**Collection:**
Green, Max: Files, 1985-1988
**Folder Title:**
Civil Rights (2 of 8)
**Box:** Box 8

# This World

CONTENTS Number Two

# Toward a New Concordat?

NATHAN GLAZER

We are now buried in an avalanche of publicity and journalistic commentary, and even a moderate degree of analysis, regarding an upsurge of fundamentalism. We have been told again and again about its potential threat to civil liberties, to a healthy diversity of opinion, and to the hope that we can conduct public affairs free of the divisiveness of religious factionalism.

Of course, we have been plagued through most of our history by religious-based conflicts. Catholics, from the time when they increased in numbers owing to Irish and German immigration in the 1840's, often have been seen as a danger. They have been subjected to prejudice, and have felt forced to create their own distinctive institutions, particularly schools and colleges. In the regions where they were numerically dominant—in the cities and states of the Northeast—Catholics have been feared as a danger to diversity and secularism by Protestants and Jews. Jews have struggled with the anti-Semitism aroused by their ethnic and national differences, and with intolerance directed against their religion, its public practice, and the special arrangements in work, education, and dietary matters that its practice requires.

But these religious conflicts did seem to be declining rapidly in intensity and significance in the 1960's and 1970's. The modernization of the Catholic Church, which created serious conflicts among Catholics, reduced conflict between Catholics and their non-Catholic neighbors. There had been fierce divisions between Catholics on the one hand and Protestants and Jews on the other during the 1930's, 1940's, and 1950's. Many of us were surprised and pleased to see divisive issues simply evaporate in the 1960's. Sadly, a distinctive Catholic culture also seemed rapidly to evaporate. Many Catholic schools closed because of the difficulty of financing in the absence of public funds; Catholic colleges became less and less distinctive, and less

and less religious. Meanwhile, Catholic public opinion became more and more similar to the opinion of other Americans of the same class and education. Two issues still remain even after the 1960's to divide Catholics from Protestants and Jews—support of parochial schools, and attitudes to abortion. But even these issues are today no longer distinctively *Catholic* issues, and certainly not as distinctively Catholic as they were 20 years ago. The Moral Majority is not Catholic, and those who support tuition tax credits and education vouchers, while they certainly include Catholics, have among their dominant voices non-Catholics. Christopher Jencks and Milton Friedman, the two fathers of education vouchers, from Left and Right, John Coons and Stephen Sugarman of the Law School of the University of California at Berkeley, who have indefatigably propagandized for education vouchers, and Senator Packwood, of the Packwood-Moynihan tuition-tax-credit proposals, are not Catholic—or if one or another may be, none is identified with Catholic causes.

It is hardly necessary to go through this recital to make the point that the new rising tide of religious issues has nothing to do with traditional Catholic/Protestant, or Jewish/Gentile splits and divisions: It rather pits fundamentalist and resurgent traditional Protestantism against liberal Protestantism. Jews and Catholics, both traditional and liberal, are involved—but now not as representatives of embattled faiths, but as citizens, because major public issues have been raised. In terms of current conflicts involving religion, Jews, Catholics, and Protestants are no longer the principal combatants, which are rather traditionalists against liberals of whatever religious background.

If some have been caught by surprise—including liberal journalists, such as Frances Fitzgerald, who rush to examine with concern the Moral Majority, its supporters and those it supports—that is because, I would argue, we have forgotten a great deal of American history. And perhaps even more important, we have ignored a great deal of existent and still potent American reality. This nation has been, if anything, a *religious* republic, and we are still, to a surprising degree for the modern, industrialized or post-industrialized world, a *religious* people. Ours is also, of course, a law-ridden republic and people. We are committed to elaborate legal processes to come to conclusions, and those conclusions are sometimes rather bizarre. And finally, paralleling our involvement in religion and our commitment to legal processes, we are committed to the market, to the free development of goods and services, which must inevitably undermine anything traditional in our society.

What has been happening in recent years, to my mind, is that law and the market have created a situation in which it was inevitable that the more religious elements of the population would react with anger and with vigor. They have done so, and put a fright into those who have forgotten our reli-

gious past, and are ignorant of the nature of the American people in the wide stretch of territory between Manhattan and Santa Monica.

## *Nationalizing Morality*

It is worth pointing out, if we have forgotten it, that intense religious-based beliefs have often directly inserted themselves into American politics, for good or ill. We are reminded of this in Paul J. Weber's interesting article on religious lobbies in the first issue of *This World*. Weber points to two major movements in American life that were fueled primarily by religious sentiment. One was abolitionism. While this encompassed a much wider band of American opinion and power than that represented by the clergy of various Protestant denominations, Weber argues that "no other segment of the population pursued the issue with such intensity or tenaciousness. No other groups had the opportunity and facilities to raise consciousness to the extent religious groups did."

Weber's second example is more ambiguous, but still shows the power of religion in American public life: the temperance movement. Once again, not only religious groups were involved. There were progressive elements who saw in the wiping out of the saloon the salvation of the working man and his family. There was also more than a touch of anti-Catholicism, for Catholics in no way shared the fervor of Protestants, and in particular of the churches of the Protestant lower-middle classes, in opposing drink. But at the heart of the movement were the religious groups. The manpower and womanpower, the contributions, the publications, were animated primarily by a religious sentiment, rather than any pragmatic or rational analysis. This was also preeminently a "single-issue" movement, parallel to today's anti-abortion, pro-prayer, and other efforts. And it won. It resulted in the 18th Amendment banning drink, an astonishing victory, which eventually had to be repealed by yet another amendment.

What explains the recent resurgence of the religious Right? It is worth looking at the issues that most agitate them, and asking what has made them issues. One was the Supreme Court decision of 1973 setting standards for state control of abortion—and in the process thrusting aside the abortion laws of 50 states. A second issue is the concern with a rising tide of non-traditional attitudes toward sexual and family roles, and the almost casual references to pre-marital sex, homosexuality, and drug use in television and the mass media. A third is the ban on school prayer. *In other words, it is the great successes of secular and liberal forces, principally operating through the specific agency of the courts, that has in large measure created the issues on which the religious fundamentalists have managed to achieve what influence they have.*

This is perhaps a strong statement, but I believe I can defend it. Abortion was not a national issue until the Supreme Court, in 1973, set national standards for state laws. It did *not* become an issue because fundamentalists wanted to ***strengthen*** prohibitions against abortion, but because liberals wanted to abolish them. Equal rights for women did *not* become an issue because fundamentalists wanted to *limit* women's rights, but because the proposed Equal Rights Amendment raised fears, rational and irrational, that all traditional distinctions between men's and women's roles would be overturned. (That these fears were not so irrational is evidenced by the litigation against a military draft for men only.) Pornography in the 1980's did *not* become an issue because fundamentalists wanted to *ban* D.H. Lawrence, James Joyce, or even Henry Miller, but because in the 1960's and 1970's under-the-table pornography moved to the top of the newsstands. Prayer in the schools did *not* become an issue because fundamentalists wanted to *introduce* new prayers or sectarian prayers—but because the Supreme Court ruled against all prayers. Freedom for religious schools became an issue *not* because of any legal effort to *expand* their scope—but because the IRS and various state authorities tried to impose restrictions on them that private schools had not faced before. (Only tuition tax credits, it can be argued, is a case of an aggressive attempt to overthrow an old arrangement —but tuition tax credits are less a concern of fundamentalists than of Catholics and conservative Protestants and Jews.)

By now perhaps it is hardly relevant who was the original initiator of these issues. But I rehearse this story to make a simple point that is much forgotten in the rising tide of fear: Dominant power—measured by money, access to the major media, influence, the opinion of our educated, moneyed, and powerful elites—still rests with the secular and liberal forces that created, through court action, the changes that have aroused fundamentalism. What we are seeing is a defensive reaction of the conservative heartland, rather than an offensive that intends to or is capable of really upsetting the balance, or of driving the U.S. back to the 19th or early 20th century.

The two decisions that have most sharply focused the anger of the heartland date back only to 1963—the school prayer decision, and 1973—the abortion decision. The decisions that have made it so difficult for states to assist private (and religious) schools date back only to the early 1970's. The decisions that have made it all but impossible for states and cities and communities to control pornography do not go much further back.

## *A Defensive Offensive*

We are in a strange political posture indeed, one in which both sides see themselves as embattled and endangered, in which both see themselves as

playing a defensive role, protecting some important value or institution against an attack which is upsetting a stable balance. It needs no argument to demonstrate that this is the posture of secular and liberal forces. I merely have to read my mail, which brings frequent appeals for contributions to protect, from the Moral Majority and others, the Constitution, the Supreme Court, and individual rights.

But I would argue this is also the self-image and the posture of the now-resurgent fundamentalist religious forces. They may be on the offensive, but it is, if I may use the phrase, a "defensive offensive," meant to get us back to, at worst, the 1950's, and even that is beyond the hopes, or I would think the power, of fundamentalist religion. This "defensive offensive" itself can only be understood as a response to what is seen as aggression—the aggression that banned prayer from the schools, or most recently the Ten Commandments from schoolhouse walls, that prevented states from expressing local opinion as to the legitimacy of abortion, and that having driven religion out of the public schools now is seeking to limit the schools that practice it, or to prevent any assistance to the private schools in which many parents—who want a religious atmosphere and a religious education for their children—have sought refuge.

We are very far, I would argue, from the time when we might have legitimately feared the power of narrow-mindedness and bigotry as embodied in fundamentalist and traditional religion. Not that there is not enough bigotry and narrow-mindedness to be found there, as elsewhere. But I think we must make a distinction between a powerful and self-confident movement that would hope to reshape America in its image, and a defensive one that wants to protect some enclaves for traditional religion. It is not easy to draw the line between one and the other, but I believe what we face today is much more the second than the first. Let me give a few reasons why I think so.

First, in an organizational sense, the movement is weaker than its opponents. It is sobering—and will be encouraging for liberals and secularists—to see how weak the major fundamentalist, traditionalist, or conservative religious lobbies are in terms of money and manpower and prestige. Paul Weber has done yeoman service in trying to characterize the religious lobbies. He has located no less than 74 in Washington, of which 27 are conservative Protestant. Of all 74 organizations, only nine had budgets of more than $1 million a year. Only three had staffs of more than 30—and all three were liberal. They are truly tiny, compared to many Washington lobbies.

Second, the conservative groups are for the most part quite new. The great majority were created in the 1970's. (This is yet another indication that they are indeed defensive, having been launched against the changes of the 1960's and 1970's.) As is true of all new lobbying movements, probably many groups will not survive.

Third, the new conservative religious movements show less bias and bigotry against other religions or minority racial groups than did religious groups in the past. They define as their enemies not Catholics, or Jews, or Negroes, but secular liberals who have introduced changes which the fundamentalists believe undermine religion and the family. We are not dealing with the Ku Klux Klan or the American Protective Association. The new movement is perhaps the first major fundamentalist Protestant movement that is not anti-Catholic. Indeed, it has many interests in common with Catholics, such as opposition to abortion and the concern for the independence of religious schools. It is not anti-Jewish, as evidenced in the interesting exchanges between Jerry Falwell and Prime Minister Begin of Israel. The movement is not anti-black.

Indeed, whatever the inevitable caution, quite justified by history, with which Jews and Catholics and blacks will view any white Protestant fundamentalist movement, this one is not based on religious or racial bigotry. I believe one reason for this refusal to embrace bigotry is that fundamentalist Protestantism is no longer dominant in the country, and seeks allies everywhere—and they can be found even among conservative Jews, and even among blacks, who are still on the whole more religious than whites, and who share, in a larger degree than white opinion generally, some of the positions of the fundamentalist Protestant movements, such as opposition to abortion.

In any case, I do not find in the issues embraced by the fundamentalist Protestants anything implicitly anti-Catholic, anti-Jewish, or anti-black, whatever the degree of these feelings that one may still find among the movement's supporters. When I remarked they want to push the clock back, at worst, to the 1950's, my point was that they do not envisage pushing it back, as far as I can see, to a time when anti-Catholic, anti-Jewish, and anti-black sentiments were endemic and widely accepted. They know a great deal has changed: but they are focusing on only some things, and nothing they say, nothing in their stands on issues, suggest that Catholics, Jews, and racial minorities would be anything less than full citizens in the ideal world they envisage.

Fourth, the new fundamentalist movement expresses points of view, attitudes, that the dominant mass media—the national newspapers, weeklies, TV networks—for the most part reject, and that dominant elites also reject. Evangelists' TV audiences are much exaggerated; they do not appear on the TV networks or the national newsmagazines—only their critics do. It is interesting to compare the attitudes on religion and religious issues of American public opinion generally and elite opinion, as we find in the important Connecticut Mutual Life Insurance Company-sponsored survey of American values. In this survey, 65 percent of the public believed abortion to be morally wrong, only 36 percent of the leaders. Seventy-one percent

of the public felt homosexuality to be morally wrong, only 42 percent of the leaders. Fifty-seven percent of the public considered smoking marijuana wrong, only 33 percent of the leaders. And I suspect that if the surveyors had asked, a much greater percentage of the leaders would have supported the Supreme Court on prayer and aid to private schools than would the public.

Admittedly, one may draw various conclusions from this division between leaders and general public opinion. One may find the wave of the future in mass public opinion. But that is not generally the way lines of influence run. I doubt that we are in any danger of being overrun by a religious mob led by fanatical religious leaders.

## *The Counter-Revolution*

But my strongest argument for seeing the new movement as defensive and with limited aims is that I believe we saw in the 1960's and 1970's a real revolution, and that what we are seeing now is an attempt at a counter-revolution—but one which, like all counter-revolutions, will have to be satisfied to accept much of the change that has aroused it.

This revolution encompassed sex, dress, drugs. One need only recall that in the late 1960's it was still possible for Harvard to debate passionately parietal rules—when boys could visit girls, and vice versa. It encompassed women's roles: Twenty years ago the proportion of women in medical and law schools was about 5 percent; today it is around 30 percent. It encompassed the schools, once a place where traditional morality and religion were taught by teachers who were authoritative, and authoritarian—and were backed-up or disciplined by self-confident authorities. The driving forces of the revolution, to my mind, were two: The expanded reach of constitutional litigation, based on the model of civil rights litigation; and the power of the free market, in goods and ideas, to diffuse minority and unconventional models of behavior. The second faced a reduced resistance from community norms because of the power of the first.

*But what both the legal revolutionaries and the marketing experts forgot is that we are not one culture, but many cultures.* The once-dominant culture of middle America had been driven from the television screens, the mass magazines, the universities, opinion-molding circles. But it still existed. The fundamentalists had suffered crushing defeats in the 1920's in their fight against revolution and modernism in the churches. They had been reduced to irrelevance in the Depression of the 1930's, and the war against Nazism in the 1940's. In the family-building period of the 1950's, there had been little to arouse them. But the cultural revolution of the 1960's and 1970's did.

I think we are in a phase not dissimilar to that described by George M. Marsden in his interesting book, *Fundamentalism and American Culture:*

*The Shaping of Twentieth Century Evangelicism, 1870-1925* (Oxford University Press, 1981). Marsden describes how what was the dominant intellectual and religious tendency of the 1870's was reduced to irrelevance—and anger—by the 1920's:

> The fundamentalists' most alarming experience was that of finding themselves living in a culture that by the 1920's was openly turning away from God. "Christendom," remarked H. L. Mencken in 1924, "may be defined briefly as that part of the world in which, if any man stands up and solemnly swears he is a Christian, all the auditors will laugh." The "irreligion of the modern world," concurred Walter Lippman in his *Preface to Morals*, ". . . is radical to a degree for which there is, I think, no counterpart."

"The American Christians [fundamentalists]," Marsden asserts, "underwent a remarkable transformation in their relationship to the culture. Respected 'evangelicals' in the 1870's, by the 1920's they had become a laughingstock, ideological strangers in their own land . . . The philosophical outlook that had graced America's finest academic institutions came to be generally regarded as merely bizarre."

It all came crashing down in the Scopes trial in Dayton, Tennessee, in 1925. Fundamentalism, insofar as the national mass media were concerned, went underground, though it still existed on a vast scale, and represented the outlook on religion and life of a substantial section of the American population. In a second period of sexual license and of changing sex roles, and with a new expansion of the mass media and mass markets, now supported by the actions of an activist bar and a responsive Federal judiciary (neither of which we had in the 1920's), fundamentalism reawakened, and reawakened too the dormant fear of theocracy. I think this fear is much exaggerated. It ignores the primarily defensive character of the new fundamentalist movement. The aim of the new movement is basically to protect enclaves of literal, fundamentalist faith and the practices that accompany it. It is in Arkansas, after all, that a state provision for equal time for creationism recently was attempted, not in New York, or Illinois, or Texas.

The protection of enclaves is best accomplished, I would argue, not by sweeping national decisions, but by practice and law and custom adapted to the enormous variety of our country. The temperance movement, to take a revealing parallel, went too far when it imposed one section's view of drink on the rest of the country. But when that dispute was finally settled by the repeal of the 18th Amendment, it did not bother most people that in one section of the country or another, one could not get a drink on Sunday. In the same way, liberalism went too far when it imposed on the whole the views of one part of the population regarding abortion, or school prayer, or support for religious schools, through major cases that led to sweeping Supreme Court

decisions that set national standards. These major decisions made what should have been state and local issues, such as abortion and school prayer, national issues.

## *A Switch in Time*

Is there a way out? I think there is. I am reminded of the Yoder decision of 1972, in which the Supreme Court ruled that the Amish of Wisconsin did not have to send their children to school past the age when they felt education was useful for them. It was not a simple decision. What of the rights of the children who may have wished to continue in school despite their parents' desire to protect them from secular influences past age 14? This was raised squarely in Justice Douglas's dissent. There are no simple solutions to conflict between overriding principles and minority practices. But this decision did create peace. Others may have the same effect.

The battle lines are now drawn, as my mail pleading for contributions to protect free abortion, free television, and the rest daily reminds me. But I think a few modest Supreme Court reversals will do wonders. One recalls that in 1936 it seemed nothing could change a conservative court but a radical increase in its size to change its complexion. But then there was the "switch in time that saved nine."

Is it possible to define the switches that are necessary to moderate fundamentalist anger, and that may yet be acceptable to the cosmopolitan elite? I would like to suggest a theme for these switches: It is local option in morality, as we have local option in drink. Imagine the uproar if the Supreme Court were to take seriously an argument—I'm sure it could be made by a decent constitutional lawyer—that restriction of drink in public places is as much an invasion of privacy, or restriction of free speech, or whatever other principle one wishes to find in the recess of the Bill of Rights, as prohibition on the use or sale or advertisement of contraceptive devices, or prohibition of abortion. There would be an uproar, and a painfully forged compromise would have been upset, a new round of national conflict over morality opened. I think local option, by states and communities, on such matters as abortion, Bible reading in schools (one can switch from one translation to the other, and add the Bhagavad Gita and the Koran as school composition changes), public assistance to private schools, and a number of other matters, could do wonders, and would simply and honestly reflect the reality that we are a diverse country. Nor would the Constitution be violated, even if undoubtedly many professors of constitutional law would be outraged. After all, the constitutional principles that permitted national prohibitions in these areas were found lurking in the Constitution only 180 years or so after it was adopted.

Marsden comments at one point in his study that both sides, it turned out, were wrong in their hopes for the future. Fundamentalism was not an anachronistic remnant doomed to disappear rapidly, but neither was the world about to be saved, once and for all. Our policy must adapt to this reality. The fundamentalists must recognize that at least half of us are and will remain skeptical and unsaved; and the secular liberals must accept the fact that even their rational outlook will not gain universal acquiescence.

The arrangements that permit us to survive are those in which neither side imposes on the other its vision of the good society. Working out the details is not simple, in a society in which there is no ruling elite, and any view, no matter how eccentric, may find itself law if it finds the right judge. But I am convinced that if we withdraw from imposing the views and beliefs of the cosmopolitan elite on the whole country, we will find the new fundamentalism returning to its modest role in the American kaleidoscope.

## Commonplace Book

*Intellectuals are less disconnected from the social body than they like to imagine. As their attitudes shift, some cultural middlemen will always be around to transmit the tremors of change to society at large. The shift may not be noticeable at once, and may seem an entirely small-scale and private affair; and usually the rate of transmission requires a decade or so to be effective. But follow the zigs and zags of any given intellectual and you may turn out to be reading the fever chart of the next generation.*

William Barrett, *The Truants*
Anchor Press/Doubleday, 1982

PERSPECTIVE

# MY CHRISTMAS PROBLEM — AND OURS

THINGS are different now, but all through my childhood I regarded Christmas with a mixture of envy and fear.

The envy is easy enough to understand. Being Jewish, I was excluded from a holiday that included, or so it appeared, everyone else in the whole wide world. This holiday, furthermore, involved delights that looked at a distance much greater than any I had ever tasted or could hope to taste.

Of course we Jews had Hanukah, which also featured decorative lights and presents. But it was, if truth be told, a pale second-best. I did not then yet know that Hanukah had been inflated in America far beyond its intrinsic religious significance as a way of compensating the children for being left out of Christmas. But even without knowing this, somehow I sensed that it was the case.

Despite Hanukah, then, I envied the Christians their Christmas. Nor to this day have I ever quite freed myself of that feeling. By contrast, the fear that once accompanied it is by now entirely gone.

It was, to put it bluntly, a fear of Christianity. To some degree this fear was ancestral, rooted in the experience of my parents and all the other Jewish immigrants by whom I was surrounded as a child. In the East European countries from which they came, Christianity represented not the love it preached but the hostility it sanctioned toward them — a hostility that could easily spill over into persecution and even murder.

