

Settling Out of Court

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In this issue:

For reasons of cost and speed, 90 percent of law suits settle out of court. Should the trend toward settlement be encouraged or resisted? p. 1

“No news is good news”—is news coverage of technological issues too negative? p. 5

A scathing look at the underlying aims of mandatory AIDS testing p. 8

Covert action: its ends, its means, and the constitutional processes it appears to threaten p. 12

A spring workshop on philosophy and public policy is announced p. 15

“I would rather lose my vineyard,” wrote Montaigne, “than go to court for it.” Many Americans apparently feel otherwise. Whether or not we are, as many have charged, the most litigious nation in human history, our civil litigation rate is certainly among the highest in the world.

Most law suits — upwards of 90 percent — settle out of court before a formal jury verdict or judicial decision is rendered. This is a matter of sheer necessity. “It is a given,” according to U.S. District Court Judge H. Lee Sarokin, “that if cases did not continue to settle in roughly the same percentages, our system of justice would come to a standstill.” For reasons of cost and speed, “in rare exceptions, it must be conceded that the preponderance of settlements in the judicial system is a worthy goal.”

The imperative toward settlement rather than trial is defended on other, less purely expedient, grounds as well. Settlement is claimed to leave participants more satisfied with the resolution of their case. It is lauded as representing a voluntary agreement between the parties rather than a coercive court order, a give-a-little, get-a-little compromise rather than a lopsided black-and-white judgment in which the winner takes all. And what Harvard’s president Derek Bok has called the “gentler arts of reconciliation and accommodation” involved in negotiating a settlement are, well, kinder and gentler than the aggressive rough-and-tumble of hard-ball litigation in the adversary system. Insofar as the so-called litigiousness of the American public is

decried, a trend toward resolving rather than trying suits seems an impulse in the right direction.

This favorable attitude toward settlement shows itself in the growing willingness of judges to use the power of the bench to put considerable pressure on the parties to settle. It has launched a movement within the legal community for alternative dispute resolution (ADR), resolution of disputes either through mandatory mediation or outside the court system altogether, in neighborhood dispute resolution centers. ADR is supported by such odd bedfellows as the establishment bar, which views ADR as a way of easing the current crisis of the courts, and liberal-left reformers who welcome it as more participatory and less bureaucratic, dispute resolution of the people, by the people, and for the people.

Certainly settlement will continue to be the destiny of most civil cases brought in American courts, just as most criminal cases will continue to be disposed of through plea bargaining. But we can ask whether this trend should be encouraged or insofar as possible resisted. Should judges actively promote settlement as a core judicial function or should they concentrate their efforts elsewhere? Settlement is cheaper and swifter: is it better?

Participant Satisfaction

One criterion for comparing settlement with judgment is to look at the participants' own satisfaction with the process. For all that people sue, apparently they don't like to sue. When asked in one study how they felt in general about suing people, 77 percent of respondents thought one should settle without suit if possible or always settle without suit. What people seem to want, by and large, is just to get their problem solved (put crassly: to get some money from somebody else), rather than to achieve a legal victory for its own sake. In a survey of Detroit area residents, for example, the proportion of respondents reporting serious problems who sought "justice" or legal vindication (as opposed to a satisfactory adjustment) was tiny in all areas other than discrimination. Moreover, in a study of small claims courts in Maine, parties whose cases were mediated reported themselves satisfied with their experience more often than those whose cases were adjudicated (66.6 percent to 54 percent).

Marc Galanter, Professor at the University of Wisconsin-Madison Law School, reminds us, however, that "significant numbers of those who settle are not very happy with the outcome." The difference in levels of reported satisfaction between settlement and trial survey groups is not all that great. And satisfaction with the process does not run very deep. Galanter cautions that "the choice of settlement (or trial) is a choice in a context of limited knowledge, strategic exigency, and a limited set of perceived alternatives." Thus he is wary of equating the "choice to settle or to litigate with an informed affirmation of the quality of the process."

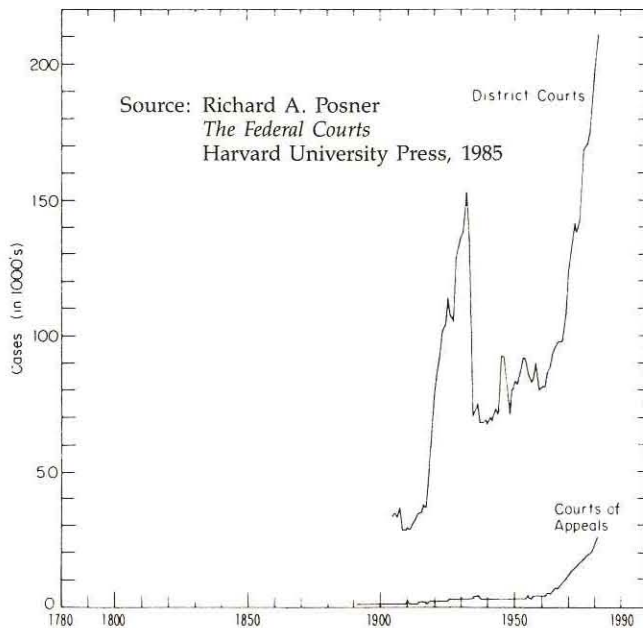
Reviewing the research on levels of participant satisfaction with settlement, David Luban, Research

Scholar at the Institute for Philosophy and Public Policy, argues that "participants aren't necessarily satisfied because the process has been a good one; they can be satisfied simply because their expectations have been illegitimately lowered." And, Luban points out, "attorneys interested in facilitating a settlement are great client-expectation lowerers." Galanter agrees: "Lawyers may spend a great deal of effort 'educating' their clients about the virtues of settlement compared to the cost, uncertainty, and arbitrariness of adjudication." The fox decides that the grapes are sour once he knows (or has been led to believe) he can't have them anyway; the client who has been convinced that she can't win at trial is then convinced to take what she can in settlement. When preferences have been carefully crafted to be easily satisfiable, their subsequent satisfaction proves little.

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Moreover, although both parties may declare themselves satisfied with their settlement — at least satisfied enough to avoid trial — significant inequities between the parties may make the rest of us question whether satisfaction in itself is an adequate index for justice. The Biblical dictum that "for whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath" (Matt. 13: 11-12) is reflected in the dynamics of the negotiating process. Both the cost savings and the satisfaction resulting from settlement tend to be unevenly distributed, for reasons that have more to do with the parties' initial endowments than with the merits of the case.

