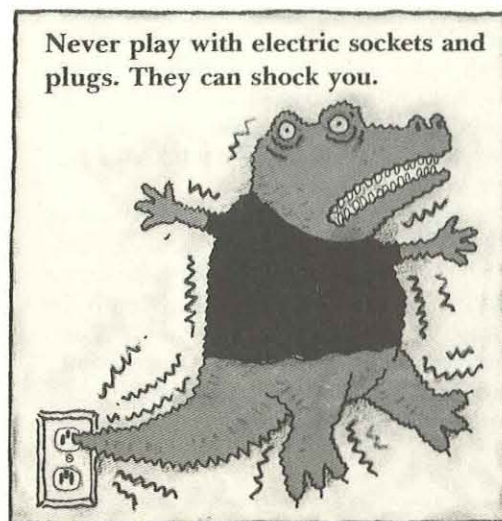
But for those who see issues of public health, safety, and environmental quality as fairly straightforward matters requiring urgent action, these exercises in methodological refinement are of dubious value. It is sensible to ask: why get stuck in such perplexities at all? Should we spend our time working to improve techniques of risk analysis and risk assessment? Or should we spend the same time working more directly to find better ways to secure a beautiful, healthy, well-provided world?

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Fortunately, many issues talked about as risks can be legitimately described in other ways. Confronted with any cases of past, present, or obvious future harm, it is possible to discuss that harm directly without pretending that you are playing craps. A toxic waste disposal site placed in your neighborhood need not be defined as a risk; it might appropriately be defined as a problem of toxic waste. New Englanders who find acid rain falling on them are under no obligation to begin analyzing the risks of acid rain; they might retain some Yankee stubbornness and confound the experts by talking about "that destructive acid rain" and what's to be

From: *Dinosaurs, Beware! A Safety Guide*

by Marc Brown and Stephen Krensky

*Hazards to be avoided—or risks to be balanced against benefits?*

done about it. A treasured natural environment endangered by industrial activity need not be regarded as something at risk; one might regard it more positively as an entity that ought to be preserved in its own right.

My point is, then, that a number of important social and political issues are badly misdefined by identifying them as matters of risk. Whenever possible, such misdefinitions ought to be resisted along with the methodological quagmires they bring in train. This is not to say that there are no issues of broad-scale social policy in which the concept of risk is legitimately applied. There are some applications of modern science and technology in which the uncertainty that surrounds suspect practices and their possible effects is so great that risk is an entirely suitable name for what is problematic. Recent worries about possible mishaps from the use of recombinant DNA techniques in scientific research and industrial applications seem to me a case in which the term was accurately applied. But there is, in our time, a willingness to cluster an astonishingly large range of health, safety, and environmental problems under this one rubric.

Two kinds of issues in particular strike me as territory that ought to be rescued from this tendency. First are our understanding of cases of actual harm — cancer, birth defects, other illnesses, deaths, damaged environments, and the like — obviously connected to profit-making industrial practices, yet sometimes treated as if their reality were merely probabilistic. We may visit the hospitals and gravesites if we need to. We may wander through industrial wastelands and breathe deeply. But let us not pretend our troubles hinge on something like a gentlemanly roll of dice, or that other people's sickness and death can be deemed acceptable from some august, supposedly neutral standpoint.

That only adds insult to injury.

Finally, there are times in which an issue that urgently needs to be addressed is poorly described (or not described at all) by subsuming it under the category of risk. A technology recognized above as an example of true risk in one context, recombinant DNA research and development, will be badly misconstrued if it is seen as nothing more than a risk question in another emerging context: public policy on genetic engineering. It is one thing to think about the prospect that a lethal bug might escape from the laboratory, quite another to ponder what it means to assume direct control of the evolution of the human species. Possibilities made available by the new biotechnologies are profound ones. But they are not questions of risk. It may happen, nevertheless, that because risk was the focus of discussion for the first decade of thinking about the ethical dimensions of recombinant DNA research and development, it will continue to shape discussions on this topic for years to come. We could see, for example, the application of moral rules of the following kind: unless the development of a new genetic configuration can be shown to involve substantial quantifiable risks, the development will be sanctioned for speedy implementation. If that happens, the shortcomings of today's discussions about risk will return to us with a vengeance.

—Langdon Winner

Langdon Winner is professor of science and technology studies at Rensselaer Polytechnic Institute. This article is condensed and adapted from his paper "On Not Hitting the Tar Baby: Risk Assessment and Conservatism," in *To Breathe Freely: Risk, Consent, and Air*, edited by Mary Gibson, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Allanheld, 1985). The original article also appears in Langdon Winner, *The Whale and the Reactor* (Chicago: University of Chicago Press, 1986).

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