I myself was born in Brooklyn, but growing up there in the 1930s did little to temper the apprehensive sense of Christianity that I carried, so to speak, in my bones. We Jews shared those mean Brooklyn streets with Roman Catholics from Sicily and black Protestants from the American South, and in neither group was any love lost on us. A palpable air of menace even seemed to emanate from the very buildings in which they congregated to pray.

In those days, Christmas in America was still primarily a religious holiday. I have no idea how many people literally believed that they were celebrating the birth of the Son of God. But they were all certainly celebrating the power and glory of the Church. This was the kind of Christmas that could well activate the visceral Jewish fear of Christianity; and for me it did.

NORMAN PODHORETZ

As the years wore on, however, Christmas seemed to become less and less religious — which is to say that it seemed to have less and less to do with Christianity as such. It had not, to be sure, been as emptied of its Christian content as Valentine's Day or Halloween, but it was on the way. Santa Claus (whose origins as a *saint* were almost totally forgotten, even when he was called St. Nick) had become a more central figure than the infant Jesus. Shopping rather than prayer had become the characteristic activity of the season. The wholly secular "White Christmas" had all but replaced "Silent Night," with its references to the "Virgin Mother and Child," as the leading Christmas carol.

Indeed, so tenuous had the connection between Christmas and Christianity become that pleas went out from distressed believers to "put Christ back into Christmas."

From such a de-Christianized Christmas, no Jew could possibly have anything to fear. And so Christmases came and went without arousing any of the old apprehensions I had once invariably felt at this time of the year.

Many of my fellow Jews would like things to go on exactly that way, and not just in relation to Christmas. They are convinced that the more secular Christianity becomes, the more it will shed its old contempt for the Jews. They are also convinced that secularization is what has spared the U.S. from the religious conflicts that have soaked, and continue to soak, so many other countries in blood. They worry that a new explosion of religious intolerance and sectarian strife will be triggered by any breach — from prayer in the public schools to a Christmas creche in the public square — in the wall of separation erected by the First Amendment between church and state.

It is this worry, more than any other factor, that explains why Ronald Reagan did so much less well with Jewish voters in 1984 than he did with all other white ethnic groups. By identifying himself with the fundamentalists, who not only want to put Christ back into Christmas but who want to put Christianity back into the center of American life, Reagan frightened away many Jews who might otherwise have supported him.

**Secularizing the holiday is no great boon to mankind**

I understand and sympathize with their anxieties on this question, but I for one do not share them. I see no clear and present danger to Jewish interests in the resurgence of Christian fundamentalism. Whatever may have been true in the past, today the fundamentalists are more, not less, sympathetic than the secularized churches to the Jewish concern over Israel and a number of other issues.

Nor in my judgment is the principle of separation threatened by the entry into the political arena of these previously non-political fundamentalist groups. That principle, after all, requires keeping the government out of religion, not keeping religion or the religious out of our public debates.

On the other hand, I do see a great danger to everyone — including the Jews — in the ever more craven submission of the mainstream churches to the moral relativism that has already robbed so many lives of meaning and weight, drama and purpose, and that has abandoned our children to the deadly temptations of drugs and easy sex.

That is why I now think there is less to fear from Christians who want to "put Christ back into Christmas" than from those "enlightened" churches which have for all practical purposes given up struggling against the moral and spiritual nihilisms of our time.

NEW YORK POST TUESDAY, JANUARY 27, 1987

PERSPECTIVE

# RETREAT FROM PROMISCUITY

NORMAN PODHORETZ

THE other day, warning that there is no cure in sight for AIDS, a Washington immunologist declared that for the time being the only way to control it is through "a moratorium on new casual sexual relations as well as nonmonogamous ones." In issuing this call, he may have been knocking on an open door.

Thus among homosexuals, who are still far and away the group most at risk, the level of promiscuity has by all accounts declined for the simple reason that the wages of a chance sexual encounter now include the distinct possibility of death.

It is also possible that along with a drop in the number of random homosexual encounters, there is getting to be a drop in the number of new recruits into homosexual activity. Once upon a time, adolescent boys whose terror of girls might have pushed or tempted them into homosexuality were often deterred by the social stigma attached to it. With the removal of this deterrent, there was a great increase in homosexuality. It seems reasonable to suppose that the fear of AIDS is beginning to have the same effect as the fear of moral and social disapproval did in the past on adolescents of wavering sexual identity.

But it is not only among homosexuals or potential homosexuals that AIDS is making for changes in sexual behavior.

As it happens, there is still room for doubting whether, or at least to what extent, AIDS can be caught through ordinary heterosexual intercourse. Statistics from Africa and Haiti suggest that it can, and women everywhere are certainly at risk from bisexual men, but there are still relatively few authenticated cases of transmission from women to men in the United States. Nevertheless, many young heterosexuals seem to be acting on the principle of better safe than sorry. For some of these young people, being safe means using condoms. But for others, it means an end to casual sex.

To practically all homosexuals, and to most young heterosexual males, this enforced return to monogamy or something like it has come as a tragic deprivation.

"Along with most of my post-World-War-II generation," writes a young journalist, Mickey Kaus, in the Washington Post, "I both subscribed to the liberated ethic and attempted to take advantage of it. For homosexuals, of course, the revolution was even more dramatic, as was the subsequent promiscuity." But now, Kaus goes on, "we have to confront the possibility that much of our agreeable modern lifestyle" may be leading to "a medical holocaust."

There was always some question as to whether young women found this "modern lifestyle" quite so "agreeable" as men did. In fact, it has even been suggested that one of the covert purposes of the feminist movement was to develop a new rationale for chastity. Be that as it may, we rarely hear any female laments over the great setback AIDS is dealing to the cause of promiscuity (otherwise known as "sexual liberation"). Having been robbed of all the old moral grounds on which to stand in resisting casual sex, and having found the feminist strategy less than fully successful, women are perhaps not averse to being provided with a good new reason for saying no.

That sexual behavior should be changing under the impact of AIDS is not in the least surprising. What is surprising is that there is so far no serious sign of a retreat from the moral attitudes associated with the "lifestyle" that is now being so widely abandoned.

**AIDS has wrought a reluctant revolution in sex behavior**

Kaus, for example, couples his stress on the "overwhelming medical case against promiscuity" with a desperate disclaimer that "the world of promiscuity we built and enjoyed was, somehow, immoral." He is willing to admit that "an ulterior hygienic function" may have been served by the "venerable" objections to "free sex." But these objections were and remain nothing more than "inane prejudices."

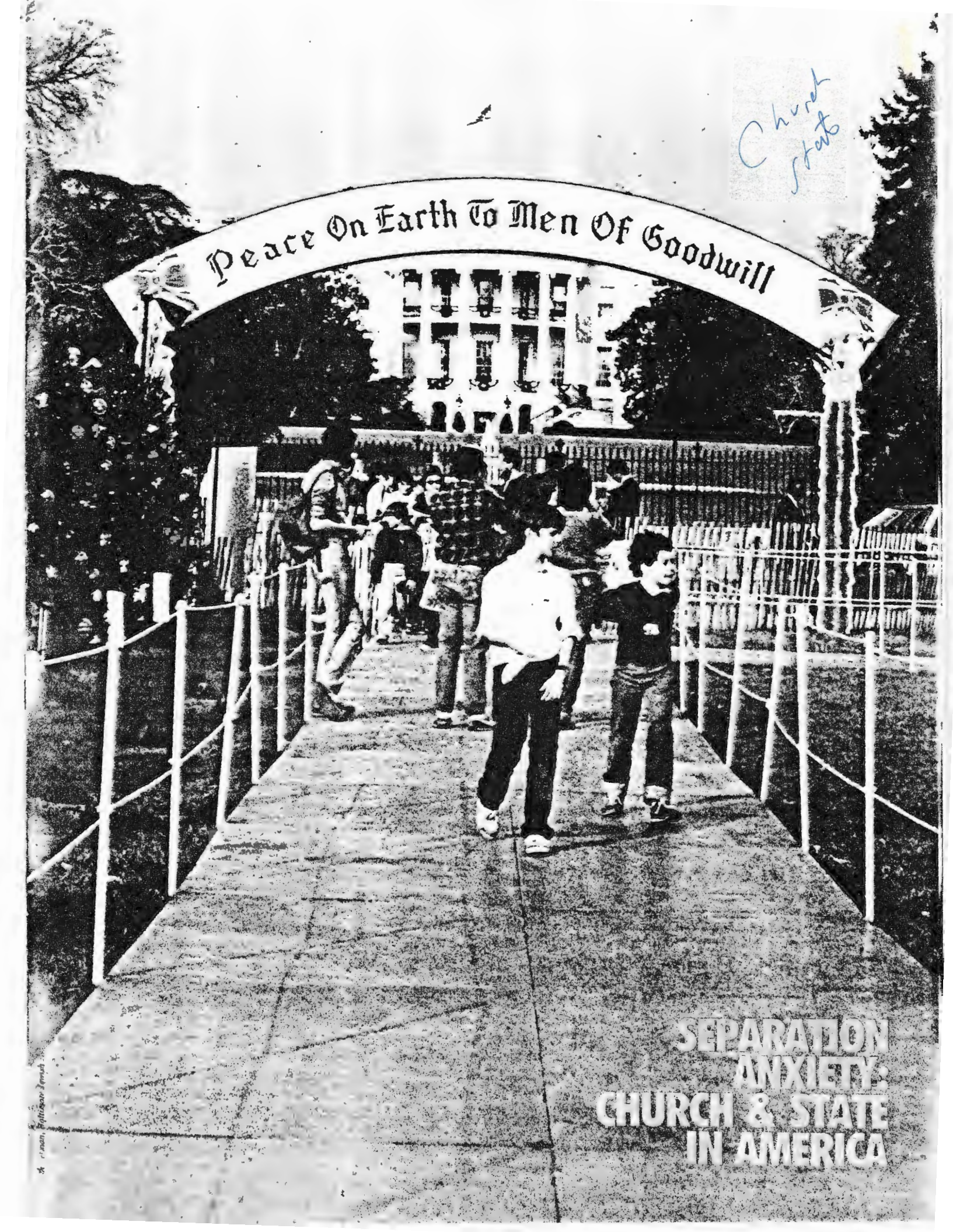
In other words, even though "we made a mistake," even though our "wonderful experiment" in sexual freedom was "an epic social blunder," we were still right, while those who opposed us, even though appearing to be justified by the outcome, were still wrong.

But if "they" were wrong about promiscuity and "we" were right, how is it that "they" turned out to be right and "we" turned out to be wrong?

Because Kaus and so many other members of his generation refuse to struggle with this question, they are unlikely to get beyond the callowness and superficiality of their ideas about sex. Meanwhile, however, a new generation is being thrown to the dogs of those very ideas. As Secretary of Education William J. Bennett observed in a major speech last week, high school students today are still being taught that "really the only things that matter about sexual activity are pleasure, or 'comfort,' or getting pregnant, or getting a sexually transmitted disease."

Reading this description of the attitudes informing sex education today, I was reminded of the joke about the apprehensive crowd in front of the Pearly Gates sending up a great cheer when St. Peter, announcing the list of disqualifications for entry into heaven, reveals that "sex doesn't count." All the promises of the sexual revolution were encapsulated in that joke, but so was the undercurrent of skepticism that has now been so cruelly vindicated by the appearance of AIDS.

For AIDS has, or should have, reminded us that sex after all does count — that, indeed, it is truly a matter of life and death, and in more ways than one. There can be no disagreeing with Bennett when he says that the time has come to rediscover those ways and to tell our children about them.




Church
State

# SEPARATION ANXIETY: CHURCH & STATE IN AMERICA

# THE COURTS

## The Jews have come of age at last—and none too soon

Why do American Jews so vehemently reject any effort that would identify government with religion? Although the connection may not be readily apparent, I believe the core of our response derives from our impotence as a community during the 1930s and 40s.

It is easy to describe that impotence: As a Jewish community, we did not succeed in making America a place of refuge for persecuted Jews; we did not succeed in causing our government to pressure Great Britain into allowing persecuted Jews to go to Palestine; we did not even succeed in getting the United States government to bomb the death trains and camps.

Some said—and still do—that this was so because American Jews and their leaders didn't really try, or that they didn't try hard enough, or that their leaders failed to cooperate with one another, or that they went about the effort in the wrong way. But a more accurate interpretation is that in those years American Jews were simply inadequate to the task.

The problem was not in our numbers or in our leadership; essentially, it was a psychological problem deeply embedded in the psyche of each of us. Intellectually, we knew then—as we know now—that the First Amendment allowed us to petition our government for the redress of our grievances. But we didn't really believe it. American Jews simply did not think of themselves as a community of citizens who could or should make heavy demands on their government, who could or should assert themselves in a politically organized fashion to achieve goals of critical importance to them. No leadership could have cured that communal pathology overnight. (Nor is it clear that the leadership was itself immune to the problem.)

The cause of the pathology was obvious: The parents and grandparents of the American Jew in the 1930s and 40s had been raised in Christendom, where they had been regarded as guests—usually very unwelcome guests. It was only natural, then, when they arrived on these shores, that they should continue to consider themselves guests. That they were now welcome guests in an incredible country, the likes of which they had never seen, was beyond their comprehension. They knew only that most Americans were Christians, and it was, therefore, likely that they were still perceived as "outsiders" (a likelihood sustained, now and again, by the evidence). Best, then, to continue to be wary, to perceive themselves as they imagined others perceived them.

American Jews were good guests. They tried hard to behave themselves, to be quiet, to refrain from making inordinate demands upon their hosts. In brief, they comported themselves, vis-à-vis their government, much as French, Belgian, English and Austrian Jews comport themselves today.

Perhaps it was inevitable, given the nature of the American society, that American Jews gradually would undergo profound psychological change and begin to view themselves as insiders. That is, of course, what happened. The shock is that we achieved that sense of at-homeness not, as so many had predicted, by shucking our Judaism. (That, after all, would not have been very persuasive evidence of genuine ease.) Instead, we came to feel free to assert ourselves, as Jews.

In my view, that transition—it is not too much to call it a transformation—was not inevitable; it was the result of very purposeful planning.

Extraordinary creativity characterized Jewish life from 1944 through 1948. The death of one out of every three Jews in the world served as a dreadful but potent catalyst. And Israel was in the process of being recreated: If American Jews were to continue to be as passive as they had been in the previous decade, the new nation would not have a chance.

Out of this creativity came, for example, new organizational structures

---

TED MANN

*Ted Mann, an attorney who has argued some of the major religious liberties cases before the United States Supreme Court, is President of the American Jewish Congress. From 1978-80, he served as Chairman of the Conference of Presidents of Major Jewish Organizations.*


Student Struggle for Soviet Jewry; (inset) AP/Wide World Photos

*Soviet Jewry activists, Independence Hall, Philadelphia, 1971; (inset) Rabbis at Soviet U.N. mission, 1977*

in American Jewish life, intended to create unity where there had been not merely division but divisiveness. And beyond the internal workings of the community, there were two other thrusts—both, as it happens, undertaken at the initiative of the American Jewish Congress—that were particularly significant. For their impact was not only structural; it reached, as well, the psyche of American Jews. It affected not only their self-image but also their understanding of what ought to be the proper relationship between American Jews and their government.

The first of these initiatives was a program of political action by Jews and their allies to obtain legislation in states throughout the nation that would make discrimination in admissions to universities, in employment and in housing illegal. Success came remarkably quickly, and the results—rapid professionalization and educational attainments—are evident today.

The second was the decision, in 1948, to concentrate the legal efforts of the American Jewish Congress in the area of church-state separation, a decision that is still the Congress's top priority. That effort has been relentless. It has involved literally hundreds of litigations in state and federal courts, with no let-up for 34 years. It has been animated by a deeply held belief that American Jews would never engage in effective political action to fight for their own vision of what America must be if they continued to view themselves as guests in a host (Christian) country.

This 34-year struggle, especially in its early years, was deprecated by many in the Jewish establishment who believed that it would do more harm than good—in the 1950s and 60s, by those who opposed a Jewish struggle against white Protestant Americans to remove the Protestant religion from government schools, and in the 60s and 70s, by those who opposed Jewish involvement in the effort against Catholic Americans to prohibit use of taxpayers' funds for the support of parochial education. Gradually, however, the Establishment was won over, and, by the early 70s, the effort to insure the Constitutional intention of separation between church and state had become the prevailing view of Jewish Community Relations Councils throughout the United States.

The victories that punctuate those 34 years are filled with significance for American Jews. When, for example, a unanimous United States Supreme Court concluded, in the early 60s, that prayer and Bible reading had no place in our public schools, it was a clear message that the Jew no longer lived in Christendom but in the first truly plural society in history. And when the Supreme Court decided that government could not support parochial education, the message was that voluntarism in matters of faith was not simply a crazy new idea of Madison and Jefferson 200 years ago, but an idea that was fundamental to the American dream in our own time.

Perhaps historians, looking back upon this period from a substantial distance, will better be able to evaluate the various reasons for the obvious transformation of the American Jewish community within our lifetime. The Holocaust and the guilt of the survivors (and all of us are survivors), and the creation of the State of Israel and the wondrous deeds of Israelis in the face of overwhelming odds have had an effect upon the self-image of Jews the world over. But the legislative removal of artificial barriers against the advancement of the American Jew professionally and

educationally, and the constant restatement during the past 34 years by the highest courts in America that church and state must be truly separate, have directly affected the Jews only in America, permitting us to think of ourselves as Americans in a new way.

Let there be no doubt about the transformation. In the early 1970s, the Soviet Jewry effort turned into a movement through which American Jews demanded that their government help free persecuted Jews in the Soviet Union; 270,000 are now free. Such a stringent, constant, nationwide and coordinated demand would have been unthinkable just 10 years earlier and *was* unthinkable in the 1930s and 40s. In the mid-70s, AIPAC changed from the quiet, small lobbying operation that it had been for so many years into the major force on the Hill that it has since become. The AWACS battle of 1981 symbolizes, more than anything else, the transformation I am talking about. An American Jewish community consciously took on an administration supported by the single most powerful special interest group in America—big business—and did so with no allies, not even the State of Israel. American Jewry was united in that battle, and fought it openly, above board, in every way as free men and women. We lost, as we are likely to lose many battles against determined administrations joined by big business. But we lost nothing either in self-respect or in the respect of others. And, clearly, if the battle had not been fought, far more weapons would have been sold to America's so-called "moderate" Arab allies in 1982 and 1983 and 1984. Simply put, we are now a factor to be reckoned with.

It is against that background that the attitude of American Jews toward the current church-state struggle must be viewed. For just as a Supreme Court decision invalidating Bible reading in the public schools was an important positive symbol for American Jewry, so a decision permitting the government to pay for the erection of a nativity scene on public property would be a negative symbol. So is the law passed in August 1984, permitting religious clubs to function in public schools. So would all of the many current efforts to bring prayer back into the schools and to give federal tax credits for tuition payments to parochial schools and to criminalize abortion. All would be negative symbols.

We must not let it happen. We cannot afford any regression in the psychological transformation that has taken place in the American Jewish community in the past generation. We cannot afford to live our lives timidly. The times require that we continue to be the highly politicized Jewish community we have become. Everything we hope to accomplish, not only the security of Israel and the freedom of Soviet Jews, but also the realization of our vision of a great, humane, prosperous and pluralistic society here in America, depends upon it.

All of the current efforts to Christianize America must be fought, and must be fought by American Jews. This is a matter of the very highest priority. And it will tax our resources, for I would expect that there will be as many litigations on church-state issues in the next four years as there were in the past 34. But there simply is no other ethnic or religious group in this society with as much at stake, or with as much vigor as is required.

The newer immigrant groups—and there are many that are non-Christian—stand in relation to the American government as we did 50 years ago, too unsure of themselves and of their rights and privileges to be assertive. Those main-line Protestant groups whose leaders, at least, agree with us, will make good allies but do not feel the threat to their self-image and self-interest that is required to assert these rights with the earnestness that the situation requires. As for secular organizations (such as the American Civil Liberties Union), which agree with us on most of the issues, they simply are not able to stand up in front of a court, as we are, and state that we will not be made strangers in our own land.

So the battle is ours to wage, to win if we persist. For the greatness of this nation is that as we wage the battle, we do not seek an "exception" from the American norm; we seek, instead, its preservation.

# THE SCHOOLS On *Wallace* v. *Jaffree:* Putting prayer in its place

DAVID SPIEGEL

Hard cases, according to a well-known legal maxim, make bad law. In *Wallace* v. *Jaffree*—the "silent prayer case"—the Supreme Court is likely to prove that the old aphorism is alive and well. Here is a matter that brings together issues of moral fervor and problems of constitutional law in a way that is likely to throw Establishment Clause law into flux for decades to come.

*Jaffree* was argued before the Court in early December 1984, and the Court is expected to hand down its decision before the end of its term in June 1985.

The specific matter at hand in *Jaffree* is the constitutionality of an Alabama state law that permits use of secondary school time for silent prayer or meditation. But it is not only the fate of the Alabama law that is at stake here—or even of similar laws in other states. (At the latest count such laws had been enacted by 23 states besides Alabama.) *Jaffree* is also likely to provide the most significant judicial signal in two decades regarding the constitutionally permissable balance in church-state relations.

All this said, *Jaffree* remains an odd candidate for celebrity status. It is essentially a local case with an idiosyncratic set of facts and an odd procedural history. Its preeminence was thrust upon it during the appellate process—a result of the accident that it was the handiest vehicle at just the time when a series of fundamental constitutional questions required resolution.