Legal scholar Owen Fiss, of Yale University Law School, explains that "settlement is [in part] a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally. . . . In these cases, the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process; and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant." Quite simply, the poorer party may be so desperate to get anything at all that he accepts whatever payment his adversary is willing to give. The more powerful and affluent party, on the other hand, already comfortably situated and with the resources to finance a protracted trial, has the luxury of choosing to bide her time, holding out for terms to her advantage.



Federal Caseload Growth, 1891-1983

Of course, the weaker party is disadvantaged in a trial as well. But, Fiss argues, in a trial "we count . . . on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities." And "there is . . . a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities."

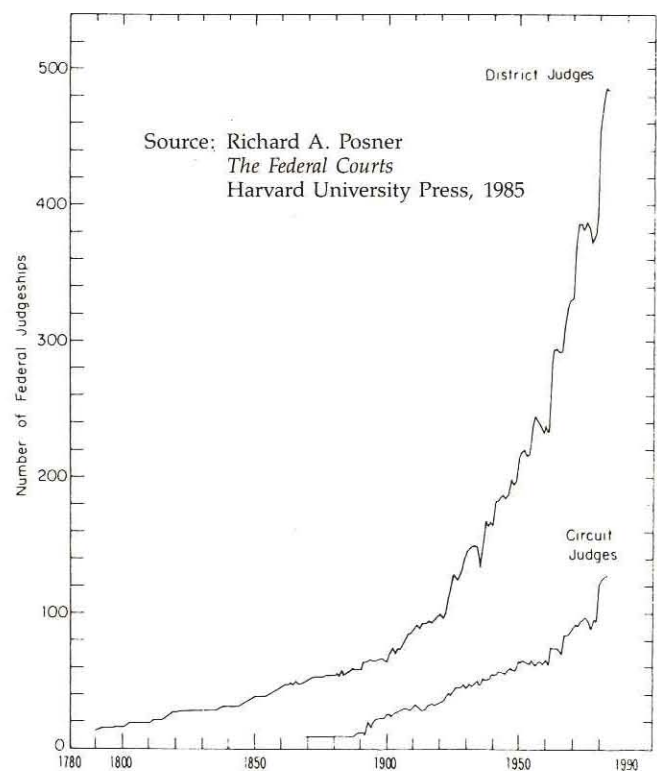
It turns out, then, that what we care about is not so much satisfaction, but justice. Is there any reason to think that settlements are more likely to lead to just results than trials? It may be hoped that as each side in a settlement proceeding has the opportunity to hear and consider the other's point of view, each will be led to appreciate the merits of the other's case. The resulting agreement may then be more just and fair, more decent and humane, than what might otherwise emerge. But Luban suggests that any advantage ADR has in this respect will be modest at best. The parties are, after all, adversaries, which is why they took each other to court in the first place. The party in a stronger bargaining position is seldom likely to accept a settlement that diverges greatly from what she could hope to get at trial.

Public Effects of Settlement

So far we have been considering whether settlement works to the interests of the disputing parties themselves. But the plaintiff and defendant are not the only ones affected by the outcome of their altercation and how it is reached; the choice between settlement and judgment may have vital ramifications for third parties as well as for the public at large.

Returning to the issue of participant satisfaction, the satisfaction of those parties present to a settlement may be achieved at the expense of other individuals or groups whose concerns their agreement flagrantly ignores. Luban, arguing that "an ADR process may well succeed because the participants are able to pass the losses and downside risks on to third parties," gives this example. "A hospital plans to build a halfway house for convalescent schizophrenics in a well-to-do neighborhood; the neighborhood's residents object and initiate legal action to prevent the construction; the hospital persists; the mayor sends in a mediator; and the disputants solve their problem by the hospital agreeing to erect the halfway house in a poor neighborhood instead." Such a "nimby" (Not In My Back Yard) problem is solved to the satisfaction of both contesting parties by thrusting it conveniently into the back yard of a third.

Civil litigation has a public as well as a private dimension. Once it enters the court system, a dispute between two private citizens raises issues that rightly concern the public at large. Of course, the taxpaying public, who foots the bill for the nation's administration of justice, has an interest in reducing costs, and all of us have an obvious stake in maintaining an efficient and orderly judicial system. These interests may be well served when cases settle out of court. But we have other values that the trend toward settlement may jeopardize.



**Number of Federal Circuit and District Judges
1789-1983**

Settlement frequently goes hand in hand with secrecy. Sarokin reports that "judges routinely... seal settlements at the request of the parties. Indeed, defendants frequently impose such secrecy as a condition of consummating the settlement and make disclosure a ground for rescinding it." Cases abound in which such "gag" orders have seriously compromised the public welfare. In recent years, reports *The Washington Post*, General Motors settled a rash of lawsuits filed by victims of fiery car crashes and then used court secrecy procedures to keep company documents about auto safety from becoming public. In another, hardly atypical case, McNeil Pharmaceutical, a subsidiary of Johnson & Johnson, was able to seal the records of hundreds of lawsuits involving fatal and life-threatening allergic reactions caused by its painkiller Zomax, thus preventing a public debate on its risks and permitting other Zomax users to continue to be jeopardized by them. The *Post* series concludes, "Every day, someone gets into a car, takes a drug, sees a doctor, or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order."

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When cases settle, the judge is also deprived of the opportunity to deliver an opinion which would otherwise have added to the body of legal precedent that constitutes our "common law." Indeed, Sarokin charges, "some settlements are consummated for just that very purpose — namely to preclude the establishment of a precedent which might affect other cases or establish requirements for future conduct." But, according to Fiss, the task of the judge is "not simply to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality in accord with them. This duty is not discharged when the parties settle." Where would we be today, what progress would we have made toward making good the Constitution's pledge of racial justice, if Linda Brown had settled her case against the Board of Education of Topeka, Kansas, rather than taken it to trial?

Cost Arguments

Setting cost aside, then, it is difficult to defend settlement of civil cases as demonstrably superior in some other way to trial. In facing the problems posed by our

overloaded civil court system, concerns about the sheer quantity of cases pending may have to be traded off against concerns about the quality of justice provided. Judges who pride themselves on being "settlement judges" rather than "trial judges" may earn kudos for cost-cutting, but that is all.