The plaintiff, Ishmael Jaffree, is a legal services lawyer whose children attended the Mobile County public school system. His complaint involved a practice that was peculiar to his local schools. At the start of the school day teachers would lead their classes in brief, supposedly non-sectarian prayers. The particular prayer varied according to the teacher. As an agnostic, Jaffree contended that this practice constituted religious indoctrination and therefore violated his children's constitutional rights.

*David Spiegel is a Washington, D.C.-based attorney who writes on a variety of legal subjects, including First Amendment issues.*

Having failed to settle his differences with local officials through administrative processes, Jaffree brought suit in federal court.

Were that the whole of it, the matter might quickly have been disposed of as a quirky local issue. But Jaffree chose—after his suit was already in progress—to broaden his claims. In addition to challenging the local practices of Mobile County, Jaffree now contended that Alabama's entire statutory scheme involving prayer observance in the schools was unconstitutional.

In fact, the Alabama laws in question do go a good deal further than those of the typical meditation statute. Not only do they permit silent prayer; they also allow teachers to lead willing students in a special, state-prescribed prayer.

This latter feature had been added by the Alabama state legislature during a special session called by the state's then-governor, Fob James, in the summer of 1982. Supposedly written by his son, the prayer in question has been referred to as the "Fob James Prayer." In tone and content it was similar to the one already in use in the Mobile County school system.

Now, therefore, Jaffree had challenged not merely local practice but state law—and highly visible state law at that. Yet still the case might have passed virtually unheralded had it not been for the involvement of an unpredictable lower court judge named William Brevard Hand.

Following a trial, Judge Hand concluded that both silent and spoken prayer and, for that matter, virtually any state-authorized religious practice, are constitutionally permissable. In so doing Judge Hand swept aside several decades of Supreme Court case law that barred any form of spoken prayer from public schools.

"The United States Supreme Court," the judge asserted, "has erred in its reading of history." Portraying himself as a "voice crying in the wilderness," Judge Hand found that the First Amendment of the Constitution prohibits establishment of a national religion only. Individual states can do as they wish. "The judiciary," concluded the judge, "has amended the Constitution to the consternation of the Republic."

After an appeal to the Eleventh Circuit Court of Appeals—an intermediate rung in the federal judicial system—Judge Hand was abruptly reversed. "Judicial precedence," noted the appeals court, "serves as the foundation of our federal judicial system." Citing the same Supreme Court decisions that Judge Hand had ignored, the court found that both silent and spoken prayers are unconstitutional.

By now, however, the case had gained the momentum that was to bring it to the nation's agenda.

The next step was a request for a rehearing, which ended with four justices of the circuit court (a minority) issuing a dissent in which they argued that the constitutionality of silent prayer represented a unique issue, one that warranted additional review.

The state then petitioned the Supreme Court to review the case. Normally such requests have little chance of success. However, in this instance a powerful ally—the Reagan Department of Justice—took up the cause.

"To hold that the moment of silence is unconstitutional," stated the Justice Department brief, "is to insist that any opportunity for religious practice, even in the unspoken thoughts of school children, be extirpated from the public sphere."

On April 2, 1984, the Court agreed to take up the issue. (As for the unconstitutionality of spoken prayer, here it simply affirmed the lower court.)

In this winnowed-down form *Jaffree* presents a sharp constitutional dilemma: Is a moment of silence an advancement of religion by the state? Or is it a relatively innocuous way of pleasing everyone (or almost everyone) without offending First Amendment values?

There are no easy answers to these questions.

On the one hand, it can be argued that the case raises no new issues. Meditation statutes can be viewed as yet another ploy to circumvent the various Supreme Court cases banning spoken prayer in public schools. The same arguments the Court applied

there can readily be applied to silent prayer: The apparent purpose and effect of meditation statutes is to advance religious observance; they affect a large and impressionable audience that is unable to make the kinds of fine distinctions that lawyers and judges make; finally, no matter what their intent, the laws will entangle teachers and administrators in a no-win area—an area where neutrality may be an unattainable goal.

On the other hand, meditation can be viewed as the ultimate compromise—a way of defusing a long-standing constitutional confrontation. "Silence operates in a perfectly tolerant, neutral and libertarian manner," notes the administration's *amicus* brief. "What is done within it remains a mystery. Each boy or girl may meditate or pray . . . each is equally free to think about yesterday's football game or tonight's date and no one will be the wiser."

If lower court opinions are a guide, then the administration's viewpoint in *Jaffree* has little chance of success. Of five federal court cases on the subject (including *Jaffree*), only one—a 1967 Massachusetts case—ended with a court upholding a silent prayer statute.

But the judicial numbers game may be deceptive, for it rests on interpretations of Supreme Court decisions, most of which are more than 20 years old. Using recent Court case law as a guide, it appears likely that a majority of the present Court will be receptive to the Alabama position.

In its recent decisions involving the Establishment Clause, the Court has strongly emphasized pragmatism over strict constructionism. It has held that the mere fact that a statute or practice has religious overtones does not necessarily violate the First Amendment. This is so even if those overtones offend certain minorities.

Thus in a 1983 case the Court found that having a Presbyterian minister lead daily prayer observances in a state legislature was "part of the fabric of our society." As such, any offense to minority religious scruples does not rise to the level of a constitutional problem.

And in a controversial decision handed down earlier in 1984, the Court, by a 5-4 majority, found that a government-sponsored Christmas nativity display in Pawtucket, Rhode Island, did not violate the First Amendment.

Eschewing a "crabbed reading" of the Establishment Clause, Chief Justice Warren Burger concluded in the Pawtucket case that the religious significance of the display was overrated. A Christmas crèche, observed the Chief Justice, is essentially a "passive symbol." Its essential purpose is to "engender a friendly community purpose of good will in keeping with the season."

Under such logic, moments of silence might likewise be viewed as constitutionally harmless. They are a neutral act—an attempt to accommodate differing viewpoints without favoritism. At worst, those who do not wish to pray will learn about the virtues of silence.

But the world outside the courtroom is unlikely to conform to this benign vision. Religion is inherently an arena of passion. That which is neutral to one person may easily be deeply offensive to another. The school's best effort at impartiality may still be repugnant to those whose mode of religious observance does not call for quiet prayer. It may also be offensive to those, such as Jaffree, who do not believe in prayer or in God.

Moreover, silent prayer can also serve as a "foot in the door"—an invitation to further school-sponsored religious observances that explicitly ignore particular minorities.

This is the underlying premise of the dissent in the nativity case. "The City's action should be recognized for what it is," noted Justice Brennan on behalf of the Court's liberal-centrist bloc, "a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority."

The Brennan logic applies to silent prayer, as well.

"Anything in this area that gives a green light to schools will be misread," notes Mark Stern, Assistant Director of the American Jewish Congress Committee on Law and Social Action. This is one of the many groups that has filed *amicus* briefs in the *Jaffree* case.

Silent prayer, contends Stern, is motivated by a belief that "promoting religion is a duty of government."

"Once you concede that," he continues, "it becomes hard to find stopping points that protect minority rights."

It is unrealistic to expect a constitutional law suit to be filed every time one of these stopping points is reached. Litigation, for most people, is not an everyday activity. The typical person would probably be willing to let grievances slide. And even if a case is brought, there is no guarantee that courts will be sympathetic. Apart from normal judicial biases, there is the further reality that court calendars are already overcrowded. Judges are likely to become increasingly impatient with a flood of local disputes such as the one at issue in *Jaffree*.

Perhaps the most intriguing question is why the Supreme Court chose to take up the *Jaffree* case in the first place. Cases that blend constitutional law with morality, religious principle and religious belief do not lend themselves to judicial "bright lines." Indeed, whatever "line" does emerge in *Jaffree* is likely to be a pastiche of concurring opinions, providing, therefore, confusing guidelines to the lower courts in years to come.

The Court, understanding the complexity of the law and the sensitivity of the issue, might simply have refused to review the circuit court decision, thereby leaving the matter of the silent prayer issue to be decided another day.

But the lure of history is powerful indeed, and the issue, as it has come to be debated across the land, is one of vast passions. The question now is not merely how the Court will decide: it is whether the decision will help reduce those passions, or serve further to inflame them. ✱

THE PARKS

# The crèche and the sukkah: Another view

Few public issues exercise our hopes and our fears as viscerally as those that fall under the rubric of "church-state relations." Most of our discussion of these questions has been grounded in the American Constitution and its 200 years of history and interpretation. But, as Jews, that is not the only grounding-place available to us. What if we also view these issues from the perspective of an older, longer life-history than those 200 years—that is, the history of the Jewish people?

If we were to do this, I think we might find that the ways in which we have celebrated the great Jewish festivals offer interesting—and even important—clues for examining the current issues of "private" and "public," "community" and "state," "religion" and "politics."

For two thousand years or so, the Jewish people have celebrated the great festivals "in private." We have held Pesach *sedarim* in our many separate houses; we have built *sukkot* in our many separate families and neighborhoods; we have fasted for Yom Kippur in our many separate synagogues.

We have not gathered, *en masse*—in *masses* of human beings—to celebrate these moments of remembering and renewing.

It was not always this way. When the Holy Temple still stood in Jerusalem, the festivals were times of great public gatherings. Hundreds of thousands of people tramped their way to the Temple—leading thousands of sheep at Pesach time, carrying thousands of branches of the *lulăv* and fruits of the *etrog* when Sukkot came around.

The great pilgrimage festivals were marches, demonstrations, rallies. Imagine the impact of these ancient great assemblies on the people and on the government. For such great masses of people signal power—political power, the power to change the world. That is why in our day hundreds of thousands of people come from their separate places to gather in Washington, D.C., to protest social injustice and the nuclear arms race. They gather to show each other, the government and the world that *together* they possess the power to change the world.

And that is why hundreds of thousands of people used to gather in Jerusalem. For them, Pesach was a physical replay of the Exodus from Egypt, that "general strike" of "exploited workers" who never came back from their "mass demonstration." When these crowds of Israelites gathered at the Temple, to whom were they demonstrating their power? Perhaps to the Pharaoh of Egypt, whose power their ancestors had for a moment broken—or perhaps to the smaller "pharaohs" of the Canaanite kingdoms or the "pharaohs" of the northern empires: Babylonia, Assyria, Persia.

But it has been almost two thousand years since our people gathered in this way for the festivals. Why? Because during this time we did *not* have political power with which to shake governments and remake the world—at least not the kind of political power that comes from concentrated numbers.

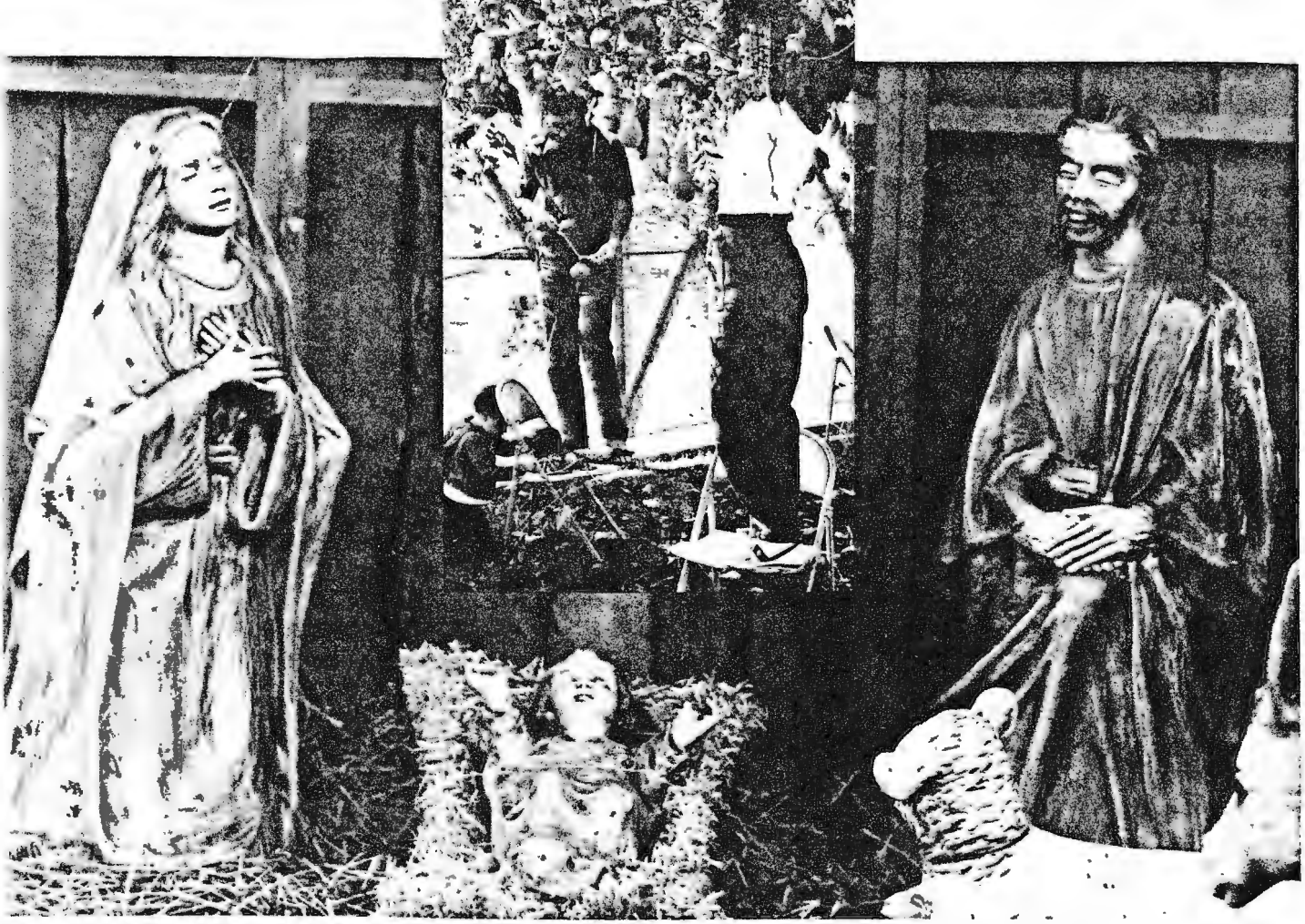
What did we have instead?

The rabbis taught that the Jewish people must experience holiness, joy, freedom not in great public demonstrations but through communal gatherings in the very nooks and crannies of the Roman Empire. We could no longer expect to change the world by marching a million strong; now our effort was to make our scattered households and communities into models of justice, peace and holiness.

Our rabbis were right for almost two thousand years. But is this *still* the truth about the Jewish people? For now, in the wake of another dreadful decimation, the Holocaust, we have regained some measure of political power. In Israel, the Jewish people rules a modern nation-state of proven military strength. And in America, the organized Jewish community holds considerable political clout. So now we can ask a new question about

ARTHUR WASKOW

*Arthur Waskow is director of the Shalom Center of the Reconstructionist Rabbinical College in Philadelphia and the author of a number of books, including* Godwrestling *and* These Holy Sparks. *He is one of three authors of "The Birthweek of the World: The Sixth Day," which appeared in these pages in October 1984.*



*Religious symbolism on public property: the White House crèche; (inset) Sukkat Shalom, Lafayette Park*

the festivals: Can we return again to some form of marching, rallying, demonstrating? Can we use these festivals to change the world?

At the Shalom Center, where our mandate is to bring Jewish perspectives to bear in preventing a worldwide nuclear holocaust, last year we asked ourselves this question about Sukkot. We remembered that in the traditional prayers each evening we say, "*Ufros aleinu sukkat sh'lomecha*—Spread over us the sukkah of Your shalom, Your peace." And when we look at the *sukkah,* we realize that because it is so fragile, so open, so vulnerable, it is the kind of "house" we could live in only if we are at peace. It is the house into which we invite *ushpizin*—the holy guests and the poor, the hungry, the homeless. It is the house that brings us closest to the world of trees and grasses—the world of all endangered species. It is the inverse of a fallout shelter.

What is more, the rabbis said that when the Temple stood there were 70 sacrifices during Sukkot in honor of the 70 nations of the world—that all should live in peace, justice and prosperity. The Prophetic portions we read for Sukkot look forward to the messianic future. The German-Jewish theologian Franz Rosenzweig called it the festival of "redemption"—the time when we bring in the great harvest of all our work, the fulfillment of all our efforts.

So Sukkot could be a time for us to build our separate *sukkot* at home and synagogue—and also to build *Sukkot Shalom* in central public places where many Jews could assemble, to make public our message.

*Could* we do this? Yes. We could build *sukkot* in public places: Lafayette Park near the White House, Boston Common, Daley Plaza. But *should* we do this?

Some said we should not. The objectors were people who *agreed* with our views on disarmament, but who feared the confusion of religion with the state.

Why did their fears surface now? Because several recent events seemed to flow into a common stream: the Supreme Court decision upholding the Pawtucket crèche, efforts in Congress to pass a Constitutional amendment favoring prayer in public schools, the recent talk among President Reagan and some strong supporters of his administration about state support for making the United States a religious, even a Christian, country.

What the critics said to us was, "How is this different from a crèche? How can we oppose the crèche and support this?"

But—we answered—this isn't the state's *sukkah.* This *sukkah* is a critique of the State, not a creature of the State. *We* will pay for it, *we* will build it, *we* will sit in it, dwell in it, pray in it, speak in it.

Doesn't matter, they said. First of all, we oppose the building of crèches on public land even if they are privately paid for and maintained. And second, this will *look* like the same thing.

The result of this dialogue was a compromise. We first built a *Sukkat Shalom* on private ground—the

George Washington University campus—near the White House—and then on Sunday morning of Sukkot, we took some of the branches from that *sukkah* and used them to help roof a *sukkah* that we then built in Lafayette Park itself. And on that Sunday, in the "yard" of that *Sukkat Shalom,* we had a rally for peace, against nuclear proliferation, for a mutual and verifiable freeze in the manufacture, testing and deployment of nuclear weapons. Then we took this one-day *sukkah* down.

Was this a profanation of the whole idea of a *sukkah?* One wise and clever Talmud teacher pointed out that our "portable" public *sukkah* was like the first *sukkot,* those our forebears carried from place to place in the Wilderness.

For the urgent moment, it was not a bad compromise. But the issues run deeper.

From the side of those who opposed the *sukkah,* the real issue was a deeper fear: that all the movement toward prayer in public schools, crèches on public land, "Christian" on the tongues of public officials—all this was leading toward a Christian hegemony in which all Jews, all Buddhists, all other religious minorities, all secularists would be outsiders.

And from the side of those who urged that *Sukkot Shalom* be built on public land?

Perhaps *their* deepest fear is that secular symbols are not deep enough to challenge the destructive power of an unbridled secular state. From this perspective, the reason that religious symbols like the *sukkah* speak so deeply to us and to others is that it is precisely a *religious* question that is at stake: the truth and value of modernity versus the truth and value of the ancient religious traditions.

Today, all around the world, there emerge signs of a religious Great Reawakening. This reawakening is rooted in deep doubts about modernism—doubts expressed either in regressive, restorative religious movements that utterly reject modernity, movements like Khomeini's or Kahane's—or in renewal movements like that of Martin Luther King, Jr., which try to infuse the better aspects of the modern "project" into a profound religious vision.

For those who see themselves as part of such a Reawakening, who draw from their religious traditions the strength and knowledge to prevent a world disaster, it seems self-destructive to leave behind their own deepest symbols when they move into public space in order to take public positions.

For them, that Sunday of Sukkot in Lafayette Park made the issue almost amusingly clear. For elsewhere in Lafayette Park that day, there were live-in tents that had been set up by another religious group. They had been named "Reaganville," as symbols of the Reagan administration's disregard for the needs of the poor and homeless. With the two symbols juxtaposed, it seemed obvious that the *sukkah* is a Jewish "tent," a poor person's home turned into the symbol of sharing. Why should a secular—or not-so-secular—tent be kosher for conveying this message, but a *sukkah* not? Should people who arrive at their political views out of religious conviction disguise their own deepest symbols that way? For Jews, does this mean that we say—for example—to those of us who are passionately committed to ending the nuclear arms race, "Join SANE, or the Freeze Committee—but stay away from Jewish symbols, hence also from Jewish life?"

Are liberals who are sensitive to pluralism and the religion-state issue trapping themselves into a position where they concede the use of religious symbols, with all their potency, to the right, which has no inhibitions about using them? After all, the secularist position *lost* the Pawtucket case. Politics and constitutional law are often a game of leapfrog. If the rules have "changed" (or gone back to what they were 30 years ago), how long do we sit on the sidelines and let others play the only game in town, and when do we decide to use the new rules to advance pluralism, liberalism, our own vision of religion?

As for those who fear the Christianization of America: how dangerous would it be for Christians to put up crèches in public spaces as an expression of the religious roots of their own political beliefs, if at the same time Jews were vigorously building *sukkot*? Are our fears rooted in an earlier era when we felt both very weak vis-à-vis the non-Jews of America, and very weak in regard to our own religious and cultural roots? Has nothing changed? (Maybe not!)

Maybe there is a more "Jewish" way to prevent Christianization than to take comfort in a bland, homogenized-secular culture? Is not such a bland culture more likely to lead to assimilation than one where Judaism, Christianity, Islam, Buddhism and other religions are intense, vigorous and publicly visible?

If we explore this path of thinking, we might find that certain themes of Jewish history echo with certain ways of understanding the American Constitution. On the Jewish side, our ancient practice—making the festivals into demonstrations of political power and social values—may make sense in a new context. Now that we have real political power, perhaps we should once again bring the authentic meaning of our festivals to bear on public policy—by celebrating them in public, *en masse*.