And even those kudos, it turns out, may be undeserved. While it is incontrovertible that settlement expedites the processing of cases, it is not clear that judicial efforts to facilitate settlement end up reducing costs or speeding dispositions. The vast majority of cases will settle anyway; little is apparently gained by judges' actively attempting to initiate or to broker settlements. Galanter observes, "That judicial participation increases the number and speed of dispositions is, for its proponents, an article of faith. But the few studies that have undertaken systematic observation have found little evidence that judicial efforts bring about production gains." The dynamics of settlement, then, seem to be relatively independent of judicial intervention.

Sarokin warns, moreover, that the trend toward settlement, while easing court dockets in the short run, may actually work to increase judicial caseloads in the long run. While it "obviously reduces the number of pending cases... it may simultaneously encourage the filing of new ones. The settlement mode of litigation makes it unnecessary to be certain of one's defense to the claims asserted. Tenuous suits may be instituted and weak defenses interposed with the confidence that neither is likely to be tested. The knowledge that the court will undertake to resolve the matter before trial may be adding to the number of cases instituted and defended." Thus is spawned a spate of nuisance suits, long decried by insurance companies — cases filed simply to settle.

Even granting the cost arguments, however, it may be that the balance between quantity and quality is being wrongly struck. Sarokin fears that "the court's interest in disposing of cases, in reducing its calendar, is becoming obsessive. Quantity has begun to compete with quality." He charges that the practice of issuing judicial "report cards," published statistics on each judge's total of dispositions and speed in rendering decisions, encourages a judicial "assembly line." Interestingly, he observes, "there are no published statistics on the number of opinions written, the number of reversals or affirmances, and obviously no analysis of the quality of a judge's performance... To be careful, thorough, thoughtful and reflective are not characteristics which the statistics reveal or encourage. The reports reveal pressure to do a lot and do it quickly."

Fiss expresses an even stronger opposition to settlement, stating, "I do not believe that settlement as a general practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated as a highly problematic technique for streamlining dockets... Although dockets are trimmed, justice may not be done. Like plea



bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."

Conclusion

The fact that most cases settle, and must settle, will continue to characterize our civil court system. We need to ask not whether it should continue, but how it should be regulated and the extent to which judges should actively intervene to encourage it. Sarokin, for one, recommends removing judges from the settlement process, leaving mediation and negotiation to specialists in that field and thereby freeing judges to concentrate on the task of judging. Other needed reforms might include legislation curbing the guarantee of secrecy as a condition of settlement; such legislation is currently under consideration in a number of states and in Congress.

The general and mounting enthusiasm for settlement

has obscured the imperative to subject it to critical scrutiny and regulatory controls. At the very least, we need to ask some new and different questions. After all, as Galanter writes, "most remedy-seeking in the vicinity of courts is going to eventuate in settlement. Ensuring the quality of these settlements is a central task of the administration of justice."

The sources used in preparing this article are: Judge H. Lee Sarokin, paper prepared for the Institute for Philosophy and Public Policy Working Group on Judicial Ethics, May 1987; Marc Galanter, "Judges and the Quality of Settlements," Institute for Philosophy and Public Policy Working Paper JE-1, March 1989; David Luban, "The Quality of Justice," Disputes Processing Research Program, Working Paper Series 8:6 (University of Wisconsin-Madison Law School, Institute for Legal Studies, June 1988), forthcoming in the *University of Denver Law Review*; Owen Fiss, "Against Settlement," *The Yale Law Journal*, vol. 93 (1984); Benjamin Weiser and Elsa Walsh, "Public Courts, Private Justice" (four-part series), *The Washington Post*, October 23, 24, 25, 26, 1988.

Is Good News No News?

No news is good news, the saying goes, carrying with it the suggestion that most news, at least as it is reported in the news media, is bad news. The charge is commonly leveled that the media place an undue emphasis on the negative, hawking papers with screaming headlines of gloom and doom, attracting television viewers with color footage of guts and gore. In recent years, in particular, critics have complained that media coverage of technological and other health risks is overly pessimistic, savoring of sensationalism.

By far the most ambitious and provocative research documenting this view is the twenty-five-year study by German sociologists Hans Mathias Kepplinger and Rainer Mathes of coverage of technology in the German print media. Kepplinger and Mathes's claim, for which they have amassed a great deal of evidence, is that media coverage of a variety of technological issues — in particular air, water, and forest pollution, radioactive fallout, and fatal traffic accidents — has become increasingly negative over the last twenty years, while the objective indicators for those issues have shown improvement or at least have not declined. For example: "The press hardly reported water pollution at all during the period of the greatest pollution of the Rhine in the late 1960s and early 1970s. . . . The press only emphasized water pollution when the pollution of the Rhine had receded and the regeneration ability of the river in terms of bio-chemical oxygen requirements had increased considerably. In relation to

the Rhine there is a contradictory development between the real pollution and reported pollution." Thus, Kepplinger and Mathes conclude, the media do not convey an accurate picture of reality. And, furthermore, "this new portrayal of reality by the media leads to a fundamental change in the public's views."

This view involves two claims: one about media content (a claim about the content of media reports on technological issues compared to "reality") and one about media effects (a causal claim about the impact of such reporting on beliefs and attitudes). Let us examine each of these, beginning with the second.

Media Effects

The evidence for the view that the media's (inaccurate) portrayal of reality changes public opinion is unclear. It is never possible to be certain, and rarely possible to be even confident, that an effect was caused by media coverage rather than by something else. Part of Kepplinger and Mathes's evidence for their conclusions seems to be that public opinion lags behind media coverage by about a year; that is, negative coverage of an environmental or technological risk is followed by negative public opinion about it. But this may be a case of *post hoc, ergo propter hoc* reasoning. Journalists and the public may both be responding to some third factor, with journalists quicker to react to events. In that case journalists would appear to be in the vanguard

of opinion change, without actually wielding much influence themselves.

Another possible explanation is that as media coverage of a controversy increases, public opposition to it also increases — irrespective of whether the coverage is predominantly negative or not. Allan Mazur, in *The Dynamics of Technical Controversy*, surmises that exposure to the disagreements among experts in the press makes a technology seem dangerous; even if pro- and anti-technology sentiments are well

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balanced, the public is inclined to conclude that it's better to be safe than sorry. If this is so, then it is not the negativity of coverage that contributes to negative public opinion; the mere increase in coverage, whether negative or positive, will bring about this effect.

Mazur's view is supported by the conclusions of the *Report of the Public's Right to Information Task Force* of the President's Commission on the Accident at Three Mile Island. At least part of the impetus for the task force's content analysis was the belief among many critics that American press coverage of Three Mile Island had been unduly alarmist or sensationalist. The content analysis found that, overall, reassuring statements reported by the press far exceeded alarming ones (56 to 39 percent). One way to reconcile the impression of alarmism with this finding is via Mazur's view that the mere increase in press coverage of an event or technology contributes to intensifying the sense of danger, even if coverage is not particularly negative. Perhaps people believe that those who speak on behalf of a technology "protest too much."

The idea that the public tends to react negatively to media coverage of environmental and technological risks even where coverage is not predominantly negative suggests that people process negative and positive messages differently. This suggestion is confirmed by the findings of Amos Tversky and Daniel Kahneman, two psychologists studying risk perception. Their work shows that people adopt a reference point from which outcomes or choices are seen as positive or negative, and they tend to react more strongly to options that are negative relative to their reference point than to options that are positive. We tend to be more eager to avoid losses than to secure comparable gains. Thus, if people see a technology as possibly saving lives but also as risking some loss of life, they will weigh the losses more heavily than the gains in deciding whether to support or oppose the technology.

These findings are reinforced by work done by

Elisabeth Noelle-Neumann and Wolfgang Donsbach on what factors influence the selection or retention of information by the newspaper reader. The flood of information grows continually, and the question arises: what filters do we use to let some of this information in and leave some out? Noelle-Neumann and Donsbach concluded that people are more receptive to negative information in the press than positive. Supporters of a technology, for instance, are more likely to be affected by critical information about it than are critics likely to be affected by positive coverage.

These findings — which come from a variety of social scientists in different fields and research areas — all support the view that people process negative and positive information differently. What follows from this? An important conclusion is that, even where people's views are formed largely on the basis of news coverage, it is a large leap from the claim that people have predominantly negative views about an environmental or technological issue, or are unduly alarmed about a given risk, to the view that the media have covered the issue in a sensational or predominantly negative way. And even where news coverage contains more negative than positive messages, it may be the amount and prominence of the coverage, rather than the slant, that has the greater impact on public opinion.

Media Content

What of the charge that the media do not portray an accurate picture of reality because press coverage is unrealistically negative? This view invites difficult questions about the proper role of the media, for it contains an implicit accusation: it suggests that the media *ought* to be attempting to reflect reality. But this assumption needs to be examined critically.

Indeed, looking at what the media do in communicating risks reveals a deep tension in our expect-

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tations of what the media ought to do. Looked at in one way, the criticism that the media do not accurately reflect reality seems a perfectly legitimate and natural one. Of course the media should reflect reality. What, after all, is the alternative? Bias. Distortion. One side of the story. But the view that the media ought at least to strive to mirror "the way things are" conflicts with much of what we know about how the news media do in fact operate. More important, it neglects how they must necessarily operate.

Often you don't. Journalists can always be criticized for the criteria they employ in choosing news stories. We may well object to the prevailing practice sum-

Even if people were aware of the pollution before extensive media coverage (surely they saw it and smelled it), they may not have viewed it as an alterable part of the environment. It is a commonplace that peo-



7

ple rebel against their circumstances when they begin to see the possibility of something better, and that this happens not when their circumstances are most dire, but when they have begun to improve. So it is very plausible that those who lived near the Rhine in the early sixties saw its filth as one of the unfortunate but inevitable consequences of civilization.

These points may go some way toward explaining and justifying negative media coverage of pollution even in the face of improving conditions. Pollution may still be excessive, even if there is less today than twenty years ago. We may appreciate its risks more now than when they were greater. And we may hold different values because of previous successes in pollution control, which lead us to demand further improvements in the environment. There is nothing obviously irrational about this process. In covering such issues, journalists can be registering dissatisfaction with a state of affairs despite its improvement over some previous state. They may be reflecting social values, engendering them, or both, but this need not indicate a failure to see "reality" as it is. For the reality at issue here includes people's values and expectations.

Of course the question remains: are journalists partly responsible for increased awareness of pollution and changing values among the public, or are they simply responding to popular trends? No doubt more research in this area can shed some light on this question, but like other chicken-and-egg questions it remains largely unanswerable. Common sense suggests that both factors play a part: journalists, as members of the larger society, respond to social trends (although perhaps more quickly than the typical citizen); at the same time they act as catalysts, speeding up those trends.

Conclusion

The mere fact that negative news coverage of an issue increases while the objective indicators of "negativity" (pollution or other damage) remain the same or even improve in itself indicates no defect in the media's treatment. Deciding what is newsworthy and what the "reality" is that news reporting ought to capture is intrinsically difficult and controversial, and reporters must grapple with these questions every day. We can blame reporters and editors if they simply wrap themselves in First Amendment justifications, as though the social consequences of their decisions were of no importance. But as they try to decide the exact scope and limits of "the news that's fit to print," they are entitled to be Cassandras as well as Pollyannas; other charges must be brought against their nattering beyond that of negativism.

— Judith Lichtenberg and Douglas MacLean

This article was condensed and adapted from "The Role of the Media in Risk Communication," in Roger Kasper and Pieter Jan Stallen, eds., *Communicating Risks to the Public: International Perspectives* (Dordrecht: D. Reidel, forthcoming). The sources cited are: Hans Mathias Kepplinger and Rainer Mathes, "Artificial Horizons" (unpublished paper, 1987); Allan Mazur, *The Dynamics of Technical Controversy* (Washington, D.C.: Communications Press, 1981); *Report of the Public's Right to Information Task Force* of the President's Commission on the Accident at Three Mile Island (Washington, D.C.: U.S. Government Printing Office, 1979); Amos Tversky and Daniel Kahneman, "Prospect Theory: An Analysis of Decisions Under Risk," *Econometrica* 47 (1979); Kahneman and Tversky, "The Framing of Decisions and the Psychology of Choice," *Science* 211 (1981); and Elisabeth Noelle-Neumann and Wolfgang Donsbach, "Selective Exposure to Newspaper Content," presented at the International Communication Association Conference, May 21-25, 1987, Montreal.