If we do we will be strengthening, not shattering, the First Amendment. For the Amendment is a one-way "wall of separation." It forbids government to shape religious life. It does not forbid religious communities to seek to shape governmental policy on great public issues.

And indeed, for at least the next generation, it is very likely that more and more public discourse on the great public issues—the fate of the earth, the fate of the poor, the fate of freedom—will be cast in religious terms. The fact is that not only the language we use *about* the issues—but more deeply—the very way the public issues are understood, may more and more arise from religious world-views.

If so, I hope the Jewish people will bring its own sense of the wisdom of Torah into the great public arena—rather than either withdrawing from the debate altogether, into a privatized religion, or relying on a frozen secular modernism as its way of thinking. ✱

# Rights Group Seeks Changes at CBS Outlet

By PETER J. BOYER

Operation PUSH, the minority group behind the boycott of CBS's Chicago television station, has asked the station to sign an agreement mandating dramatic increases in the number of minority anchors, reporters and managers.

The proposed agreement, which includes a provision for monitoring compliance, also asks the station, WBBM, to contract with minority-owned businesses and to donate $10 million to the United Negro College Fund and $1 million to black organizations chosen by PUSH.

The proposal, called the "WBBM-TV Covenant," has been a point of discussion between boycott leaders and CBS executives since last December. A copy was obtained by The New York Times this week.

Neil Derrough, president of the CBS stations division, said yesterday that it "would not be realistic and right" for CBS to accede to some of elements of the PUSH proposal. "It is our responsibility to manage the station," Mr. Derrough said. "If we signed this covenant, we would be giving the responsibility to them, we'd be giving the authority to them."

**Demotion Prompted Boycott**

Mr. Derrough said that PUSH has not yielded on its proposals. The group has not changed its position, even after the appointment last week of Johnathan Rodgers, who is black, as vice president and general manager of WBBM.

The Rev. Henry Hardy, chief negotiator for Operation PUSH, said yesterday of the proposed agreement, "It is a serious document to be taken at face value, but we don't just expect them to come in and sign it."

"It is a document for discussion," Mr. Hardy said, adding that PUSH might be willing to move away from some of its requests.

PUSH has been boycotting WBBM since last October, when Harry Porterfield, a veteran anchorman and a black, was demoted to make way for a white anchor, Bill Kurtis. Mr. Kurtis, who had been anchor of the "CBS Morning News," had enjoyed immense popularity at WBBM before going to work in New York, and was returned to Chicago partly to stem WBBM's ratings slide.

The station, once the most successful in Chicago, had lost its standing to the ABC station, WLS, a circumstance further complicated by the boycott. PUSH has distributed thousands of anti-CBS bumper stickers and posters throughout Chicago. Research by WLS indicates that the CBS station has lost some black viewership, but Mr. Derrough, while acknowledging WBBM's ratings decline, has put the blame on factors other than the boycott.

CBS executives have suggested to PUSH that the network's record on minority employment is good and that further efforts have been made since the boycott to bring minorities into the station. In a letter to Mr. Hardy last January, Gary Cummings, former general manager of the station, noted that CBS had hired or promoted two minority producers, a director, a researcher and a writer since the boycott began.

Mr. Cummings was dismissed earlier this month and replaced by Mr. Rodgers, who is the only black general manager of any network-owned station.

**Concessions Sought**

Among the concessions PUSH asked of CBS are these:

¶That WBBM establish a 40 percent employment quota for blacks and Hispanic employees at the station.

¶That WBBM hire two male minority anchors — black or of Hispanic origin — for its weekday news broadcasts.

¶That the station conduct at least 35 percent of its business with black-owned banks.

¶That 25 percent of WBBM's legal work be done by black or Hispanic lawyers, and 35 percent of the station's outside accounting work be contracted to minority accountants.

¶That WBBM agree to assign a portion of its insurance and advertising business to minority companies, as well as pledging 18 percent of procurment expenditure, ranging from painting to cleaning, to minority contractors.

¶That WBBM provide $20,000 scholarships to Chicago minority students, create a Black Policy Institute budgeted at $150,000 annually, donate $10 million to the United Negro College Fund and "contribute a minimum of $1 million to Black organizations designated by PUSH."

"If they would give us that, it would be fantastic," said Mr. Hardy. "But we realize the reality of negotiation." He said the group recognized that it was not likely to receive full compliance with its request.

**Request for Male Minorities**

One request — the hiring of two male minority anchors — has CBS executives taken aback. WBBM currently has three white male anchors on its weekday newscasts, and a black woman, Robin Robinson, anchoring its Sunday newscasts. But PUSH has specifically asked for male anchors.

"That black woman is fine, she's a fine person," said Mr. Hardy, but he added his belief that the employment of black women impeded the progress of black men in white-dominated businesses, such as the news media.

"The black male has always been castrated by white America," Mr. Hardy said. "Black women have always been used to keep black men in their place."

Mr. Hardy said that young black men needed role models other than athletes, and that black men at the anchor desk would be an ideal image. "Instead of getting a virile, charismatic black anchor, they use a black female," he said. "The black man is always portrayed as less a man than he really is."

The Rev. Jesse Jackson, founder of PUSH, said last week that the boycott of WBBM was the first effort in a campaign to increase minority participation in the news business. The group has said it might extend the boycott against CBS nationwide.

Mr. Jackson was in New York yesterday to meet with members of the Black Employees Association, a group representing black workers at CBS.

Mr. Rodgers, meanwhile, is faced with the dual task of repairing a faltering station, an important revenue source, and dealing with the black community. "In my mind, I'm vice president and general manager of WBBM, period. I'm not the black general manager," Mr. Rodgers said. "I'm here to do a job regardless of race, creed or color. I will not play off of race. They need to know of me that I am the general manager of the station."

Mr. Hardy said that PUSH will give Mr. Rodgers some time. "We realize that it takes some time to get your legs," Mr. Hardy said. "On the other hand, while we're negotiating with 'm, we'll be boycotting."

Left: Camera Press

The Rev. Jesse Jackson, left, who met with black employees of CBS yesterday in New York, and Johnathan Rodgers, who has been named vice president and general manager of WBBM-TV, the CBS-owned station in Chicago.

*Blending In*

# Cuban Arrivals of 1980 Hit Miami Very Hard But Assimilated Well

## The 125,000 Mariels Brought Problems Local Hispanics Did Much to Help Solve

## Thousands of Serious Felons

By Roger Lowenstein
*Staff Reporter of* The Wall Street Journal

MIAMI—Linda Berkowitz remembers the Mariel invasion of 1980 as well as anyone does:

"Someone called me down to Tamiami Park and said, 'You won't believe who has gotten off the boat.' I saw rows of prisoners with tattooed bodies and shaven heads."

In the next few weeks, as 125,000 Cubans began pouring into Florida, Miss Berkowitz recalls, Miami became a changed city: Refugees were sleeping under highways, on houseboats, in tents and beneath the Orange Bowl bleachers. Racketeers rolled up profits from faked IDs, and officials with experience in dealing with hurricanes and floods began trying to feed, process and resettle one of the largest convoys of immigrants in the nation's history.

Five years later, Miami is even more changed, but the Mariels—who were seen as the dregs of Cuban society—are easing their way into American life. "It has turned out miraculously well," says Miss Berkowitz, the Miami district director of the state health department.

### Blending In

The Mariels got little help from government but a lot from Cubans who had come here earlier. And while a minority turned out to be criminals, most of the 100,000 who settled in South Florida seem to have assimilated well. "Their integration has been very good," says Msgr. Bryan Walsh, the executive director of Catholic Community Services. "They have disappeared into the overall Cuban society."

Rodolfo Gouthmann's first day in Miami was June 25, 1980. He moved in with his father, a mechanic who had arrived 10 years earlier. "We had a typical Cuban dinner—rice, beans and pork," he recalls. "The next day we went to work."

Mr. Gouthmann had a series of seven jobs—welding steel, fixing automobile transmissions—over the next three years, and he also was out of work for stretches. But when his father-in-law lent him $2,000, he started a small but thriving business reupholstering cars.

There was nothing daunting about the presence of people like Mr. Gouthmann when they arrived one at a time, but Miami took in not one but 100,000. Mariel seemed to swing open a door in the city's psyche, exposing mistrust between Anglos, blacks and Cubans.

A law was enacted banning the use of Spanish in conducting the official business of Dade County. Many Anglos themselves began to feel like foreigners, struggling with the Spanish of Cuban store clerks and surrounded by Latin rhythms.

There was rioting by blacks, an underlying cause of which seemed to be the rioters' sense of displacement by immigrants.

## Boiling Over

Even before Mariel, 36% of Dade County's residents were born overseas. New York City, by comparison, is 24% foreign-born. After the boatlift, Miami became an overheated melting pot—not just of Latins but of Indians, of Asians and, especially, of Haitians, who had come just before the Mariels in hundreds of tiny boats.

"In Overtown [a black slum], people stopped going to the county hospital because they didn't like waiting for the Cubans and Haitians," says Marvin Dunn, a black psychologist. "Seeing those ragged people made Miami seem like a dumping ground. People felt like they were losing control."

And in a sense they had. The year after the Mariels arrived, murders in Dade County rose to 515 from 320.

Miami Beach became a haven for Mariel criminals and vagrants, and some of the retired people there began to leave. Such problems had been growing before Mariel, notes Iris Maxwell, a longtime real-estate agent in Miami Beach. But after Mariel, crime did increase.

Robert Stephenson, of the Dade Miami Criminal Justice Council, estimates that 15,000 to 20,000 could be criminals. Most are petty offenders, he says, but roughly 6,000 are hard-core felons.

## Who Was Who?

The issue of who exactly the Mariels are was confused from the start. Refugees began leaving Cuba in April 1980 from the port of Mariel and the flow continued until October. Cuba forced the boats—many of which had been sent by relatives in the U.S.—to give passage to convicts and mental patients, too. The U.S. had no sure way of telling who was who.

The vast majority—about 110,000 people—have begun the process of applying for U.S. citizenship, and almost all of them are without criminal records in the U.S. Juan Clark, a sociologist who polled 514 Mariels, says most of the newcomers were blue-collar or middle-class Cubans—people not too different from those who had come in the 1970s.

Mr. Clark, who teaches at Miami-Dade Community College, says that 14% of the Mariels had been professionals or managers in Cuba. The average Mariel had nine years of schooling, slightly more than

*Please Turn to Page 17, Column 2*

Wall Street Journal, Page A1 and a 17
November 13, 1985

# Blending In: Cuban Arrivals of 1980 Mostly Adjusted Well

*Continued From First Page*

was the average for Cubans who arrived in Miami with less fanfare in the 1970s.

Mr. Clark, who surveyed the Mariels with Alejandro Portes of Johns Hopkins University two years ago, says that unemployment among them was relatively high—27%—although the figure was lower than for some other immigrant groups and may have diminished since. Some 55% of the working Mariels were either self-employed or working for other Cubans. "They were absorbed by the Cuban enclave economy after only three years," he says.

Still, some of the earlier waves of Cubans looked down on the newcomers—as less educated, less cultured, and blacker. Some older Cubans saw the Mariels as a threat to their own assimilation. "Cuban-Americans felt they had made it," a relief worker says. "All of a sudden, Cubans were at the bottom."

"The people who had come earlier treated us as if we had come out of caves," says Mario Lopez, who took a job in a carwash before finding work as a psychologist, which was his profession in Cuba. "When I told a woman that I liked her art nouveau lamp, she said, 'Oh, you've heard of art nouveau?' "

But for the most part, Cubans established in Miami supported the Mariels, and their help was critical. Andres Valerio, an artist, moved in with his sister in Hialeah. "A group of her friends—some I knew, some I didn't—took up a collection for me and raised $4,000." For good measure, they threw in a '73 Chevy, he says.

Mr. Valerio sold his first painting two weeks later and built up a clientele through the Cuban grapevine. He and his wife, a nurse, bought a house on a quiet street. "We made it," he says, "because the Cubans here have buying power."

The Cuban subculture eased the transition for Miguel Rodriguez, too. The young mechanic has two jobs; the first, at a Chrysler-Plymouth dealer, could almost be in Latin America, so dominant are Spanish speakers there. At the second, at a Sears, Roebuck store, he has a Cuban boss.

Whatever alienation he might have felt is long gone. "This job ends at 5; then I go home, change my shirt and see my family," he explains, lowering the hood of a red Chrysler LeBaron. "The job at Sears doesn't start until 5:30."

The ease with which Mariels have fitted into Miami's Cuban culture may have at least one drawback; it has slowed their assimilation into the mainstream, English-speaking America. Mr. Rodriguez, for example, proudly asserts that he could live anywhere in America. But the fact is that most Mariels have remained in Miami.

"I was lucky to land in a Hispanic city," says Eduardo Suarez, a cameraman in Cuba. In Miami, Mr. Suarez got a producer's job at a Spanish-language television station, Channel 23. But he has hardly begun to lose his Cuban identity. Although a success at work, he is "*loco* to see Cuba" and uncomfortable speaking English. On the weekends he often returns to Key West, where, he says, he gazes out across the water toward his homeland.

The Cuban support network was crucial, because federal refugee assistance didn't reach the majority of Mariels for nearly a year. What's more, the Reagan administration cut off basic relief payments after 18 months (previous refugees had been given 36 months of support). Job-training funds weren't made available until 1982. "This is the group that got the least help from government," says Msgr. Walsh of Catholic Community Services.

Local authorities are still preoccupied with the Mariels. There is a sizable community of drifters in Miami Beach, and the county jail has more than 100 people sleeping on mattresses on the floor.

But people say that the burden is shrinking. For instance, in the first year after Mariel, the number of households receiving food stamps in the Miami area soared to 120,000 from 93,000. But the number has fallen in every year since and is now down to 74,000.

"The Mariels aren't a significant [welfare] burden," Miss Berkowitz says. Roughly two-thirds, she adds, stopped taking relief payments before their benefits expired.

Various analysts say the economy has absorbed the Mariels without seriously displacing other workers. Wage and employment rates in Dade, for instance, haven't fallen relative to the rest of Florida.

"The fixed-pie theory"—the notion that as aliens come each American gets a smaller slice—"is crazy," says Lawrence Fuchs, a Brandeis University historian. "Economics 100 says if you want to grow, you need capital and labor."

Perhaps no institution absorbed the Mariels better than the schools. After a year of intensive English and bilingual education, most of the Mariels went into normal classes.

Unlike their parents, the students had grown up under communism. They were fast learners but often had trouble adjusting to life in South Florida. "They were commies," says Billy Wills, who teaches English as a second language at Miami Senior High School. "They would come to me and say, 'Comrade so-and-so wants to see you in the guidance office,' " she says.

Juan Martinez, an 18-year-old senior at Miami High, has won two school prizes as a playwright. He has a refugee's insecurity: forever fearful that his world might someday again turn topsy-turvy. But it is heartening to watch Juan struggle through second-year French and lapse into English—his adopted tongue—when he needs an explanation. It seems clear at schools such as Miami High that Mariel children are learning—or have learned—English.

Just a handful remain in remedial English courses, which now are populated with more recent arrivals from El Salvador, Nicaragua and South America. "As far as we're concerned, Mariel is history," says Peter Nelson, the vice principal at Miami High. "We don't know who the next group will be, but I'm sure we'll get them."

SPRING 1983 — David

# The judiciary in the administrative state

Civil rights

JEREMY RABKIN

THE extraordinary activism of the federal courts in recent decades is often attributed to the proliferation of new claims against the state. As popular expectations of government have expanded, so "inevitably"—as many commentators assure us—have the responsibilities of the courts been multiplied and extended. And indeed the rhetoric of the welfare state seems to invite broad judicial involvement in public affairs. President Roosevelt described the New Deal as pointing beyond the promotion of the general welfare to the establishment of "a second Bill of Rights," embracing "the right to a useful and remunerative job," "the right of every family to a decent home," "the right to adequate medical care" and "the right to a good education," among others. What could be more natural than to have the judiciary protect and enforce these new rights, as it had always protected citizens' rights to liberty and property?

It takes some effort to recall that, at the outset, harmony between the judiciary and the welfare state did not seem natural at all. Before Roosevelt devised his court-packing plan in 1937, the federal judiciary was regarded as one of the prime *barriers* to expansion of the welfare state. The subsequent accommodation between the judiciary and the welfare state brought with it a far-reaching



transformation of American jurisprudence. As the logic of that transformation has worked its way out, the judiciary has changed from a guardian of private rights and representative government to a managing partner in the modern administrative state.

## Decades of acquiescence

The authority of the American judiciary was originally conceived in rather narrow terms. "The province of the court," Chief Justice Marshall insisted in *Marbury* v. *Madison*, "is, solely, to decide on the rights of individuals, not to inquire how . . . executive officers perform duties in which they have a discretion." The courts would review the legality of government actions only at the behest of those whose liberty or property—whose own private rights—were immediately threatened by the government. Even challenges to the constitutionality of a particular law could only be brought by those claiming that their own personal rights were threatened by its enforcement. Where government did not directly coerce private conduct or take private property, its decisions received no more judicial attention than those of a private person in his own affairs.

This still left considerable room for the application of judicial brakes to government expansion, however. Chief Justice Marshall was zealous in enforcing the constitutional prohibition against state laws "impairing the obligation of contracts." Late in the nineteenth century, his successors began to strike down state labor laws which interfered with "liberty of contract," a right ostensibly guaranteed by the Fourteenth Amendment. Such decisions as *Lochner* v. *New York*—in which the Supreme Court struck down a maximum-hours law for bakery workers—have entered the folklore of the modern judiciary as willful attempts to read *laissez faire* economics into the text of the Constitution. But in truth such judicial balkings at paternalistic legislation were rather exceptional even at the time. Prevailing legal doctrines were quite able to accommodate the emergence of new health and safety regulations (at the state and local level) in the early decades of this century. The Court's confrontation with the New Deal did not stem from its skepticism of paternalistic legislation, per se, but rather from its efforts to uphold what it regarded as essential principles of the constitutional order—and what New Dealers regarded as fundamental barriers to the expansion of "affirmative government."

First, the Court felled several major New Deal enactments—as it had struck down a few pieces of progressive legislation in pre-

ceding decades—for exceeding the powers of the federal government and usurping decisions reserved for state and local authorities. To the justices, preserving the autonomy of state and local governments meant preserving the opportunity for meaningful popular participation in civic affairs, and allowing these local adaptations and accommodations that make for responsive government. In previous generations, the overwhelming majority of Americans had indeed regarded federalism as the most vital guarantee of self-government. But by the early decades of this century, many progressives had come to regard federalism as an obstacle to active government. Fearing loss of business to their neighbors, states would go only so far in raising tax burdens and extending regulatory controls. Federal taxes and regulations promised to be quicker and more complete—if only the federalist limitations, still nurtured and enforced by the Supreme Court, could be swept aside.

The Supreme Court also struck down two New Deal enactments that delegated too much law-making authority to administrators. This was the first time the "non-delegation" doctrine was actually used to invalidate an act of Congress. But from as far back as Marshall's time, the Court had repeatedly warned that unduly vague or open-ended laws would violate the fundamental principles of constitutional government. To the justices, the non-delegation doctrine was an essential guarantee that administrative activity would be constrained by law and that "law" would be made by elected representatives, not by unaccountable officials.

To the New Dealers, however, the non-delegation doctrine seemed as anachronistic as federalism. Congress, they insisted, could not possibly have enough time, enough technical competence, nor enough political fortitude to make all the policy decisions involved in the regulation of a modern industrial economy. Sound policy required administrative flexibility and wide scope for the exercise of administrative expertise.

In fact, traditional jurisprudence was not uniformly hostile to executive discretion, or indifferent to the claims of administrative expertise. That is why the federal courts refused to interfere in executive affairs, except to protect private rights—and generally held to a narrow or negative understanding of rights, embracing little beyond the right to be free of unauthorized or unconstitutional government coercion. But vague statutes would undermine even this role, since no reviewing court could then be very sure of what regulatory or administrative decisions were or were not authorized.

To many New Dealers, however, this was far from troubling. They were already fighting to loosen judicial controls on administrative decision-making. As late as 1940, President Roosevelt vetoed an administrative procedure bill, sponsored by the American Bar Association, for making judicial review too widely available, and for imposing excessively formal procedures on administrative agencies (which would have facilitated closer judicial review of their decisions).

The eagerness of the New Dealers to loosen judicial controls on administration was, like their impatience with federalism and the non-delegation doctrine, partly a result of their recent experience with unsympathetic judges. But the general concern to restrict judicial review also reflected a general suspicion of the rule of law, and of the conception of legal rights that sustained it. A generation of "legal realists" in the better law schools had inculcated the teaching that legal issues were inseparable from economic and social policy questions. And if one shifted attention in this way from legal rights to social consequences, the obvious conclusion was that disputes should be settled by those with the relevant expertise and information: specialized administrators rather than judges. Thus, a contemporary text on administrative law candidly acknowledged that entrusting "the determination of individual rights and interests" to regulatory agencies "cannot but make those rights more flexible and more responsive to uncertain factors of discretion," as befitting "the newer philosophy of social solidarity." By contrast, "the old system of adjudication by courts . . . applying supposedly permanent rules of law" proceeded with a "single-minded attention to the individual rights of the parties immediately before the court, with only accidental regard for the interests of the public at large or the exigencies of social policy. . . ."[1]

On the whole, the New Deal succeeded in impressing these attitudes on the federal judiciary by the end of Roosevelt's second term. Fortified by the rapid accession of Roosevelt appointees after 1937 (eight in four years), the Supreme Court repudiated volumes of constitutional precedents with astonishing speed and directness. Little more was heard of a constitutionally-guaranteed liberty of contract, or of the other nineteenth-century doctrines that had once been invoked against economic regulation. No problem, it seemed, was so clearly the province of the states or so clearly local in character that the Supreme Court would not sanction a federal response. No delegation of authority to administrators was too open-ended for the courts to accept, and few administrative rules too arbitrary

in the characteristic mode of nineteenth century jurisprudence, in terms of "the principles of constitutional liberty." "The fundamental objection to the statute," he wrote, "is that it interferes with the personal freedom of citizens . . ."