Mandatory AIDS Testing

Well after *Brown v. Board of Education*, Jackson, Mississippi, maintained racially segregated public swimming pools, claiming that only through segregation could violence and social chaos be avoided there. The federal courts saw through this stratagem, noting that it was a variant of the heckler's veto, thinly masking racial animus. But did Jackson integrate its pools? No. The city council voted instead to close them all. This time out, the courts were not so wise.

In 1971, the Supreme Court upheld the constitutionality of the pool closings. The Court was snookered by the surface similarity of the policy's treatment of blacks and whites — neither could, after all, use the

swimming pools. The practice appeared to treat similar cases similarly. And indeed the pool-closing statute did not refer in any way to blacks. However, shallow formalism aside, the pool closing was an even more inequitable treatment of blacks than was the original policy of segregation. Segregation merely perpetuated social custom, but the closings were a social ritual that elevated pervasive custom to the level of a sacred value. For the white city council's action told blacks that whites view them as so disgusting and polluting that white social solidarity will be maintained even if to do so requires of whites the loss of comfort, joy, and the pleasures of the season. Happiness is as nothing when

social identity is challenged. The Court could not see that the point of the legislative act of closing the swimming pools was to stigmatize blacks, even though the act made no mention of them.

Similarly, I will argue here that the significance of mandatory AIDS-antibody testing is the degradation of gays and the reconsecration of heterosexual supremacy as a sacred value, even though mandatory testing, to date, has not been directly aimed at gays nor, indeed, has made any mention of them. AIDS-testing legislation should not be understood as business-as-usual public policymaking aimed at the social good of protecting public health — it can adequately be understood only in terms of the nature and function of social rituals, in particular, purification rituals.

Purification Rituals

Six years into the AIDS crisis President Reagan gave his first and only speech on AIDS. Without ever mentioning gays, the president called for mandatory testing for AIDS antibodies among certain segments of society: marriage-license applicants, prisoners, and immigrants applying for permanent U.S. residency. Subsequently, the latter two forms of testing were formally instituted at the national level through administrative rule, and Illinois and Louisiana have enacted mandatory marital testing laws. Other groups already subject to mandatory federal AIDS testing are military recruits and active-duty personnel, Foreign Service officers, and employees of the Job Corps.

The public health community has done a passable job in showing that mandatory testing is not justified on traditional public health grounds and in particular showing that coerced testing is unlikely to do much to stop the spread of the disease, is likely to drive the disease underground, is a very poor investment of public dollars incapable of justification on a cost-benefit analysis, and will have consequences both tragic in case of false test results and absurd when the funds for the tests' administration could be going into desperately needed research and patient care.

However, the public health community, in showing this, has completely missed the social point of the statutes and rules mandating antibody testing. Indeed, in its very claims (though true) that the laws are inefficient, it actually sustains the evil of the laws' real purpose. For governmental actions mandating AIDS testing are not merely miscalculations, misdirected attempts to maximize utility. Rather they are part of the social rituals through which the nation expresses and strengthens its highest values — the values, that is, for which it will pay any price.

Such rituals and their values are the means by which and the forms in which the nation identifies itself to itself, and through which it maintains, largely unconsciously, its group solidarity. But group solidarity comes with a price — or, as social theorist Mary Douglas has summarized: "Solidarity is only gesturing when it involves no sacrifice." The social inefficiency of AIDS testing demonstrated by the public health com-

munity is the sacrifice that society has accepted to express and reconfigure its solidarity around its central sacred value. An examination of cases will show that the chief sacred value wrought by various AIDS testing laws is what Adrienne Rich has called compulsory heterosexuality.

Typically, when all goes well, a society does not have a foreground cognition of what its highest values are. They are not the object of its active social concern but a filter through which all social structures are projected and, in turn, through which social behavior is perceived. Because compulsory heterosexuality is so pervasive in society as to be its persistent and uniform background phenomenon, it goes as unnoticed in our thinking about society as air at a constant skin temperature goes unnoticed as we walk around a room.

Because compulsory heterosexuality is so pervasive in society as to be its persistent and uniform background phenomenon, it goes as unnoticed in our thinking about society as air at a constant temperature goes unnoticed as we walk around a room.

Though we are completely engulfed in it, we are completely oblivious to it. No one looking at the cavalcade of wedding and engagement pictures in Tuesday's newspaper thinks, "Gosh, what a slew of heterosexuals." Paradoxically, then, in AIDS testing legislation that which is most degraded — the gay person — goes entirely unmentioned.

Marital Testing

The most obvious case for my general thesis is mandatory testing as a condition of getting a marriage license — remember, gays need not apply.

Courts have done backflips in order to uphold cases of the legal existence of marriages even when the formal requirements (like age) and procedural requirements (like solemnization) for entry into marriage have been wholly absent or blatantly violated. They have done so to such an extent as to draw into doubt the rule of law in this area. The one spot, though, where they have balked at allowing access to marriage is access for gays. The courts have used every legal contrivance to block the recognition of gay marriages. These paired legal patterns showing a systematic and uniform warping of judicial judgment clearly suggest that here we have reached the bedrock and fundamental stuff of society — the thing that will not be budged, the thing that cannot be remade.

When absolutes are challenged, beware. And that is what is happening in the AIDS crisis, in part because it has thrown gays more prominently and more threateningly into social consciousness than ever before



Associated Press

*A slew of
heterosexuals?*

and in part because of the transfiguration of sexual values wrought by it. AIDS has caused people to confuse the merely instrumental virtue of prudence with the final goods for the acquisition of which one would want to be prudent. AIDS has certainly upped the ante on the means to a robust sex life; promiscuity unguarded is now not prudent. But rather than seeing AIDS as merely raising prudential concerns, weak minds, including most gay ones, have unwittingly transferred the badness of means — high costs — to sex as an end. Sex is now a final bad, to be tolerated and redeemed, if at all, only within an abiding relation for which it serves as a token or symbol, a relation of exclusive marriage. For all the wrong reasons, AIDS has applied conceptual pressures to the going social definition of marriage — a definition which gives heterosexuals an exclusive purchase on marriage.