The *Brown* case, by contrast, was a class action by black students who charged that education in segregated schools was necessarily inferior to that of white students. The Supreme Court went out of its way to treat the case as a problem of inequality in the provision of public services, rather than a question of state coercion. Thus, the Court began by noting that the status of public education had greatly changed since the enactment of the Fourteenth Amendment in the aftermath of the Civil War. "In approaching this problem" today, the Court stressed, we "must consider public education in the light of . . . its present place in American life throughout the Nation. . . . In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." The Court's reliance on social science evidence, purporting to demonstrate that segregation "has a tendency to [retard] the educational and mental development of negro children," was not a gratuitous embellishment, as has sometimes been claimed, but a central link in the argument, once the issue was framed in terms of quality-of-service.

The Court's rhetorical strategy in *Brown* undoubtedly had something to do with the nature of the case—which was, after all, about the distribution of public benefits, not about state regulation of commercial activity, as in *Plessy*. But it would not have been impossible to treat *Brown* as a claim about personal liberty, adapting the argument of Justice Harlan's famous dissent in *Plessy*. Indeed the Court did precisely this in *Bolling* v. *Sharpe*, its decision striking down compulsory school segregation in the District of Columbia, handed down the same day as *Brown*. Since the Fourteenth Amendment prohibits only the states from denying "equal protection of the laws," the *Bolling* decision was forced to fall back on the Fifth Amendment's guarantee against deprivation of "life, liberty or property without due process of law." The decision read, in part: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper government objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty. . . ."

to uphold. By the 1940s and 1950s, the watchword in judicial decisions was deference to administrative expertise, and the role of the judiciary became largely passive.

### The wider significance of *Brown*

Conventional wisdom traces the reemergence of judicial power back to the Supreme Court's historic 1954 decision in *Brown* v. *Board of Education*. In hindsight, the *Brown* decision has indeed assumed the dimensions of a founding myth, the *Marbury* v. *Madison* of the modern judiciary. To the defenders of judicial activism in the 1970s, *Brown* became the shining model of the proper judicial role—breaking through official timidity and political deadlock to champion the cause of the oppressed—and the ultimate rejoinder to all arguments for judicial restraint. Even in scholarly debate on technical questions of court jurisdiction or procedure, *Brown* eventually achieved the status of a definitive argument-stopper. As Owen Fiss (himself a passionate advocate of judicial activism) has observed, it became enough by the late 1960s to show that a traditional jurisdictional or procedural norm conflicted with *Brown* to prove that it could no longer be maintained.

The power of *Brown* derives largely from the abhorence with which all decent people regard the system of racial segregation that *Brown* attacked. But the authority of that decision also owes much to the deft way in which it twisted traditional jurisprudence to the perspective of the welfare state. *Brown* did not simply overrule *Plessy* v. *Ferguson*, the notorious 1896 decision that established the doctrine of "separate but equal." It also cast the meaning of constitutional limitations in a new light, encouraging the judiciary to play an ambitiously new role in managing the welfare state.

However lamentable the result, the *Plessy* case came to the Court in a perfectly traditional way. Plessy was arrested for violating a Louisiana law requiring "colored" passengers to be seated in separate coaches on railroad trains. The Supreme Court, to its eternal disgrace, held that the Louisiana staute was a "reasonable" restraint, "enacted in good faith for the promotion of the public good." But the Court took for granted that the central issue was the justifiability of such state coercion. It merely noted the provision for "equal" accommodations for "colored" passengers as evidence of the state's "good faith," confirming that enforced separation in this context was a "reasonable exercise of the police power" of the state. Even Justice Harlan's celebrated dissent in *Plessy* framed the issue,

But the Court was curiously uncomfortable with this line of argument, and it quickly dropped from sight in the developing case law. In the years immediately following the *Brown* decision, the Supreme Court struck down compulsory segregation in public beaches, public transportation, and public parks. Unable to discourse upon the critical importance of such public facilities "in American life throughout the Nation," the Court preferred to give no argument at all for these decisions: It simply declared these laws unenforceable in curt, per curiam orders.

By the late 1960s, the unfolding of desegregation law confirmed that *Brown* was not really concerned with the constitutional impropriety of compulsory assignment by race. Amorphous appeals to the need for educational equality, invoked against the assignment of students by race in 1954, could be invoked with as much logic fifteen years later to justify racial assignments and compulsory busing, measures avowedly designed to enhance the educational opportunities of blacks as a class. *Brown*, it turned out, was not even a bar to invidious racial exclusions in the distribution of public benefits, so long as these struck the Court as contributing to some well-meaning vision of social equality. In 1980, the Court upheld a "slap dash" rider to a congressional pork barrel bill (as Justice Stevens aptly characterized it) which set aside 10 percent of government public works contracts for the exclusive benefit of minority-owned businesses.[2]

### The right to public assistance

In *Brown* the Supreme Court declared that "the opportunity of an education" was so crucial that "where the state has undertaken to provide it, it is a right which must be available to all on an equal basis." The Court, then, did not affirm a right to education per se, but a right to its equal delivery—whatever that might mean. Such open-ended reasoning about equality proved conveniently adaptable to state management of racial progress. But in time such slippery notions of "rights" also opened a far wider field of welfare state jurisprudence. The old jurisprudence had distinguished sharply between rights—which the government was absolutely obliged to respect—and privileges—which government could give or withhold on its own terms, at its own discretion. The approach taken in *Brown* seemed to license the Court to remodel every "important" welfare or benefit program to suit its own sense of fairness.

By the early 1970s, the Court had carried this logic to the point



of rewriting eligibility standards for direct payment programs. In *Frontiero v. Richardson*, the Court held that special dependents' benefits available to men in the armed forces must also be available to women: It was unfair, the Court ruled, for Congress to assume that the wives of servicemen were more likely to be dependents than the husbands of women in the services. Sometimes the Court found that special financial benefits for women were acceptable, as compensation for past discrimination against the entire sex; in other cases, it insisted that Social Security or survivors' benefits available to widows must also be available to widowers.

In a string of cases in the mid-1970s, the Supreme Court decided that various welfare and survivors benefits available to legitimate children must also be available to illegitimate children on the same terms.[3] And in a 1973 decision—graphically illustrating the Court's aversion to any bias toward the traditional family in welfare provisions—the Court struck down a congressional enactment that had limited food stamps to households of related individuals.[4] This, the Court scolded, was an unfair exclusion aimed at "hippie communes." The Court was equally impatient with various state welfare provisions distinguishing citizens from aliens, though it eventually decided that Congress could indeed limit Medicare benefits to those with at least five years residency in the United States.[5] Like women and illegitimates, aliens were not to be treated differently from others (except sometimes, times best known to the Supreme Court).

In most of these cases, the Court did not even bother to inquire whether restrictive benefit formulas were the expression of an invidious or malicious governmental intent; much less did it try to explain why the democratic process could not be trusted to deal fairly with "classes" like "women" (or men) who comprise fully half the electorate. Nor could the Court be troubled to recall that the "equal protection" clause applies only to the states, as it went about enlarging eligibility formulas for one federal program after another on equal protection grounds. The Court simply assumed that extra funds would be appropriated to cover the new beneficiaries it created—as indeed they were.

In a number of cases, the Court preferred to see welfare restrictions as a threat to liberty, rather than to equality. Thus, beginning in the late 1960s, the Court overturned a series of durational residency requirements for various state welfare benefits, lest these restrict the "liberty" of poor people to engage in interstate travel. The Court did, however, allow reduced tuition at state universities to be limited to past state residents, because, after all, there were

limits to what a state could afford to subsidize.[6] In a famous 1963 decision, the Court held that South Carolina could not deny unemployment benefits to a Seventh Day Adventist who had refused a series of jobs requiring her to work on her Sabbath.[7] To treat this woman as voluntarily unemployed, and therefore ineligible for the benefits, would violate her religious liberty. This did not, of course, mean that government must accommodate its benefit programs to *every* religious practice, but simply that the Court would "balance" competing claims and decide what was most fair. Relying on similar logic, the Court in 1980 came within one vote of declaring that the newly discovered constitutional right to an abortion *required* Congress to finance abortions for the poor through Medicare.

By 1978, Harvard law professor Laurence Tribe, one of the leading academic theorists of the new jurisprudence, could foresee the emergence of "a general doctrine . . . [which] recognizes for each individual a constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, work and schooling." He could already discern "strands of doctrine pointing in this general direction." But the Court's hesitations meant that the time for this had "not yet come" and so "constitutional lawyers must continue to struggle with less sweeping solutions and more tentative doctrinal tools."[8]

### The old liberties, and the new

If the Court sometimes varied in its readiness to revise legislative judgments to protect the "liberty" or "equality" of welfare beneficiaries, it was quite firm and consistent in limiting the economic liberties of businessmen. The Court acknowledged no constitutional liberty to be free of unreasonable constraints on business or professional activity—that went out in 1937. Nor could the "equal protection" clause be invoked to challenge arbitrary distinctions among comparable businesses in economic regulation, even when the distinctions were meant to separate the politically well-connected from the less well-connected. After the 1940s, all such challenges (with one exception, itself subsequently repudiated) were rebuffed on the grounds that judicial interference in legislative balancing is "improper." Nor could those who paid for all these enlarged benefits raise any sort of constitutional objection against them; taxpayers were simply denied standing to make such challenges in federal court.



The old judiciary, in keeping with its emphasis on private rights, had also denied standing to taxpayers unless they could show that a particular spending program had significantly increased their own individual tax bills. Post-New Deal courts were only too happy to maintain this barrier to questioning government expenditures. But the Warren Court made one revealing exception in 1968: Taxpayers should be allowed to challenge government expenditures aiding religion, even if their own tax stake in the matter were "miniscule." In this one area, the Court thought it vitally important to make sure that public funds did not get into the hands of the wrong beneficiaries. But in many ways the Court's activity in this area was quite consistent with the overall thrust of its new jurisprudence, despite the numerous doctrinal contradictions it had to swallow along the way. The Court had abandoned any serious pretense of protecting individual liberties, and had embarked on a fairly straightforward effort to remodel public programs to suit its own vision of social well-being.

It was only in 1947 that the Court first discovered that the Constitution prohibits state laws which "aid all religions," as much as laws which "influence a person to go to . . . church against his will."[9] On this basis it struck down non-compulsory prayers and Bible readings in public schools in the early 1960s, treating the mere fact of state endorsement for religion as a violation of "liberty," despite the absence of coercion. The Court later used taxpayer suits to strike down virtually every state or federal program that might incidentally benefit religious schools, or might make it easier for parents to send their children there. Neither direct grants to the schools, nor subsidies to teachers of secular subjects at the schools, nor tuition tax credits for the parents, nor even reimbursement to the schools for administering state mandated tests could be tolerated.[10]

Supreme Court opinions of the 1970s continued to cite with approval a 1925 decision holding that parents had a constitutional right to send their children to private or parochial schools. It even occasionally acknowledged that cost pressures were making it increasingly difficult for poor and middle income parents to exercise this right. But because the vast majority of private schools are religious schools, this remained one right the Court would not require —indeed would not allow—government to subsidize. At the very time it was ordering the extension of other welfare and subsidy programs on the barest of "equal protection" claims, the Court warned that allowing even very limited, indirect aid to religious

schools would set a dangerous precedent: "We know from long experience . . . that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies." At the very time the Court was sanctioning divisive racial preference schemes and explosive compulsory busing orders, the Court insisted that aid to religious schools would place too much strain on the political process: "The potential for political divisiveness related to religious belief and practice is aggravated in these . . . programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."[11]

Interestingly enough, the Court was prepared to relax its intransigent reading of the First Amendment—and its fears of "political divisiveness"—to allow state and federal aid to church-related colleges. Chief Justice Burger was perfectly candid about the reason: "College students are less impressionable and less susceptible to religious doctrine . . . [while] college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."[12] The Court could barely conceal its distaste for religious "indoctrination" of "impressionable" youth. In *Brown*, the Court had rhapsodized about elementary and secondary education as "the very foundation of good citizenship . . . a principal instrument in awakening a child to cultural values . . . and in helping him to adjust normally to his environment." Plainly the Court had decided that religious schools were not well suited to such a mission. It preferred to put its trust in public schools—public schools heavily regulated from Washington.

### Partnerships between courts and agencies

*Brown* proved to be a great milestone for the new judiciary, not only in its reasoning, but also in its subsequent implementation. For with this decision we see the first inklings of a new relationship between the courts and the growing administrative state—a collusive relationship in which mutually reinforcing actions would allow both parties greater influence over social policy.

The Court in *Brown* had made no pretense of deciding the rights of Linda Brown and other individuals: It was openly making grand policy for the nation. Thus, having declared school segregation in violation of the Constitution, the Court did not think it was obliged to order the practice to cease—in Topeka, Kansas, or anywhere else. Instead, the Supreme Court decided that lower courts should oversee a gradual transition to desegregation "with all deliberate speed." Linda Brown, herself an elementary school student in Topeka when the case began, had already graduated from a segregated high school before this "deliberate" policy had achieved any significant results.



The truth—and it is a truth that is too often obscured in the mythology of *Brown*—is that the Court's majestical pronouncement in 1954 achieved relatively little by itself. Only after 1964, when Congress finally enacted strong civil rights legislation that provided federal enforcement machinery, did the schools of the South really begin to move away from segregation. Only in 1969, with a powerful HEW bureaucracy in place behind it, did the Supreme Court suddenly lose all patience, demanding desegregation (by then meaning statistical integration) "at once," even if this meant disrupting classes in mid-term.

In fact, the evolving standards for "desegregation" owed as much to the HEW bureaucracy as did the timing of this great regulatory venture. Under the 1964 Civil Rights Act, HEW was authorized to withhold federal education grants to school districts practicing "discrimination . . . on the basis of race, color or national origin." Ignoring a variety of procedural safeguards built into the statute, HEW used its funding leverage to pressure southern school officials into "adequate" desegregation. This proved so effective at the outset that HEW rewrote its desegregation standards each year in the latter half of the 1960s, demanding more statistical integration each time. It was HEW that took the lead in repudiating "freedom of choice plans," though lower federal courts quickly followed in their own decisions on "constitutional" requirements. It was HEW, again, that pioneered busing schemes some years later, and again federal judges followed, often calling in HEW "experts" to design "remedial plans" in their own cases. The Supreme Court's refusal to order busing into northern suburbs in 1974 may have had something to do with HEW's refusal, during the Nixon administration, to blaze that most dangerous trail for the courts.

Such hands-off maneuvers between federal judges and federal agencies proved very effective in other contexts during the 1970s, particularly in the elaboration of social regulatory statutes. Courts would first defer to bold agency initiatives; then the agencies, invoking judicial decisions they had heavily influenced, would proceed to further extremes, while Congress stood passively to one side. Thus, in an informal 1970 memorandum, HEW suggested to state school officials that, as the Civil Rights Act explicitly prohib-

ited "discrimination" on the basis of "national origin," it might also require special educational programs for non-English speaking students. In a 1974 suit by Chinese students against the San Francisco public schools, the Supreme Court cited HEW's interpretation of the Civil Rights Act in holding that San Francisco had a statutory obligation to provide "some" special remedial services. Within a year HEW was imposing elaborate bilingual education requirements—and citing the Supreme Court decision as *its* authority.

The Equal Employment Opportunity Commission came to rely extensively on such shell games with federal judges in developing its quota policies for private employment in the late 1960s. And the game has proven adaptable to many regulatory fields. The essential requisite is to allow private suits to supplement agency action, breaking new ground for the agency to follow. Some regulatory statutes explicitly provide for a "private right of action." The 1964 Civil Rights Act, for example, does expressly provide that victims of discrimination in private employment may independently sue employers if the EEOC is unable or unwilling to pursue their charges. But most federal regulatory statutes simply authorize agencies to enforce their provisions, without saying anything about enforcement by private parties. Until the mid-1960s, courts assumed that such statutes intended to make enforcement the exclusive responsibility of the agencies involved. One of the prime reasons for establishing regulatory agencies, after all, was to assure that controls were developed in a coherent and coordinated fashion, stabilizing the expectations of regulated interests, or at least providing a central source for their guidance and direction. Centralizing enforcement in the responsible agency also allowed Congress to maintain control over enforcement levels through the budget process. But beginning in 1964, the Supreme Court encouraged lower federal courts to find "implied rights of action" for private litigants in statutes that did not actually provide them.

The first case of this kind involved a provision of the Securities and Exchange Act. The Supreme Court decided that shareholders might sue a company for providing misleading information in a proxy statement, and collect punitive damages which need bear no relation to the amount of financial injury suffered by the shareholders. With this incentive, private securities lawyers proved only too happy to help the SEC in detecting—and progressively redefining—"fraud" in the securities markets. Lower courts quickly decided that other agencies, such as the Labor Department in its regulation of working conditions, could also use help from private



enforcement actions. Within a few years, courts were discovering "implied rights of action" across the whole regulatory spectrum.

Not every agency, however, was happy to have the assistance of private enforcers (or, as they were sometimes described, "private attorneys general"). Private enforcement did lift some of the onus of regulatory expansion from the "responsible" agency—as well as from Congress—but it also restricted the agency's control over its own regulatory agenda, and over its capacity to reach efficient accommodations with regulated interests. Finally acknowledging these difficulties in the late 1970s, the Supreme Court did begin warning lower courts against the promiscuous creation of "private rights of action."

But by then it was too late to restore agencies to control of their own enforcement priorities. Many of the decisions finding "implied rights of action" rested on the assumption that the intended "beneficiaries" of regulatory legislation were "entitled" to these benefits, and accordingly must have a "right" to enforce their delivery. By the early 1970s, federal judges in many parts of the country were running entire school districts to enforce the constitutional entitlement to equal educational opportunity declared in *Brown*. They were not about to let the preferences of federal regulatory officials stand in the way of enforcing entitlements to newly improvised regulatory benefits. The reverence for administrative "expertise," so central to New Deal thinking, had worn rather thin by the late 1960s. So the federal courts, doubtless exhilarated by their active partnership in the desegregation struggle, moved readily into the role of senior partners in the administrative state.

### Redistributing the "new property"

The concept of a statutory "entitlement" did not arise with *Brown* v. *Board of Education*, nor did it presage the collusion between courts and bureaucracy which was to come. In some ways, it was a natural corollary of welfare state rhetoric, with its insistence on the citizen's "right" to a decent standard of living. Thus the original Social Security legislation of 1935 provided that anyone who met the relevant eligibility criteria (or thought he did) could sue the Social Security Administrator to enforce his claim to benefits. In practice, the courts tended to be rather deferential to the factual findings and statutory interpretations of Social Security officials. But everyone understood from the outset that this appellate authority gave the last word on Social Security "entitlements" to

independent courts, rather than to the officials in charge of the program. In this sense, Social Security "entitlements" (and an increasing variety of other welfare benefits) were assured legal protection analogous to that accorded private property.

But for some decades after the New Deal, the analogy could cut both ways. The courts did not presume to accord business property or economic liberty any more protection than regulatory statutes had allowed. They might occasionally overturn a regulatory imposition for exceeding what the statute authorized, but they would no longer question whether the Constitution set limits on what legislative enactments *could* authorize or require. In the same way, courts might overturn administrative decisions in enforcing statutory "entitlements," but would hardly presume to revise the statutory standards themselves. As late as 1960 the Supreme Court readily upheld a recent Congressional enactment denying Social Security payments to those deported for "subversive activity."[13] The Court dismissed the argument that this constituted punishment without trial, since "the sanction is the mere denial of a noncontractual government benefit. No affirmative disability or restraint is imposed." Moreover, the Court noted, "engrafting upon the Social Security System a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands."

Within a few years, of course, the Supreme Court swung around to the view that *courts* could display as much "boldness" as legislators, and were perfectly justified in revising legislative judgments about how much "flexibility" to retain in benefit standards. It was hardly surprising, then, that as the Court began rewriting eligibility criteria for welfare statutes in the late 1960s, it also decided to improve the mandated procedures for administering these programs. This was one more way in which the new senior partner began asserting its control over the shape of the welfare state. In a celebrated 1968 decision, the Supreme Court held that welfare recipients could not have their benefits withdrawn without a formal administrative hearing *before* any action was taken.[14] Since "entitlements" were the equivalent of "property," the Court reasoned, they must be protected by the constitutional prohibition against denial of "life, liberty or property without due process of law." It was not enough to allow aggrieved claimants to contest the withdrawal of benefits after the fact. The Court resolutely brushed off pleas that the delay and expense of formal hearings would divert welfare resources from their primary function and might make welfare officials overly cautious in admitting applicants to the rolls. This was a matter of constitutional right.

This reasoning was quickly adapted to an astonishing range of "entitlements" (or "new property," as legal commentators began to call them). In its enthusiasm, the Court failed to examine whether the statutes actually provided for judicial review of benefit denials, or even if the statutes actually created entitlements. Not only direct payment programs, then, but a variety of administered services and benefits were brought under "due process" protection. In 1975, the Supreme Court ruled that attendance at public schools was also a form of "entitlement" equivalent to property, and held that unruly students could not be suspended or expelled without a prior, formal hearing. This may have hindered school officials from removing disruptive students, thus jeopardizing the educational "entitlements" of other students—but, again, the Court saw constitutional rights at stake. In other cases, the Court interpreted the due-process guarantee to prevent state officials from revoking a driver's license, cancelling a convicted criminal's parole or probation, or failing to renew a state college instructor's contract without a prior hearing.[15]

By the mid-1970s, however, the Supreme Court had begun to acknowledge limits on the extension of constitutional hearing rights. Thus it declined to order administrative "due process" for the transfer of an inmate to another state prison, or for the firing of a city policeman—and, most incongruously, for the termination of disability payments by the Social Security Administration.[16] Lower federal courts then began to develop complex balancing tests—weighing the recipient's interest in the benefit against the state's interest in "flexibility"—to determine which administrative decisions would trigger "due process" safeguards and how elaborate the procedural safeguards must be.

### Entitlements to regulatory benefits

In the meantime, the "due-process revolution" was carried with scarcely a second thought from personal benefits to collective benefits, from individual "entitlements" to regulatory expectations. Administrative law had always recognized the obligation of regulatory agencies to afford "due process" to individual property interests directly threatened by regulatory actions. By the late 1960s, lower courts had begun to demand that the intended beneficiaries of regulatory action also be accorded the right to participate in, and

even initiate, administrative hearings. The right to be heard, however, could not assure that administrators would listen, so lower courts also began to relax standing requirements to make judicial review available to the intended beneficiaries of regulatory programs, when they claimed their interests had been neglected. One of the earliest cases involved an activist church group that had petitioned the Federal Communications Commission (FCC) to withdraw the license of a particular Mississippi broadcaster for inadequate service to black listeners. The D.C. Court of Appeals insisted that the FCC must grant the group a hearing. And, after the hearings, when the Commission still decided to renew the broadcaster's license, the court overruled the decision on appeal by the church group, and ordered the license withdrawn on its own authority (an authority nowhere evident in the Federal Communications Act).

In 1970 the Supreme Court threw open the courthouse doors to such challenges, holding that standing should be accorded to anyone claiming "injury" from an administrative decision, who was "arguably within the zone of interests to be protected by the statute" involved. As subsequent cases made clear, the injury could be psychic or intangible and certainly could be relative.[17] Typically, the plaintiffs' complaint was that their "interests" were not *adequately* considered, not that they had been altogether neglected. In implicit acknowledgement of the complexities of regulatory decision-making, the courts did not often invoke the rhetoric of "rights" or "entitlements" in these cases, more often overturning new rules or decisions on procedural rather than substantive grounds. But the impulse was essentially the same. In plain language, the underlying theory was that, if Congress intended particular interests to benefit from a regulatory statute, administrators must answer to the courts if these interests did not benefit as much as they might. And if "the interests to be protected" were indistinguishable from the interests of the public at large, that was certainly all right with the courts. This is the typical situation in litigation brought by environmental and consumer groups, and such "public interest" groups proliferated with remarkable speed under the new dispensation in administrative law in the early 1970s.

It is true that in a few environmental statutes of the early 1970s Congress explicitly authorized "citizen suits" to force the Environmental Protection Agency to fulfill its statutory "duties." No federal judge seems ever to have questioned whether Congress actually had the authority, under the Constitution, to delegate its own oversight responsibilities to the federal courts in this wholesale manner. In fact, the courts had begun to expand rights to initiate hearings and appeal administrative decisions even before Congress authorized this. And, as with "private rights of action," the courts never regarded the appearance of expanded participation or review provisions in some statutes as any reason to deny these rights where they were not provided by statute. Indeed many legal commentators took to describing the "new administrative law" of the 1970s as a delayed response to the demise of the old non-delegation doctrine after the New Deal. If statutes granted overly-broad discretion to administrators, it was said, courts must play a more active role to ensure that this discretion was not abused, creating procedural safeguards at the administrative level and demanding reasoned consistency in administrative decisions. In fact, such arguments did allow business lawyers to trade precedents with "public interest" groups in obtaining ever lengthier and more elaborate hearings in regulatory rule-making.



But if one looked at the larger picture, this sudden enthusiasm of federal judges for regulatory due process and administrative consistency was rather hard to take seriously. At the same time that appellate judges were improvising such elaborate safeguards for regulatory decision-making, individual district court judges were taking on the direct management of school districts, mental hospitals, and prisons. In such cases of direct judicial administration, the judges appointed expert consultants and heard community "representatives" only as they pleased—and proceeded to ignore their advice as they pleased. And when such cases were appealed, the appellate judges invariably deferred to the district judge's mastery of the "complex factual circumstances," rarely subjecting remedial orders and implementing procedures to any serious scrutiny. To this day, the Supreme Court still finds itself too busy to review one of these institutional reform cases and clarify which specific constitutional rights are involved and what the limits of judicial power may be in enforcing them. Somehow the better law journals, filled with discussions in praise of "public interest" representation throughout the 1970s, have had nothing to say about the problem of excessive discretionary power or the "due process" claims of "the public" in *these* cases.

Even in the regulatory context, the burgeoning of procedural safeguards turned out to be small consolation for opponents of big government. Business lawyers could exploit the expanded opportunities for procedural fencing, and sometimes delay the imposition of particular new rules or constraints to the advantage of their

clients. But this did little to stem the extraordinary tide of regulatory expansion during the 1970s. And it is hard to believe that anyone ever expected it to: The main function of these elaborate rituals was to reassure Congress that businesses and other regulated entities would somehow be treated fairly, without Congress itself having to specify what fair treatment might require. And when these administrative procedures are insufficient, judges will order whatever they like. For example, after a decade of administrative hearings on the issue, Judge Abner Mikva of the D.C. Court of Appeals recently ordered the Department of Transportation to impose airbag requirements on the auto industry. From his position on the bench Mikva was able to go much further in vindicating the "consumer's interest" (as he saw it) than he had been as a mere congressman during the 1970s.

### Legal realism inverted

Cynics have argued that these trends in modern jurisprudence simply reflect a shift in the political allegiance of the judiciary, realigning the federal courts with what they have perceived as the dominant political forces in the country. The triumph of the New Deal, it is said, forced the courts to abandon their Republican business constituency, with its enthusiasm for limited government and the rights of property. In the decades after *Brown*, the courts simply found a new outlet for judicial activism, serving Democratic or Great Society constituencies of minorities, poor people, and regulatory enthusiasts. There is obviously a great measure of truth in this. But, in the end, such a narrowly political interpretation claims both too much and too little.

It claims too much, because a non-representative institution like the federal judiciary may have biases, but it cannot have true constituencies. Thus, there will be busing in Boston whether black voters there want it or not. The narrowly political interpretation also claims too little, because it misses the most decisive factor in the change: The crucial factor is not that the judiciary has adopted the constituencies of the welfare state, but that it has absorbed the philosophy of the welfare state.

What, after all, did President Roosevelt mean when he spoke of "the right to a useful and remunerative job" or "the right to a good education"? Plainly, he did not mean to commit the government to precise, enforceable duties when he called for a "second Bill of Rights" to guarantee such claims. The architects of the New Deal



were particularly emphatic that personal rights must be balanced against social needs. The New Dealers were not about to endorse fixed, absolute claims to new government benefits, any more than they endorsed fixed and absolute claims to the old rights of property. Calling government assistance a "right" was simply a means of highlighting its moral urgency (and perhaps of preempting political debate), not of tying down expert policy makers. Respect for this philosophy rendered the judiciary rather passive for almost two decades after the New Deal. It is the internalization of this philosophy by judges, spurred by the thrilling precedent in *Brown*, that has given us the activist, ubiquitous judiciary of recent decades.

*Brown* served to show that judges, too, could relate complex social realities to moral claims for government assistance, by "socializing," as it were, the traditional judicial focus on individual rights. Henceforth, legal "rights" need not be limited to discrete, preemptive claims against the majority, but might be related to routines that seemed socially useful. This perspective explains the curious oscillation of modern jurisprudence between a crass utilitarianism and a sanctimonious dogmatism about "rights." This explains the Supreme Court's readiness to invoke principles it cannot possibly, and does not really, try to apply with consistency. This explains the readiness of the Court to tackle issues—like the proper level of government connection with "religion in general"—that cannot possibly be conceptualized in terms of the "rights of individuals." This also explains the readiness of lower courts to enter into active partnerships with regulatory administrators, and even to undertake the direct administration of public institutions on their own. There is no longer any essential difference in the perspectives of judges and administrators—except that judges can congratulate themselves on being less vulnerable to political pressure.

This is not to say that the old jurisprudence was always a model of formal consistency. Eager to show that judicial protection of private rights was quite compatible with effective government, the old judiciary was often inclined to stretch its doctrines and discover strange exceptions. But the chief complaint of "realist" critics in the 1920s and 1930s (such as Jerome Frank and the young Felix Frankfurter) was not against inconsistencies in constitutional doctrine, which they noted simply to underscore their argument that "the law" was not, and could not be, a fixed abstraction. Their central complaint was precisely that established doctrines were too rigid and formulaic, that constitutional law had purchased an artificial clarity by blinding itself to the complexity of modern so-

cavalier attitude toward law is simply the functional equivalent of the cavalier attitude toward "rights" in the jurisprudence of the welfare state.

The welfare state has been driven forward by the demand for "social justice," an amorphous concept that has less to do with the blame or merit of individuals than the distribution of benefits between classes. "Social justice" is concerned with misfortunes or inequities that society might ameliorate, but cannot blame on any particular culprit. The old judiciary was preoccupied with legal guarantees of personal autonomy, regarding clear and definite laws as the prime bulwark of personal autonomy. It did not presume that "social justice" was something that could be determined by judges, and was always wary lest government measures to this end should impinge on personal autonomy. The new judiciary is only too happy to assist in the elusive quest for "social justice." It has come to see the Constitution as "a reasonable approximation of justice" (in Ronald Dworkin's phrase) rather than a legal framework for limited government. Almost anything which runs counter to its vision of the "just society" may thus come within its reach.

The change is equally evident in private law. Contract law was derided by many scholars in the 1920s and 1930s for its artificial clarity, but the right to enforce a contract has now become so riddled with judicially-created exceptions and qualifications in the name of fairness that one can rarely be sure when a contract will actually be enforceable. Similarly, strict notions of causality and fault have been gradually eroded in tort law so that someone with more money—usually a corporation—can be ordered to compensate victims of almost any accident or misfortune. Perhaps this is more in accord with "social justice" but it certainly affords much less predictability: It is difficult to know how to go about one's business without risking intrusive or costly suits.

The new judiciary derived much of its confidence from its struggles with southern racism. Even in this area, however, the judiciary borrowed still more of its confidence from a federal bureaucracy that it once nurtured, and now presumes to direct. And in policy fields quite removed from "civil rights," the federal judiciary, with its open-ended mission, has enjoyed a curiously symbiotic relationship with the federal bureaucracy, and its open-ended mandates.

In recent years, the intellectual respectability of federally-directed solutions has faded somewhat, and the Supreme Court has shown signs of caution and irresolution. But it is far too late to restore the old jurisprudence. The judges will just have to muddle



cial conditions. A modern industrial economy required expansive federal powers and an administrative apparatus with wide discretionary authority. Outdated constitutional formulas could not be allowed to stand in the way, the realist critics insisted. And they derided the old Court's solicitude for the "liberty of contract" of the working man, a purely formal liberty which, as they scornfully noted, could only be taken seriously by judges with no understanding of social reality.

The modern judiciary has simply absorbed the lesson of the realist critics and inverted its original point. In the decades since *Brown*, the judiciary has decided to embrace "social reality," rather than renounce judicial power. The modern judiciary has no patience with formalities when social justice is at stake. In *Brown*, the Supreme Court cited social science evidence to prove that segregated schools were "inherently unequal." Thereafter it recognized that treating students in a color-blind manner would provide only formal equality. So it then required racial assignments, sanctioned experiments with compulsory busing, and now approves special privileges for minorities. The Court has also recognized that confining its attention to racial discrimination would involve a purely formal distinction which would blind the judiciary to the claims of other needy groups. But here, too, the Court has seen that rigid norms would be incompatible with a due sensitivity to the social complexities involved.

### Can courts administer the "just society"?

Along the way, of course, the courts have also come to recognize that distinctions between private property and public benefits are largely dispensable formalities. So, too, are the traditional distinctions between private rights and the public interest, between judges and administrators, even between judges and legislators. The notion that representative bodies are truly or fairly representative is simply one more formal presumption, not to be taken too seriously. Courts now intervene wherever they think they can improve the status quo, whether or not a case involving a distinct private right is presented. Above all, the modern judiciary has recognized—having been well tutored in this by the New Dealers—that "law" need not be clear or consistent to be effective or legitimate. Constitutional and administrative law have become hodgepodges of "balancing tests," "rebuttable presumptions," "preferred values," and free-floating precedents for occasional seasons. This

along. The judges are often arbitrary or oppressive in their muddling course, but what more can one ask of officials with no law to guide them?

## NOTES

[1] John Dickinson, *Administrative Justice and the Supremacy of Law in the United States*, (New York: Russell & Russell, 1929), pp. 29-30.
[2] Fulilove v. Klutznick, 448 U.S. 448 (1980).
[3] E.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Jimenez v. Weinberger, 417 U.S. 628 (1974); but also Mathews v. Lucas, 427 U.S. 495 (1976), upholding a Social Security Act provision disadvantaging illegitimate children.
[4] U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).
[5] Graham v. Richardson, 403 U.S. 365 (1971) [welfare payments]; Sugarman v. Dougall, 413 U.S. 634 (1973) [public employment]; but also Mathews v. Diaz, 426 U.S. 67 (1976) [upholding residency requirements for Medicare].
[6] E.g., Shapiro v. Thompson, 394 U.S. 618 (1969) [welfare payments]; Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) [free medical care]; but also Starns v. Malkerson, 401 U.S. 985 (1971) [upholding durational residency requirements for in-state tuition benefits].
[7] Sherbert v. Verner, 374 U.S. 398 (1963).
[8] Laurence Tribe, *American Constitutional Law*, (Mineola, N.Y.: Foundation Press, 1978), p. 574.
[9] Everson v. Board of Education, 330 U.S. 1 (1947), held that the Fourteenth Amendment's guarantee against denial of "life, liberty or property" prohibited states from "establishing religion." The old court had not found that even the First Amendment ("*Congress* shall make no law respecting an establishment of religion") would bar Congress from giving aid to religious institutions if they were also providing valued secular services. Bradfield v. Roberts, 175 U.S. 291 (1899).
[10] Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittinger, 403 U.S. 602 (1975); Levitt v. Committee for Public Education, 413 U.S. 472 (1973).
[11] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).
[12] Tilton v. Richardson, 403 U.S. 672 (1971).
[13] Fleming v. Nestor, 363 U.S. 603 (1960).
[14] Goldberg v. Kelly, 397 U.S. 254 (1970).
[15] Goss v. Lopez 419 U.S. 565 (1975) [school attendance]; Bell v. Burson, 402 U.S. 535 (1971) [drivers license]; Morrissey v. Brewer, 408 U.S. 471 (1972) [revocation of parole]; Gagnon v. Scarpelli, 411 U.S. 778 (1973) [revocation of probation].
[16] Bishop v. Wood, 426 U.S. 341 (1976) [firing policeman]; Meachum v. Fano, 427 U.S. 215 (1976) [prison transfer]; Mathews v. Eldridge, 424 U.S. 319 (1976) [Social Security disability benefits].
[17] In SCRAP v. U.S. 412 U.S. 669 (1973), for example, a group called Students Challenging Regulatory Agency Proceedings was granted standing to challenge ICC approval of railroad rate increases on the grounds that higher rail rates might discourage the use of recyclable products, thereby producing more litter, thereby "injuring" the students involved by diminishing their enjoyment of the environment.



# Welfare and the New Dignity

CLIFFORD ORWIN

ONE hallmark of recent liberal thinking about social welfare has been an insistence on the equal "dignity" or "worth" of every member of society. If this view does not sound wholly new, that is because it is not. Liberalism has always taught that all men are created equal, and has always affirmed the dignity of the ordinary man.[1] But it both has and has not asserted the equal dignity of all men, ordinary or otherwise. By this I do not mean that the liberal tradition has hedged, but rather that it has made distinctions. It has held, in effect, that as there is a basic sense in which all of us are of equal worth, so there is another in which we are not, and that respect for this distinction is the mark of a liberal polity.

The newer liberalism denies this distinction, urging a simplified version of dignity in support of an expanded one of "welfare." Dignity is a good part of what the welfare state is about these days. It is not only that we are admonished to treat all of its clients with dignity. Leading social theorists also tell us that the cause of dignity itself requires a vast expansion of the welfare state, viewed

[1] I will speak throughout of liberalism in its broadest sense, as the general outlook underlying liberal democracy; not as a term of partisan distinction but as describing that consensus which defines the context within which partisanship occurs. This is the only sense in which the term is still useful today.

Statement of

JEFFREY P. SINENSKY

Legal Affairs Director

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

on

Affirmative Action and Executive Order 11246

delivered at the

U.S. Chamber of Commerce Press Conference

on formation of

The Ad Hoc Coalition Against Quotas

Washington, D.C.

November 5, 1985

The unfortunate reality is that by executive fiat, federal regulation and legislative initiative, the laudable concept of Affirmative Action to assist minorities and the disadvantaged has been transformed into quotas, so-called goals and timetables and other forms of race preference now ingrained in our society. The Anti-Defamation League has been working for the last two decades to reverse that trend and we are pleased that the first tentative steps to do so have been taken by this Administration. The Department of Justice, for example, has adopted the forthright position in its briefs as well as in consent decrees it has negotiated that it will no longer seek or support racial quotas or their equivalent. Now the President has the opportunity by a stroke of the pen to do away with, once and for all, government sanctioning of race preference. ADL urges him to do so by signing into law a revised Executive Order 11246.

We should all recall that the concept of "counting by race" was foreign to the proponents and principal supporters of the landmark 1964 Civil Rights Act and never intended or countenanced by them. During Congressional debate on the Act, Senator Hubert Humphrey, one of the bill's authors, stated explicity: "The proponents of this bill have carefully stated on numerous occasions that the Act does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."

The intent of the Civil Rights Act was rather to encourage affirmative action which involves a conscious and active effort to recruit minorities, to provide training in skills necessary for advancement, and where appropriate, remedial education. It does not mean practicing discrimination as a means of combatting discrimination. Legitimate affirmative action programs are directed to one end -- equality of opportunity, not necessarily equality of results, for all individuals regardless of race, color, creed, sex or national origin.

Quotas and their functional equivalent goals and timetables are themselves discriminatory because they inevitably result in employment decisions based on race, ethnicity and gender. ADL believes that government mandated goals and timetables are particularly troublesome as applied to federal contractors. For current federal regulations impose on those contractors an obligation to meet racial goals and timetables or else lose lucrative government contracts. Placing government's imprimatur on goals and timetables in an Executive Order or in federal regulations has, ADL believes, a coercive effect on those employers who do business with the government. Threatened with debarment for noncompliance, a contractor will understandably take the easy road and transform a so-called goal into a quota by hiring and promoting individuals solely on the basis of race and ethnicity -- a clearly discriminatory practice which federal law, in fact, prohibits.

The danger of goals, "proportional representation" schemes and other numerical methods of evaluating affirmative action is that they presuppose a "correct" percentage of minority employment thereby setting an arbitrary limit on equal opportunity.

Discrimination is like a cancer. The cure for discrimination in our society is to eliminate it totally not transfer it to a new set of victims. The way to remedy past discrimination is to stop discriminating period.

Racially based programs arbitrarily favor some while arbitrarily punishing others regardless of its intentions. The civil rights movement had as its objective the outlawing of all forms of discrimination. The Anti-Defamation League strongly believes that the return of quotas, masquerading as government sanctioned goals and timetables, is contrary to the high purposes and spirit of our civil rights struggle.

WASHINGTON REPRESENTATIVE • 2027 Massachusetts Avenue N.W. • Washington, D.C. 20036 • (202) 265-2000

October 31, 1985

CR65

To: Ralph Neas

Fr: Hyman Bookbinder

Subject: Jewish Position on Proposed Executive Order

In reply to your inquiry regarding the Jewish community's position in the proposed Executive Order on affirmative action requirement for government contractors, I can report an overwhelming consensus in opposition to such an order. This is based on the following facts :

1. Several major national organizations have made public, explicit statements affirming such opposition. They include the American Jewish Committee, the American Jewish Congress, the Union of American Hebrew Congregations and the National Council of Jewish Women. Only one national Jewish organization, the anti-Defamation League, to the best of my knowledge, has made any public declaration in support of such order.

2. On September 11, the approximately 25 members of the Domestic Task Force of the National Jewish Community Relations Council (NJCRAC), a co-ordinating body of 11 national Jewish agencies and over 100 city-wide community relations agencies, met here in Washington to discuss the reported draft Executive Order. After my statement to the Task Force, and a prolonged discussion that followed, the Task Force voted unanimously to recommend opposition to the proposed order.