Now, marriage is the central institution of heterosexuality. If, under pressures exterior to the institution of marriage but interior to the society that it is supposed to epitomize and valorize, the institution is to be maintained in its traditional form, it must be purified and re-anointed. Simply perpetuating the old bar to gay legal marriages is not sufficient to new circumstances. A new ritual is called for and it is handily supplied by the AIDS crisis itself, since, as shown by AIDS jokes and graffiti, there is a virtual identification in the mind of America between AIDS and gays. The new ritual that, within the configuration of marriage, will do the requisite work is to test those who are to be married to make sure that they are not polluted with the very stigma that challenges the institution itself. Here a social policy, perfectly absurd when viewed in terms of social utility, makes perfect sense when viewed as a social purification ritual. Marital AIDS testing reconsecrates the temple of marriage and the cosmic

canopy of heterosexuality — largely by the careful exorcising of demons.

Immigration and the Military

Other categories and forms of mandatory AIDS-antibody testing can be treated in shorter compass. Immigration policy and military policy are nominally designed to defend the nation, but the history of both institutions — their racial histories, for instance — shows that their chief function is not so much defending but determining and defining what the nation is. This is the real reason that mandatory AIDS testing has been instituted in these two areas.

The military has offered various paternalistic and strategic rationalizations for testing. But what tips the military's hand to reveal its true motives is its actual practice. Even though Congress has barred the armed forces from using a soldier's antibody status as a reason for ousting him, in practice the military simply badgers the antibody-positive soldier until he admits he's gay and then discharges him on that ground. Antibody testing is the physical correlate for homosexuality that the armed forces have long been seeking in order to purge themselves of pogues. Recent empirical studies have found that the military's past record of discovering even its sexually active gay males has been very poor indeed. With AIDS testing the army now thinks it has found the tool for which it has long hankered.

Since 1952, federal law has barred gays from becoming resident aliens and so also naturalized citizens. Yet gays are notoriously difficult to identify at the borders — they look just like people. The purpose of AIDS-antibody testing in immigration and its twin, military policy, is the barring of gay people from the institutions by which the nation defines itself, in order to keep the nation pure.

Of Walls and Vampires

Prison testing is a convoluted yet particularly telling case. The real reason for prison testing is provided by a remark, cryptic on its surface, made by then Attorney General Edwin Meese. As reported in the June 9, 1987, *New York Times*, Meese claimed that prison testing is necessary because when prisoners are released many of them gravitate toward jobs in day-care centers. I take it that this dense remark, when unfolded, entails something like the following concatenation of ideas: one, homosexuality is a corruptive contagion, so that even if one was not queer going into prison, one likely is when coming out; and two, all gays are child molesters.

A corruptive contagion is a disease that reproduces itself from one person to the next simply and sufficiently through its symptoms. The myth that homosexuality is a corruptive contagion — that one gets it from someone performing homosexual acts upon or near one — runs very deep in our culture. In 1978, Associate Justice, now Chief Justice, Rehnquist, while protesting the Supreme Court's declining to hear a successful gay student case, went out of his way to hold that a gay student organization's claim to campus recognition is "akin to . . . those suffering from measles [claiming they] have a constitutional right, in violation of quarantine regulations, to associate together and with others who

do not presently have measles, in order to urge repeal of state law providing that measles sufferers be quarantined."

AIDS too is mistakenly thought to be a corruptive contagion. Irrational fears of casual contagion and the mistaken but popular comparison of it to airborne diseases like influenza suggest that it is a disease the symptoms of which are the proximate cause of its transmission, where in fact, since it is a bloodborne disease, the actions of the person who gets the disease are (virtually always) the proximate cause of its transmission. It is the clustering of these two errors of taking gays and AIDS as each a vampire-like corruptive contagion, together with a statistical overlap between the two on a par with that of poverty and color, that has led to the virtual identification of AIDS and gays in the mind of America. They are taken as a tandem of invisible lurking evils, lying in wait to get you.

The real rationales for antibody testing in prisons (and the isolation there of those testing positive) apply just as well to all gays in non-prison settings, whether testing positive or not. The ritualistic purpose of prison testing is to assert the social validity of purging gays from the general population. Gays might do well to remember that the 1942 immurement of the Warsaw Ghetto was promulgated as a public health measure — to stop the spread of typhus. It made no reference to Jews. And gays might well remember too that FDR's executive order 9066, which set up America's concentration camps, made no mention of Japanese-Americans. Rather, it authorized the military to exclude "any and all persons" from designated areas to protect national defense.

Conclusion

Testing discovers and divides. Testing discovers the invisible and mysterious and it divides "us" from "them." It is the perfect vehicle for a civilization reasserting its most basic values under challenge. It casts lurking threats into the light so that they may be exiled or committed to the flames. At the same time, testing regroups the dominant culture by showing that it is willing not only to sacrifice others to its values but to sacrifice itself for the sake of them as well. Thus the more the public health community points up the irrationality of mandatory testing by its own criteria, the more it underscores and contributes to the true function of the testing, which is the assertion of group solidarity through self-sacrifice. In this crisis, the public health community is the lone lit candle in Kafka's cathedral: its singular flame simply makes the darkness darker.

— Richard D. Mohr

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The Ethics of Covert Operations

"Covert action" has been used to describe many different kinds of activities in U.S. foreign policy since World War II. The most controversial of these include the U.S.-backed coups d'état in Iran and Guatemala in the 1950s, the CIA-assassination plots against foreign leaders such as Fidel Castro and Patrice Lumumba in the 1960s, the attempts to prevent the election of Salvador Allende as president of Chile in 1970 and then to subvert his government after he was elected anyway, and, of course, the contra war in Nicaragua during this decade. A larger number of covert operations have met with general, if not unanimous, public approval — for example, financial and political support for moderate parties and labor organizations in Italy and France in the late 1940s and 1950s and military aid for the anti-Soviet guerillas in Afghanistan in the 1980s.

These operations had certain elements in common. Each involved interference in the internal affairs of another state. In each case efforts were made to conceal the involvement of the United States. Each was carried out without public congressional scrutiny or review. Yet it is the differences among the cases that are more striking. They encompass many different kinds of activity, in pursuit of disparate political objectives, undertaken covertly rather than overtly for a variety of reasons. This should make us hesitate to draw categorical conclusions like those that occur so often in discussions of the ethics of covert action (e.g., that it is always wrong).

It seems fairly clear that the issues of principle arising for controversial cases of covert action fall into three groups: sometimes we argue about the *ends* of covert action, sometimes about the *means* used to pursue these ends, and sometimes about the constitutional *process* through which the operations in question were (or were not) authorized and overseen. Let us consider each in turn.