3. On October 21, the Executive Committee of the NJCRAC met in Boston to consider the Task Force recommendation. Approximately 60 delegates from national agencies and city bodies were present to consider the issue. I participated in the discussion. On the vote to accept the Task Force recommendation, only two negative votes were cast -- those of the Anti-Defamation League and the Jewish War Veterans. The following organizations were present and accepted the recommendations:

American Jewish Committee
American Jewish Congress
Hadassah
Jewish Labor Committee
National Council of Jewish Women
Union of American Hebrew Congregations
Union of Orthodox Jewish Congegations
United Synagogue of America

Following the meeting, the Jewish Community Councils of the following cities joined in a statement urging the President to reject the order: Washington, Indianapolis, Milwaukee, Bergen County (NJ), Kansas City(Mo), Baltimore, Detroit, Houston, Philadelphia, San Francisco, Flint(Mich), Miami and San Diego.

New York Review of Books: May 9, 1985

# How Poor Are the Poor?

Christopher Jencks

**Losing Ground:**
**American Social Policy, 1950–1980**
by Charles Murray.
Basic, 323 pp., $23.95

From 1946 until 1964 the conservative politicians who dominated Congress thought that the federal government might be capable of transforming American society, but they saw this as a danger to be avoided at almost any cost. For the following twelve years the liberals who dominated Congress thought that the federal government should try to cure almost every ill Americans were heir to. After 1976 the political climate in Congress changed again. The idea that government action could solve—or even ameliorate—social problems became unfashionable, and federal spending was increasingly seen as waste. As a result, federal social-welfare spending, which had grown from 5 percent of the nation's gross national product in 1964 to 11 percent in 1976, has remained stuck at 11 percent since 1976.

Conservative politicians and writers are now trying to shift the prevailing view again, by arguing that federal programs are not just ineffective but positively harmful. The "problem," in this emerging view, is not only that federal programs cost a great deal of money that the citizenry would rather spend on video recorders and Caribbean vacations, but that such programs hurt the very people they are intended to help.

*Losing Ground*, by Charles Murray, is the most persuasive statement so far of this new variation on Social Darwinism. Murray is a former journalist who has also done contract research for the government and is now associated with the Manhattan Institute, which raises corporate money to support conservative authors such as George Gilder and Thomas Sowell. His name has been invoked repeatedly in Washington's current debates over the budget—not because he has provided new evidence on the effects of particular government programs, but because he is widely presumed to have proven that federal social policy as a whole made the poor worse off over the past twenty years. Murray's popularity is easy to understand. He writes clearly and eloquently. He cites many statistics, and he makes his statistics seem easy to understand. Most important of all, his argument provides moral legitimacy for budget cuts that many politicians want to make in order to reduce the federal deficit.

Murray summarizes this argument as follows:

> The complex story we shall unravel comes down to this:
>
> Basic indicators of well-being took a turn for the worse in the 1960s, most consistently and most drastically for the poor. In some cases, earlier progress slowed; in other cases mild deterioration accelerated; in a few instances advance turned into retreat. The trendlines on many of the indicators are—literally—unbelievable to people who do not make a profession of following them.
>
> The question is why....
>
> The easy hypotheses—the economy, changes in demographics, the effects of Vietnam or Watergate or racism—fail as explanations. As often as not, taking them into account only increases the mystery.
>
> Nor does the explanation lie in idiosyncratic failures of craft. It is not just that we sometimes administered good programs improperly, or that sound concepts sometimes were converted to operations incorrectly. It is not that a specific program, or a specific court ruling or act of Congress, was especially destructive. The error was strategic....
>
> The most compelling explanation for the marked shift in the fortunes of the poor is that they continued to respond, as they always had, to the world as they found it, but that we—meaning the not-poor and undisadvantaged—had changed the rules of their world. Not of our world, just of theirs. The first effect of the new rules was to make it profitable for the poor to behave in the short term in ways that were destructive in the long term. Their second effect was to mask these long-term losses—to subsidize irretrievable mistakes. We tried to provide more for the poor and produced more poor instead. We tried to remove the barriers to escape from poverty, and inadvertently built a trap.

*Charles Murray*

In appraising this argument, we must, I believe, draw a sharp distinction between the material condition of the poor and their social, cultural, and moral condition. If we look at material conditions we find that, Murray notwithstanding, the position of poor people showed marked improvement after 1965, which is the year Murray selects as his "turning point." If we look at social, cultural, and moral indicators, the picture is far less encouraging. But since most federal programs are aimed at improving the material conditions of life, it is best to start with them.

## 1.

In making his case that "basic social indicators took a turn for the worse in the 1960s," Murray begins with the official poverty rate. The income level, or "threshold," that officially qualifies a family as poor varies according to the number and age of its members and rises every year with the Consumer Price Index, so in theory it represents the same level of material comfort year after year.[1] If a family's total money income is below its poverty threshold, all its members are counted as poor. The official definition of the poverty level is to a large extent arbitrary. When the Gallup survey asks how much money a couple with two children needs to "get along in this community," for example, the typical respondent said $15,000 in 1983. The "poverty" threshold for such a family was only $10,000 in 1983. But few would say that people with incomes below the poverty threshold were not poor.

Table 1 (see next page) shows that the official poverty rate fell from 30 to 22 percent of the population during the 1950s and from 22 to 13 percent during the 1960s. This hardly seems to fit Murray's argument that social indicators took a turn for the worse in the 1960s. The official rate was still 13 percent in 1980, but even this was not exactly a "turn for the worse." Furthermore, the official poverty statistics underestimate actual progress since 1965. To begin with, the Consumer Price Index (CPI), which the Census Bureau uses to correct the poverty thresholds for inflation, exaggerated the amount of inflation between 1965 and 1980 by about 13 percent, because of a flaw in the way it measured housing costs. The official poverty line therefore represented a higher standard of living in 1980 than in 1965. If we use the Personal Consumption Expenditure (PCE) deflator from the National Income Accounts to adjust the poverty line for inflation, Table 1 shows that poverty fell from 19 percent in 1965 to 13 percent in 1980.

A more fundamental problem with the official poverty statistics is that they do not take account of changes in families' *need* for money. They make no adjustment for the fact that Medicare and Medicaid now provide many families with low-cost medical care, for example, or for the fact that food stamps have reduced families' need for cash, or for the fact that more families now live in government-subsidized housing.

Experts on poverty have devised a number of different methods for estimating the value of noncash benefits. Most conservatives prefer the "market value" approach, which values noncash benefits at what it would cost to buy them on the open market and adds this amount to recipients' incomes. To see what this implies, consider Mrs. Smith, an elderly widow living alone in Indiana, who is covered by both Medicare and Medicaid. Private insurance comparable to Medicare-Medicaid would have cost Mrs. Smith $4000 in 1979.[2] To get Mrs. Smith's "true" income, advocates of the "market value" approach simply add $4000 to her money income. Since, by the official standard, Mrs. Smith's poverty threshold was only $3472 in 1979, the "market value" approach put her above the poverty line even if she had no cash income whatever. This is plainly absurd. Mrs. Smith cannot eat her Medicaid card, or trade it for a place to live, or even use it for transportation to her doctor's office.

If we want a more realistic picture of how Medicare and Medicaid have affected Mrs. Smith's life, we must answer two distinct questions: how it affected her ability to obtain medical care and whether it cut her medical bills.

When the Census Bureau values noncash benefits according to what they save the recipient, it finds that they lowered the 1980 poverty rate from 13 to 10 percent.[3] The Census has not made comparable estimates for the 1950s or 1960s, but we can make informed guesses about 1950 and 1965. In 1965, Medicare and Medicaid did not exist, food stamps reached fewer than 2 percent of the poor, and there were 600,000 public housing units for 33 million poor people. In 1950

[1] Until 1980 the thresholds were also lower for farm families and for families headed by women. A widow living alone, for example, was supposed to need about 7 percent less than a widower living alone.

[2] US Bureau of the Census, "Estimates of Poverty Including the Value of Noncash Benefits: 1979–1982," Technical Paper 51 (Government Printing Office, 1984).

[3] US Bureau of the Census, "Estimates of Poverty Including Noncash Benefits: 1979–1982," Technical Paper 51 (Government Printing Office, 1984).

food stamps did not exist at all and there were 200,000 public housing units for 45 million poor people. Taken together, these programs could hardly have cut the poverty rate by more than one point in either year. On this assumption Table 1 estimates the "net" poverty rate at 10 percent in 1980, 18 percent in 1965, and 29 percent in 1950.[4]

It should go without saying that since the original poverty threshold was arbitrary, these statistics do not prove that only 10 percent of the population was "really" poor in 1980. The figure could be either higher or lower, depending on how you define poverty. The figures do, however, tell us that the proportion of the population living below our arbitrary threshold was almost twice as high in 1965 as in 1980, and almost three times as high in 1950 as in 1980. At least in economic terms, therefore, Murray is wrong: the poor made a lot of progress after 1965.

Furthermore, even these "net" poverty statistics underestimate the improvement in poor people's material circumstances. Mrs. Smith's $4000 Medicaid card may not lift her out of poverty, but it has dramatically improved her access to doctors and hospitals. In 1964, before Medicare and Medicaid, the middle classes typically saw doctors five times a year, whereas the poor saw doctors four times a year. By 1981, the middle classes were seeing doctors only four times a year, while the poor were seeing them almost six times a year. Since the poor still spent twice as many days in bed as the middle classes, and were three times as likely to describe their health as "fair" or "poor," this redistribution of medical care still fell short of what one would expect if access depended solely on "need."[5] But it was a big step in the right direction.

Increased access to medical care seems to have improved poor people's health. The most widely cited health measure is infant mortality. The United States does not collect statistics on infant mortality by parental income, but it does collect these statistics by race, and it seems reasonable to assume that differences between whites and blacks parallel those between rich and poor. Table 1 shows that the gap between blacks and whites, which had widened during the 1950s and narrowed only trivially during the early 1960s, narrowed very rapidly after 1965. Table 1 tells a similar story about overall life expectancy. Life expectancy rose more from 1965 to 1980 than it had from 1950 to 1965, and the disparity between whites and nonwhites narrowed faster after 1965 than before. Nobody knows how much Medicare and Medicaid contributed to these changes, but notwithstanding all the defects in the American medical care system, it is hard to believe they were not important.[6]

Nonetheless, despite all the improvements since 1965, Murray is right that, apart from health, the material condition of the poor improved faster from 1950 to 1965 than from 1965 to 1980. The most obvious explanation is that the economy turned sour after 1970. Inflation was rampant, output per worker increased very little, and unemployment began to edge upward. The real income of the median American family, which had risen by an average of 2.9 percent a year between 1950 and 1965, rose only 1.7 percent a year between 1965 and 1980. From 1950 to 1965 it took a 4.0 percent increase in median family income to lower net poverty by one percentage point. From 1965 to 1980, because of expanding social welfare spending, a 4.0 percent increase in median income lowered net poverty by 1.2 percent. Nonetheless, median income grew so much more slowly after 1965 that the decline in net poverty also slowed.[7]

Murray rejects this argument. In his version of economic history the nation as a whole continued to prosper during the 1970s. The only problem, he claims, was that "the benefits of economic growth stopped trickling down to the poor." He supports this version of economic history with statistics showing that gross national product grew by 3.2 percent a year during the 1970s compared to 2.7 percent a year between 1953 and 1959. This is true, but irrelevant. The economy grew during the 1950s because output per worker was growing. It grew during the 1970s because the labor force was growing. The growth of the labor force reflected a rapid rise in the number of families dividing up the nation's economic output.

**Table 1**
**THE CONDITION OF THE POOR: 1950–1980**

| | 1950 | 1960 | 1965 | 1970 | 1980 |
|---|---|---|---|---|---|
| **Poverty Rate** | | | | | |
| Official[a] | 30 | 22 | 17 | 13 | 13 |
| Corrected Official[b] | 30 | 23 | 19 | 15 | 13 |
| "Net" | 29 | | 18 | | 10 |
| **Infant Mortality as a percent of live births**[c] | | | | | |
| White | 2.7 | 2.3 | 2.2 | 1.8 | 1.1 |
| Black | 4.4 | 4.4 | 4.2 | 3.3 | 2.2 |
| Gap | 1.7 | 2.1 | 2.0 | 1.5 | 1.1 |
| **Life Expectancy in years**[c] | | | | | |
| White | 69.1 | 70.6 | 71.0 | 71.7 | 74.4 |
| Nonwhite | 60.8 | 63.9 | 64.1 | 65.3 | 69.5 |
| Gap | 8.3 | 6.7 | 6.9 | 6.4 | 4.9 |
| **Median Family Income (in 1980 dollars)**[d] | $10,500 | $14,000 | $16,200 | $19,200 | $21,000 |
| **Gross National Product**[e] (in 1980 dollars) | | | | | |
| Per worker | $15,300 | $18,900 | $22,300 | $23,400 | $24,600 |
| Per household | $21,900 | $24,900 | $28,900 | $30,600 | $32,600 |

*Sources:* a. Murray, pp. 65 and 245. The 1950 value is approximate. Corrected for inflation using the Consumer Price Index.
b. Corrected for inflation using the Personal Consumption Expenditure deflator and for measurement changes in 1966, 1974, and 1979.
c. *Statistical Abstract of the United States*, 1984.
d. US Bureau of the Census, *Current Population Reports*, Series P-60, no. 132, corrected for inflation using the PCE deflator, not the CPI.
e. *Economic Report of the President*, 1984.

[4]Murray presents a different set of estimates for "net" poverty, taken from the work of Timothy Smeeding. Unlike the Census Bureau's estimates, Smeeding's estimates are corrected for underreporting of income. Smeeding's estimates for years prior to 1979 are also corrected for underreporting of noncash benefits. But Smeeding's 1979 estimate, on which Murray places great emphasis, is not corrected for such underreporting. As a result, Smeeding's series underestimates the decline in net poverty during the 1970s.

[5]Data taken from US Public Health Service, *Health, United States* (Government Printing Office, 1983), pp. 126, 127, 137.

[6]Hope Corman and Michael Grossman examine the effect of Medicaid on infant mortality in "Determinants of Neonatal Mortality Rates in the United States: A Reduced-Form Model," Working Paper 1387 (National Bureau of Economic Research, 1985).

[7]From 1950 to 1980 the correlation between the official poverty rate and the logarithm of real median family income is 0.995.

GNP per household hardly grew at all after 1970 (see Table 1).[8]

But a question remains. As Table 2 shows, total government spending on "social welfare" programs grew from 11.2 to 18.7 percent of GNP between 1965 and 1980. If all this money had been spent on the poor, poverty should have fallen to virtually zero. But "social welfare" spending is not mostly for the poor. It includes programs aimed primarily at the poor, like Medicaid and food stamps, but it also includes programs aimed primarily at the middle classes, like college loans and military pensions, and programs aimed at almost everybody, like medical research, public schools, and Social Security. In 1980, only a fifth of all "social welfare" spending was explicitly aimed at low-income families, and only a tenth was for programs providing cash, food, or housing to such families.[9] Table 2 shows that cash, food, and housing for the poor grew from 1.0 percent of GNP in 1965 to 2.0 percent in 1980.[10] This was a large increase in absolute terms. But redistributing an extra 1.0 percent of GNP could hardly be expected to reduce poverty to zero.

A realistic assessment of what social policy accomplished between 1965 and 1980 must also take account of the fact that if all else had remained equal, demographic changes would have pushed the poverty rate up during these years, not down. Table 2 shows that both the number of people over sixty-five and the number living in families headed by women grew steadily from 1950 to 1980. We do not have poverty rates for these groups in 1950, but in 1960 the official rates were roughly 33 percent for the elderly and 45 percent for families headed by women. Since neither group includes many jobholders, economic growth does not move either group out of poverty very fast. From 1960 to 1965, for example, economic growth lowered official poverty from 22 to 17 percent for the nation as a whole, but only lowered it from 33 to 31 percent among the elderly and from 45 to 42 percent among households headed by women.

When poverty became a major social issue during the mid-1960s, government assistance to both these groups was quite modest. In 1965 the typical retired person got only $184 a month from Social Security in 1980 dollars, and a large minority got nothing whatever. Only about a quarter of all families headed by women got benefits from Aid to Families with Dependent Children (AFDC), and benefits for a family of four averaged only $388 a month in 1980 dollars (see Table 2).

From 1965 to 1970 the AFDC system changed drastically. Welfare offices had to drop a wide range of restrictive regulations that bad kept many women and children off the rolls. It became much easier to combine AFDC with employment, and benefit levels rose appreciably. As a result of these changes something like half of all persons in families headed by women appear to have been receiving AFDC by 1970.[11]

But as the economy floundered in the 1970s legislators began to draw an increasingly sharp distinction between the "deserving" and the "undeserving" poor. The "deserving" poor were those whom legislators judged incapable of working, namely the elderly and the disabled. Despite their growing numbers, they got more and more help. By 1980 the average Social Security retirement check bought 50 percent more than it had in 1970, and official poverty among the elderly had fallen from 25 to 16 percent (see Table 2). Taking noncash benefits into account, the net poverty rate was lower for those over 65 than for those under 65 in 1980.[12]

We have less precise data on the disabled, but we know their monthly benefits grew at the same rate as benefits for the elderly, and the percentage of the population receiving disability benefits also grew rapidly during the 1970s. Since we have no reason to suppose that the percentage of workers actually suffering from serious disabilities grew, it seems reasonable to suppose that a larger fraction of the disabled were getting benefits, and that poverty among the disabled fell as a result.

While legislators were increasingly generous to the "deserving" poor during the 1970s, they showed no such concern for the "undeserving" poor. The undeserving poor were those who "ought" to work but were not doing so. They were mainly single mothers and marginally employable men whose unemployment benefits had run out—or who had never been eligible in the first place. Men whose unemployment benefits have run out usually get no federal benefits. Most states offer them token "general assistance," but it is seldom enough to live on. Data on this group is scanty.

Single mothers do better than unemployable men, because legislators are reluctant to let the children starve and cannot find a way of cutting benefits for mothers without cutting them for children as well. Nonetheless, as Table 2 shows, the purchasing power (in 1980

[8] As Murray notes, GNP *per person* also grew quite rapidly during the 1970s, because the number of workers grew while the number of children fell. But this change did not reduce poverty, because family size did not decline appreciably among those with incomes below $10,000 in 1980 dollars. See US Bureau of the Census, *Current Population Reports*, Series P-60, no. 80, p. 17 and no. 132, p. 61 (Government Printing Office, 1971 and 1982).

[9] US Bureau of the Census, *Statistical Abstract of the United States: 1984* (Government Printing Office), pp. 368 and 371.

[10] Murray's figures show even more rapid growth in both "public aid" and "public assistance" after 1965, because he concentrates exclusively on *federal* spending, ignoring state and local expenditures. I find it hard to see how a writer who sees rising AFDC benefits as a major source of social decline can focus entirely on federal spending. It is the states, after all, that set AFDC benefits.

[11] The exact ratio is hard to determine, because prior to 1982 the Census Bureau did not have a satisfactory procedure for identifying mother-child families living with relatives.

[12] See US Bureau of the Census, "Estimates of Poverty Including the Value of Noncash Benefits: 1979-1982," Technical Paper 51 (Government Printing Office, 1984).

**Table 2**
**SOCIAL WELFARE SPENDING: 1950–1980**

| | 1950 | 1960 | 1965 | 1970 | 1980 |
|---|---|---|---|---|---|
| **Percent of GNP spent on:** | | | | | |
| "Social Welfare" | 8.2 | 10.3 | 11.2 | 14.7 | 18.7 |
| Means-tested cash benefits, Food Stamps, and housing subsidies[a] | 0.9 | 0.8 | 1.0 | 1.2 | 2.0 |
| **Percent of persons who are:** | | | | | |
| Over 65 | 8 | 9 | 9 | 10 | 11 |
| In families headed by women | 6[b] | 7 | 9 | 10 | 12 |
| In AFDC families | 1.5 | 1.7 | 2.3 | 4.7 | 4.9 |
| **Illegitimate births as a percent of all births** | 4 | 5 | 8 | 11 | 19 |
| **Percent of personal income derived from:** | | | | | |
| Social Security and SSI | 0.4 | 2.8 | 3.3 | 3.9 | 5.9 |
| AFDC | 0.3 | 0.3 | 0.3 | 0.6 | 0.6 |
| **Mean monthly payment (in 1980 dollars) to:** | | | | | |
| Retired workers | $138 | $184 | $195 | $228 | $341 |
| AFDC family of four[c] | NA | $396 | $388 | $435 | $350 |
| **Official poverty rate:[d]** | | | | | |
| Persons over 65 | NA | 33[e] | 31[e] | 25 | 16 |
| Persons in families headed by women | NA | 45 | 42 | 38 | 37 |
| **Percent of all poor people who are:** | | | | | |
| In families headed by women | NA | 18 | 23 | 30 | 35 |
| Over 65 | NA | 14 | 18 | 19 | 13 |

Sources: *Statistical Abstract*, 1984; *Economic Report of the President*, 1984; *Historical Statistics of the United States*; and *Current Population Reports*, Series P-60, no. 145. Pre-1980 dollars are converted to 1980 dollars using the PCE deflator.

a. Includes all "Public Aid" and "Housing" expenditures, less Medicaid. "Public Aid" includes some social services.
b. Estimated from data on percent of families headed by women in 1950 and 1960, and percent of persons in such families in 1960.
c. Benefit level for a family with no other income. (For source, see footnote 14.)
d. Corrected for measurement change in 1966.
e. Estimated from the total poverty rates in 1960 and 1965 and from the poverty rates for the elderly in 1959 and 1966.

dollars) of AFDC benefits for a family of four rose from $388 a month in 1965 to $435 in 1970. In addition, Congress made food stamps available to all low-income families after 1971. These were worth another $150 to a typical family of four.[13] By 1972, the AFDC-food stamp "package" for a family of four was worth about $577 a month. Benefits did not keep up with inflation after 1972, however, and by 1980 the AFDC-food stamp package was worth only $495 a month.[14] As a result, the welfare rolls grew no faster than the population after 1975, though the number of families headed by women continued to increase.[15]

According to Murray, keeping women off the welfare rolls should have raised their incomes in the long run, since it should have pushed them into jobs where they would acquire the skills they need to better themselves. This did not happen. The official poverty rate in households headed by women remained essentially constant throughout the 1970s, at around 37 percent. Since the group at risk was growing, families headed by women accounted for a rising fraction of the poor (see Table 2).