Ends

Covert action is interventionary in a broad sense: in almost every case, it aims at influencing the course of political life in the target state by inducing or preventing a change in government or policy. Interference typically risks several kinds of harm, which are reflected in the three most prominent general arguments against intervention: that it offends the political sovereignty of the state being interfered in; that it disrupts a people's common life; and that it upsets the international order.

Some people think that its interventionary character

is enough to show why *all* covert action must be illegitimate. But this is too quick. All of the prevailing views about ethics in international affairs recognize exceptions to the general prohibition of intervention, such as self-defense, counter-intervention, and intervention to prevent gross violations of human rights. Thus, we must confront the question of whether (and how) the exceptions might apply to covert action.

A CIA official suggested one answer when he described "covert actioneers" as "the 'do-gooders' of the clandestine business" because their aim is usually to lend help to "people and institutions legitimately in need of such assistance." Covert action, this official was claiming, has a paternalistic, other-regarding rationale: its goal is to serve the interests of the residents of the state in which it takes place.

Although few cases of covert action appear to have been motivated by this kind of rationale, we should not dismiss it altogether. It reflects a long tradition in American foreign policy of justifying intervention on the ground that it is good for those whose societies are being intervened in. The Reagan Doctrine of support for "freedom fighters" is only the most recent formulation of this idea. So it is worth observing that paternalistic considerations could justify intervention, if at all, only if there were good reasons to believe that its consequences really would be in the interests of the target population. This is no small matter. One needs to know enough about the culture and values of the target society to make informed judgments about its welfare, and enough about its politics and history to calculate the likely consequences of the kinds of intervention contemplated. Any review of the history of intervention in U.S. foreign policy would quickly conclude that there were few cases in which the principal decision-makers could honestly have claimed sufficient knowledge to make these judgments responsibly. Covert interference encompasses additional difficulties arising from the constraints of secrecy. For example, a special problem of operational control occurs when intermediaries are employed to carry out the interference — partly because their aims may differ from ours, and partly because the chain of command is more ambiguous and less reliable. This leads to greater uncertainty in predicting the costs of the operation and increased chances of unintended results.

The more common justification of covert intervention, of course, is that it advances the security interests of the nation. But the ambiguities of the idea of the national interest are well known, and the bare invocation

of this idea, without more, can hardly justify any potentially costly venture. For one thing, it may refer to values of varying degrees of urgency or moral significance: although protecting a population against unprovoked attack and protecting access to raw materials or markets for goods could both be said to be in the national interest, for example, they represent concerns of dramatically different levels of importance. In addition, the national interest may be invoked in response to threats of differing degrees of immediacy: compare the imminent threat of a military invasion with the long-term threat that a nonaligned but left-leaning and strategically located regime might come to be a Soviet ally. From a moral point of view, these differences matter. Those who would justify a policy of covert intervention on the grounds that it could help avert threats to U.S. interests must explain what values would be advanced by the policy in question, how these are threatened under the status quo, and why these threats are important enough to justify the harms that interference would impose on its victims.

Advocates of covert action often point out its desirability as an instrument of foreign policy, in comparison to the alternative of regular military force,

The low-risk, quick-fix aspect of covert action almost certainly encourages decision-makers to commit national power more widely than they would otherwise find it advisable to do.

which does more damage and intrudes more deeply on the rights of other states and peoples. Covert action provides a "third way" between diplomatic pressure and overt economic or military aid, on the one hand, and direct military intervention, on the other. But the familiar tendency to rationalize adventurist foreign policies by invoking vague and overblown conceptions of national interest suggests that the relatively less damaging character of covert action might be more a liability than an asset. For the low-risk, quick-fix aspect of covert action almost certainly encourages decision-makers to commit national power more widely than they would otherwise find it advisable to do. It also reduces the incentives to reach diplomatic solutions.

Means

Covert operations can employ a wide variety of means, each of which raises different ethical questions. These include the acceptability of techniques of non-coercive interference such as propaganda and corruption of the integrity of domestic political procedures, the justifiability of political assassinations, and the legitimacy of supporting forces that use indiscriminate

military and paramilitary tactics in their efforts to destabilize a government.

I would like to concentrate on issues surrounding covert action as a form of manipulation. Covert action is often manipulative. The meaning of this, and of the evil connected with it, is not as obvious as it may seem, especially in the context of international relations.

On the level of individual relations, manipulation is a form of power that employs deception of those over whom power is exercised. It is a way of getting what you want despite the possible resistance of others. Manipulation occurs when you exercise power over other people, inducing them to behave according to your wishes, in a way intended to conceal from them that power has been exercised. For example, you might induce people to do one thing rather than another by providing them with skewed or incomplete information or by altering their preferences in ways they are unlikely to detect (as in subliminal advertising). The distinctive evil of manipulation derives from the fact that by attempting to hide the exercise of power, manipulation seeks to enlist a person's capacity for self-determination in the service of goals which are not, or not necessarily, the person's own. Because manipulation interferes with the normal process of selecting goals and deciding how to pursue them, it is an invasion of a person's autonomy. And because it operates invisibly, manipulation leaves a person peculiarly defenseless against this invasion.

There is a clear analogy at the international level. Consider, for example, the CIA's attempts to manipulate the Chilean elections of 1964 and 1970 by funneling funds to conservative forces in order to prevent victories by parties of the left. These activities were not coercive in any strict sense; individuals were not forced to act against their will. Nor were constitutional procedures crudely set aside (as they were in the coup of 1973, for example). Rather, constitutional procedures were *used*, in the pejorative sense of that term. The U.S. acted in ways calculated to cause the normal processes of social decision-making to produce outcomes that might not otherwise have taken place. Because the U.S. role was kept secret, the Chilean people were defenseless against it; for example, in deciding how to vote, they were unable to compensate for the influence on their attitudes and beliefs of U.S. interference in their domestic political life. This is just as much an assault on the autonomy of those affected as is manipulation in the individual case. Indeed, it is worse. The offense to individual autonomy is compounded at the social level by an offense to democracy, whose integrity depends on the capacity of its people to participate knowledgeably and rationally in political deliberation. This, of course, is precisely what manipulation subverts.

Constitutional Processes

Covert operations have to be kept secret to be effective, but this means that they cannot be subjected to the usual processes of public consideration and review.

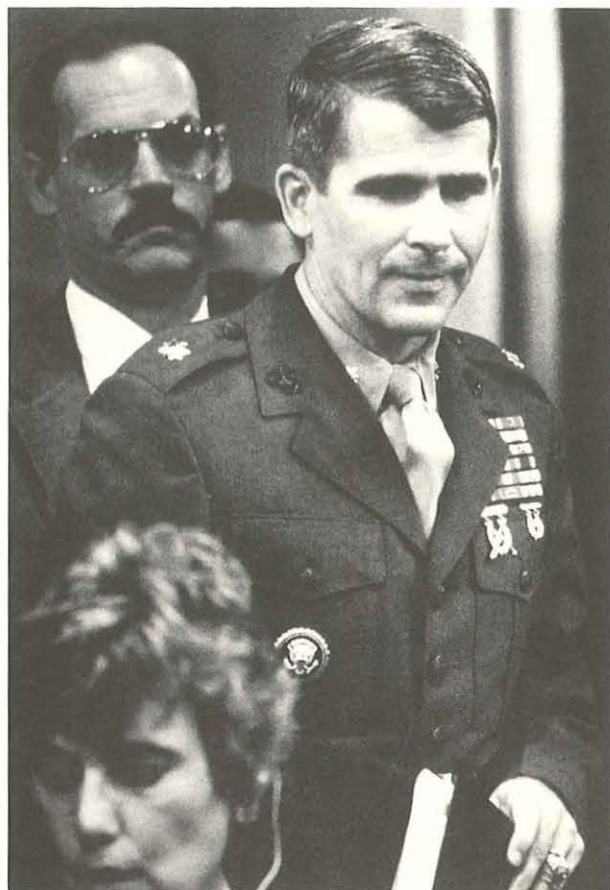


Photo by Glen Stubbe/The Washington Times

Gregory Trevorton refers to this as "the paradox of secret operations in a democracy." On the one hand, Trevorton is ready to agree that there may be occasions when covert action would be justifiable on grounds of national security. On the other, he does not see how covert action, even if justifiable on these grounds, can be reconciled with democratic principles.

The difficulty in this way of seeing things can be explained in two connected points. First, democracy is not some sort of mechanical device designed to harness individual political decisions to the popular will, so that any decision not approved by the people must be suspect. Democratic institutions are means for ensuring the responsiveness of policy to the interests of the people and for deterring the unauthorized use of power by those who hold public office. There is no reason to deny that democratic citizens could have good reasons for removing certain categories of decisions from popular control or even popular review. Indeed, a wide range of existing practices in such disparate areas as the administration of justice and macroeconomic policy suggests exactly this. These practices limit opportunities for public review of executive decisions, yet we do not usually regard them as contrary to democratic ideals.

But this does not mean (and this is the second point) that there is nothing more to be said about how the democratic idea constrains the role of secrecy in government. We need to tell a story connecting any provisions

for secrecy with the underlying aims of democratic institutions, showing in each case why those aims are likely to be achieved more successfully with secrecy than without it. This story will also suggest the limits of secrecy — where to draw the line between decisions that may be made secretly and those that must be publicly acknowledged and what procedural safeguards would be desirable to deter negligence and malfeasance among those officials who operate behind the shield of secrecy.

The real issue is not whether we make a logical or conceptual mistake in thinking that covert action is compatible with democracy. The serious question is practical, not conceptual; it is whether there are ways to organize the planning and execution of covert operations so that they serve rather than subvert the aims of democratic government.

The new covert action regime instituted in the mid-1970s employs a form of limited accountability whereby the executive branch is required to inform certain members of Congress about the planning and execution of covert operations. The proponents of the new regime were moved by the hope it would help deter several kinds of abuse of executive authority. Chief among these was the danger that covert action would fail to be the servant of official policy. They also hoped to deter transgressions of domestic law and the Constitution, and to guard against violations of international law and human rights.

This new emphasis on accountability has ethical as well as political significance. It reflects a judgment about the conditions under which it could be reasonable for citizens to risk depriving themselves of information that is important to the conduct of democratic political life — in other words, about the practical conditions under which democracy and covert action can coexist.

The question before us today is whether the judgments reached more than a decade ago were sound. Events of the Reagan years suggest that the formula worked out in the mid-1970s was a step in the right direction, but that it contained loopholes that enabled zealots in the CIA and the National Security Council to repeat the same kinds of abuses of authority that the formula was devised to deter. Certainly efforts should be made to close these loopholes. But as a matter of political ethics, our emphasis should be on a deeper question. This is whether any form of accountability is likely to be sufficient to bring the unauthorized use of executive power under control. If the answer to that question is no, then our democratic principles compel us to consider whether the capacity to conduct covert operations in peacetime should properly belong to the executive branch at all.

— Charles R. Beitz

Charles R. Beitz is Associate Professor of Political Science at Swarthmore College. This article was adapted and condensed from his paper, "Covert Intervention as a Moral Problem," *Ethics & International Affairs*, vol. 3 (April 1, 1989).

WORKSHOP IN PHILOSOPHY AND PUBLIC POLICY

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The keynote speaker is Tom Beauchamp, Professor of Philosophy, Georgetown University and Kennedy Institute of Ethics, author of *Philosophical Ethics* and coauthor of *Principles of Biomedical Ethics*, *The Virtuous Journalist*, and *Medical Ethics*. Other workshop faculty, from the Institute for Philosophy and Public Policy, include: Robert K. Fullinwider, William Galston, Judith Lichtenberg, David Luban, Mark Sagoff, Alan Strudler, and Robert Wachbroit.

Agenda

Wednesday, June 21

3:00-5:00 p.m.	Registration
5:00 p.m.	Reception
6:30 p.m.	Dinner
8:00-10:00 p.m.	Keynote Address "What Is Philosophical Ethics Good For?" Tom Beauchamp

Thursday, June 22

9:00-10:30 a.m.	"Do Political Candidates Have an Obligation to Play Hardball?" William Galston
10:45-12:00 a.m.	Small group discussion
1:30-3:00 p.m.	"Biotechnology and the Idea of Nature," Mark Sagoff
3:15-4:30 p.m.	Small group discussion
5:00 p.m.	Reception

Friday, June 23

9:00-10:30 a.m.	"Is Balanced Journalism Truer Journalism?" Judith Lichtenberg
10:45-12:00 a.m.	Small group discussion
1:30-3:00 p.m.	"Let the Punishment Fit the Tort," David Luban
3:00 p.m.	Adjournment

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