Taken together, Tables 1 and 2 tell a story very different from the one Murray tells in *Losing Ground*. First, contrary to what Murray claims, "net" poverty declined almost as fast after 1965 as it had before. Second, the decline in poverty after 1965, unlike the decline before 1965, occurred despite unfavorable economic conditions, and depended to a great extent on government efforts to help the poor. Third, the groups that benefited from this "generous revolution," as Murray rightly calls it, were precisely the groups that legislators hoped would benefit, notably the aged and the disabled. The groups that did not benefit were the ones that legislators did not especially want to help. Fourth, these improvements took place despite demographic changes that would ordinarily have made things worse. Given the difficulties, legislators should, I think, look back on their efforts to improve the material conditions of poor people's lives with some pride.

## 2.

Up to this point I have treated demographic change as if it were entirely beyond human control, like the weather. According to Murray, however, what I have labeled "demographic change" was a predictable byproduct of government policy. Murray does not, it is true, address the role of government in keeping old people alive longer. But he does argue that changes in social policy, particularly the welfare system, were responsible for the increase in families headed by women after 1965. Since this argument recurs in all conservative attacks on the welfare system, and since scholarly research supports it in certain respects, it deserves a fair hearing.

Murray illustrates his argument with an imaginary Pennsylvania couple named Harold and Phyllis. They are young, poorly educated, and unmarried. Phyllis is also pregnant. The question is whether she should marry Harold. Murray first examines her situation in 1960. If Phyllis does not marry Harold, she can get the equivalent of about $70 a week in 1984 money from AFDC. She cannot supplement her welfare benefits by working, and on $70 a week she cannot live by herself. Nor can she live with Harold, since the welfare agency checks up on her living arrangements, and if she is living with a man she is no longer eligible for AFDC. Thus if Phyllis doesn't marry Harold she will have to live with her parents or put her baby up for adoption. If Phyllis does marry Harold, and he gets a minimum-wage job, they will have the equivalent of $124 a week today. This isn't much, but it is more than $70. Furthermore, if Phyllis is not on AFDC she may be able to work herself, particularly if her mother will help look after her baby. Unless Harold is a complete loser, Phyllis is likely to marry Harold—if he asks.

Now the scene shifts to 1970. The Supreme Court has struck down the "man in the house" rule, so Phyllis no longer has to choose between Harold and AFDC. She can have both. According to Murray, if Phyllis does not marry Harold and he does not acknowledge that he is

the father of their child, Harold's income will not "count" when the local welfare department decides whether Phyllis is eligible for AFDC, food stamps, and Medicaid. This means she can get paid to stay home with her child while Harold goes out to work, but only so long as she doesn't marry Harold. Furthermore, the value of her welfare "package" is now roughly the same as what Harold or she could earn at a minimum-wage job. Remaining eligible for welfare is thus more important than it was in 1960, as well as being easier. From Phyllis's viewpoint marrying Harold is now quite costly.

While the story of Harold and Phyllis makes persuasive reading, it is misleading in several respects. First, it is not quite true, as Murray claims, that "any money that Harold makes is added to their income without affecting her benefits as long as they remain unmarried." If Phyllis is living with Harold, and Harold is helping to support her and her child, the law requires her to report Harold's contributions when she fills out her "need assessment" form. What has changed since 1960 is not Phyllis's legal obligation to report Harold's contribution but the likelihood that she will be caught if she lies. Federal guidelines issued in 1965 now prohibit "midnight raids" to determine whether Phyllis is living with Harold. Furthermore, even if Phyllis concedes that she lives with Harold, she can deny that he pays the bills and the welfare department must then prove her a liar. Still, Phyllis must perjure herself, and there is always some chance she will be caught.

The second problem with the Harold and Phyllis story is that Murray's account of Harold's motives is not plausible. In 1960, according to Murray, Harold marries Phyllis and takes a job paying the minimum wage because he "has no choice." But the Harolds of this world have always had a choice. Harold can announce that Phyllis is a slut and that the baby is not his. He can tell Phyllis to get an illegal abortion. He can join the army. Harold's parents may insist that he do his duty by Phyllis, but then again they may blame her for leading him astray. If Harold cared only about improving his standard of living, as Murray suggests, he would not have married Phyllis in 1960.

According to Murray, Harold is less likely to marry Phyllis in 1970 than in 1960 because, with the demise of the "man in the house" rule and with higher benefits, Harold can get Phyllis to support him. But unless Harold works, Phyllis has no incentive either to marry him or to let him live off her meager check, even if she shares her bed with him occasionally. If Harold *does* work, and all he cares about is having money in his pocket, he is better off on his own than he is sharing his check with Phyllis and their baby. From an economic viewpoint, in short, Harold's calculations are much the same in 1970 as in 1960. Marrying Phyllis will still lower his standard of living. The main thing that has changed since 1960 is that Harold's friends and relatives are less likely to think he "ought" to marry Phyllis.

This brings us to the central difficulty in Murray's story. Since Harold is unlikely to want to support Phyllis and their child, and since Phyllis is equally unlikely to want to support Harold, the usual outcome is that they go their separate ways. At this point Phyllis has three choices: get rid of the baby (through adoption or abortion), keep the baby and continue to live with her parents, or keep the baby and set up housekeeping on her own. If she keeps the baby she usually decides to stay with her parents. In 1975 three-quarters of all first-time unwed mothers lived with their parents during the first year after the birth of their baby. (No room for Harold here.) Indeed, half of all unmarried mothers under twenty-four lived with their parents in 1975—and this included divorced and separated mothers as well as those who had never been married.[16]

If Phyllis expects to go on living with her parents, she is not likely to worry much about how big her AFDC check will be. Phyllis has never had a child and she has never had any money. She is used to her mother's paying the rent and putting food on the table. Like most children she is likely to assume that this arrangement can continue until she finds an arrangement she prefers. In the short run, having a child will allow her to leave school (if she has not done so already) without having to work. It will also mean changing a lot of diapers, but Phyllis may well expect her mother to help with that. Indeed, from Phyllis's viewpoint having a child may look rather like having another little brother or sister. If it brings in some money, so much the better, but if she expects to live with her parents money is likely to be far less important to her than her parents' attitude toward illegitimacy. That is the main thing that changed for her between 1960 and 1970.

[13]US Bureau of the Census, Statistical Abstract of the United States, 1984, p. 371.

[14]House Committee on Ways and Means, "Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means" (Government Printing Office, 1985). The drop is even larger using the conventional inflation adjustment based on the CPI instead of the PCE deflator.

[15]The percentage of *families* on the rolls stabilized after 1975. The percentage of *persons* on the rolls declined after 1975, because AFDC families got smaller.

[16]David Ellwood and Mary Jo Bane, "The Impact of AFDC on Family Structure and Living Arrangements" (Kennedy School of Government, Harvard University, March 1984, offset).

Systematic efforts at assessing the impact of AFDC benefits on illegitimacy rates support my version of the Harold and Phyllis story rather than Murray's. The level of a state's AFDC benefits has no measurable effect on its rate of illegitimacy. In 1984, AFDC benefits for a family of four ranged from $120 a month in Mississippi to $676 a month in New York. David Ellwood and Mary Jo Bane recently completed a meticulous analysis of the way such variation affects illegitimate births.[17] In general, states with high benefits have *less* illegitimacy than states with low ones, even after we adjust for differences in race, region, education, income, urbanization, and the like. This may be because high illegitimacy rates make legislators reluctant to raise welfare benefits.

To get around this difficulty, Ellwood and Bane asked whether a change in a state's AFDC benefits led to a change in its illegitimacy rate. They found no consistent effect. Nor did high benefits widen the disparity in illegitimate births between women with a high probability of getting AFDC—teen-agers, nonwhites, high school dropouts—and women with a low probability of getting AFDC.

What about the fact that Phyllis can now live with Harold (or at least sleep with him) without losing her benefits? Doesn't this discourage marriage and thus increase illegitimacy? Perhaps. But Table 2 shows that illegitimacy has risen at a steadily accelerating rate since 1950. There is no special "blip" in the late 1960s, when midnight raids stopped and the "man in the house" rule passed into history. Nor is there consistent evidence that illegitimacy increased faster among probable AFDC recipients than among women in general.

Murray's explanation of the rise in illegitimacy thus seems to have at least three flaws. First, most mothers of illegitimate children initially live with their parents, not their lovers, so AFDC rules are not very relevant. Second, the trend in illegitimacy is not well correlated with the trend in AFDC benefits or with rule changes. Third, illegitimacy rose among movie stars and college graduates as well as welfare mothers. All this suggests that both the rise of illegitimacy and the liberalization of AFDC reflect broader changes in attitudes toward sex, law, and privacy, and that they had little direct effect on each other.

But while AFDC does not seem to affect the number of unwed mothers, as Murray claims, it does affect family arrangements in other ways. Ellwood and Bane found, for example, that benefit levels had a dramatic effect on the living arrangements of single mothers. If benefits are low, single mothers have trouble maintaining a separate household and are likely to live with their relatives—usually their parents. If benefits rise, single mothers are more likely to maintain their own households.

Higher AFDC benefits also appear to increase the divorce rate. Ellwood and Bane's work suggests, for example, that if the typical state had paid a family of four only $180 a month in 1980 instead of $350, the number of divorced women would have fallen by a tenth. This might be partly because divorced women remarry more hastily in states with very low benefits. But if AFDC pays enough for a woman to live on, she is also more likely to leave her husband. The Seattle-Denver "income maintenance" experiments, which Murray discusses at length, found the same pattern.

The fact that high benefits lead to high divorce rates is obviously embarrassing for liberals, since most people view divorce as undesirable. But it has no bearing on Murray's basic thesis, which is that changes in social policy after 1965 made it "profitable for the poor to behave in the short term in ways that are destructive in the long term." If changes in the welfare system were encouraging teen-agers to quit school, have children, and not take steady jobs, as Murray contends, he would clearly be right about the long-term costs. But if changes in the welfare system have merely encouraged women who were unhappy in their marriages to divorce their husbands, or have discouraged divorced mothers from marrying lovers about whom they feel ambivalent, what makes Murray think this is "destructive in the long term"?

Are we to suppose that Phyllis is better off in the long run married to Harold if he drinks, or beats her, or molests their teen-age daughter? Surely Phyllis is a better judge of this than we are. Or are we to suppose that Phyllis's children will be better off if she sticks with Harold? That depends on how good a father Harold is. The children may do better in a household with two parents, even if the parents are constantly at each other's throats, but then again they may not. Certainly Murray offers no evidence that unhappy marriages are better for children than divorces, and I know of none.

Shorn of rhetoric, then, the "empirical" case against the welfare system comes to this. First, high AFDC benefits allow single mothers to set up their own households. Second, high AFDC benefits allow mothers to end bad marriages. Third, high benefits may make divorced mothers more cautious about remarrying. All these "costs" strike me as benefits.

Consider Harold and Phyllis again, but this time imagine that they married in 1960 and that it is now 1970. They have three children, Harold still has the dead-end job in a laundry that Murray describes him as having taken in 1960, and he has now taken both to drinking and to beating Phyllis. Harold still has two choices. He can leave Phyllis or he can stay. If he leaves, Phyllis can try to collect child support from him, but her chances of success are low. So Harold can do as he pleases.

Phyllis is not so fortunate. She is not the sort of person who can earn much more than the minimum wage, so she cannot support herself and three children without help. If she is lucky she can go to her parents. Otherwise, if she lives in a state with low benefits, she has two choices: stick with Harold or abandon her children. Since she has been taught to stick with her children, she has to stick with Harold. If she lives in a state with high benefits she has a third choice: she can leave Harold and take her children with her. In a sense, AFDC is the price we pay for Phyllis's commitment to her children. At 0.6 percent of total US personal income, it does not seem a high price.

Giving Phyllis more choices has obvious political drawbacks. So long as Phyllis lives with Harold, her troubles are her own. We may shake our heads when we hear about them, but we can tell ourselves that all marriages have problems, and that that is the way of the world. If Phyllis leaves Harold—or Harold leaves

[17] Ellwood and Bane, "The Impact of AFDC on Family Structure and Living Arrangements" (Kennedy School of Government, Harvard University, March 1984, offset).

Phyllis—and she comes to depend on AFDC, her problems become public instead of private. Now if she cannot pay the rent or does not feed her children milk it could be because her monthly check is too small, not because she doesn't know or care about the benefits of milk or because Harold spends the money on drink. Taking collective responsibility for Phyllis's problems is not a trivial price to pay for liberating her from Harold. Most of her problems will, after all, remain intractable. But our impulse to drive her back into Harold's arms so that we no longer have to think about her is the kind of impulse decent people should resist.

## 3.

The idea that Phyllis will be the loser in the long run if society gives her more choices exemplifies a habit of mind that seems as common among conservatives as among liberals. First you figure out what kind of behavior is in society's interest. Then you define such behavior as "good." Then you argue that good behavior, while perhaps disagreeable in the short run, is in the long-run interest of those who engage in it. Every parent will recognize this ploy: my son should take out the garbage because it is in his long-run interest to learn good work habits, not because I don't want to take it out or don't want to live with a shirker. The conflict between individual interests and the common interest, between selfishness and unselfishness, is thus transformed into a conflict between short-run and long-run self-interest. Unfortunately, the argument is often false.

Early in *Losing Ground*, Murray calculates what he calls the "latent" poverty rate, that is, the percentage of people who fall below the poverty line when we ignore transfer payments from the government such as Social Security, AFDC, unemployment compensation, and military pensions. The "latent" poverty rate rose from 18 percent in 1968 to 22 percent in 1980. Murray calls this "the most damning" measure of policy failure, because "economic independence—standing on one's own abilities and accomplishments—is of paramount importance in determining the quality of a family's life." This is a classic instance of wishful thinking. Murray wants people to work (or clip coupons) because such behavior keeps taxes low and maintains a public moral order of which both he and I approve, so he asserts that failure to work will undermine family life. He doesn't try to prove this empirically; he says it is self-evident. ("Hardly anyone, from whatever part of the political spectrum, will disagree.") But the claim is not only not self-evident; it is almost certainly wrong.

One major reason latent poverty increased after 1968 was that Social Security, SSI, food stamps, and private pensions allowed more old people to stop working. These programs also made it easier for old people to live on their own instead of moving in with younger relatives. Having come to depend on the government, old people suffer from latent poverty. But is there a shred of evidence that these changes undermined the quality of their family life? If so, why were the elderly so eager to trade their jobs for Social Security, and so reluctant to move in with their daughters-in-law?

Another reason latent poverty increased after 1968 was that more women and children came to depend on AFDC instead of on a man. According to Murray, a woman who depends on the government suffers from latent poverty, while a woman who depends on a man does not. But unless a woman can support herself and her children from her own earnings, she is always dependent on someone ("one man away from welfare"). Murray assumes that AFDC has a worse effect on family life than Harold. But that depends on Harold. Phyllis may not be very smart, but if she chooses AFDC over Harold, surely that is because she expects the choice to improve the quality of her family life, not undermine it. Even if, as Murray imagines, most AFDC recipients are really living in sin with men who help support them, what makes Murray think that the extra money these families get from AFDC makes their family life worse?

Murray's conviction that getting checks from the government is always bad for people is complemented by his conviction that working is always good for them, at least in the long run. Since many people do not recognize that working is in their long-run interest, Murray assumes such people must be forced to do what is good for them. Harold, for example, would rather loaf than take an exhausting, poorly paid job in a laundry. To prevent Harold from indulging his self-destructive preference for loafing, we must make loafing financially impossible. America did this quite effectively until the 1960s. Then we allegedly made it easier for him to qualify for unemployment compensation, so he was more likely to quit his job whenever he got fed up. We also made it easier for him to live off Phyllis's AFDC check. Once Harold had tasted the pleasures of indolence, he found them addictive, like smoking, so he never acquired either the skills or the self-discipline he would have needed to hold a decent job and support a family. By trying to help we therefore did him irreparable harm.

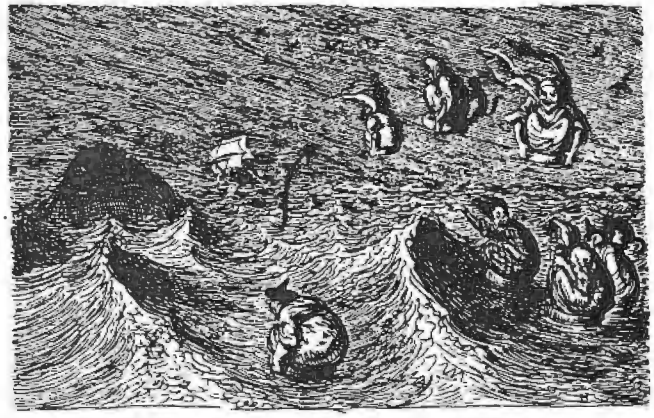
While I share Murray's enthusiasm for work, I cannot see much evidence that changes in government programs significantly affected men's willingness to work during the 1960s. When we look at the unemployed, for example, we find that about half of all unemployed workers were getting unemployment benefits in 1960. The figure was virtually identical in both 1970 and 1980.[18] Thus while the rules governing unemployment compensation did change, the changes did not make joblessness more attractive economically. Murray is quite right that dropping the man-in-the-house rule made it easier for Harold to live off Phyllis's AFDC check. But there is no evidence that this contributed to rising unemployment. Since black women receive about half of all AFDC money, Murray's argument implies that as AFDC rules became more liberal and benefits rose in the late 1960s, unemployment should have risen among young black men. Yet Murray's own data show that such men's unemployment rates fell during the late 1960s. Murray's argument also implies that young black men's unemployment rate should have fallen in the 1970s, when the purchasing power of AFDC benefits was falling. In fact, their unemployment rates rose.

While Murray is probably wrong to blame government benefits for undermining the work ethic after 1965, he could be right that some groups, especially young blacks, became choosier about the jobs they would accept. Before accepting

[18] *Economic Report of the President: 1985* (Government Printing Office, 1985), pp. 269 and 274.

this popular theory, however, we ought to demand some hard evidence. Murray offers none. His data do show a widening gap between the unemployment rates for young blacks and young whites, and also between the rates for young blacks and older blacks, but there are many possible explanations for this change. To begin with, the ablest young blacks were more likely to be in school, leaving the least employable looking for jobs. Young blacks also faced increasing competition from white high school students, who were working in unprecedented numbers, and from Latin American and Asian immigrants, whom many employers preferred on the grounds that they worked harder for less money.

The kinds of jobs that young blacks had traditionally held may also have disappeared at an especially rapid rate in the 1970s—as they did, for example, when southern agriculture was mechanized in the 1950s and early 1960s. A fascinating book could be written on this whole issue, but *Losing Ground* is not it. Murray is so intent on blaming unemployment on the government that he discusses alternative explanations only in order to dismiss them.[19]



## 4.

While Murray's claim that helping the poor is really bad for them is indefensible, his criticism of the ways in which government tried to help the poor from 1965 to 1980 still raises a number of issues that defenders of these programs need to face. Any successful social policy must strike a balance between collective compassion and individual responsibility. The social policies of the late 1960s and 1970s did not strike this balance very well. They vacillated unpredictably between the two ideals in ways that neither Americans nor any other people could live with over the long run. This vacillation played a major role in the backlash against government efforts to "do good." Murray's rhetoric of individual responsibility and self-sufficiency is not the basis for a social policy that would be politically acceptable over the long run either, but it provides a useful starting point for rethinking where we went wrong.

One chapter of *Losing Ground* is titled "The Destruction of Status Rewards"—not a happy phrase, but a descriptive one. The message is simple. If we want to promote virtue, we have to reward it. The social policies that prevailed from 1964 to 1980 often seemed to reward vice instead. They did not, of course, reward vice for its own sake. But if you set out to help people who are in trouble, you almost inevitably find that most of them are to some extent responsible for their present troubles. Few victims are completely innocent. Helping those who are not doing their best to help themselves poses extraordinarily difficult moral and political problems.

Phyllis, for example, turns to AFDC after she has left Harold. Her cousin Sharon, whose husband has left her, works forty hours a week in the same laundry where Harold worked before he took to drink. If we help Phyllis very much, she will end up better off than Sharon. This will not do. Almost all of us believe it is "better" for people to work than not to work. This means we also believe those who work should end up "better off" than those who do not work. Standing the established moral order on its head by rewarding Phyllis more than Sharon will undermine the legitimacy of the entire AFDC system. Nor is it enough to ensure that Phyllis is just a little worse off than Sharon. If Phyllis does not work, many—including Sharon—will feel that Phyllis should be substantially worse off, so there will be no ambiguity about the fact that Sharon's virtue is being rewarded.

The AFDC revolution of the 1960s sometimes left Sharon worse off than Phyllis. In 1970, for example, Sharon's minimum-wage job paid $275 a month if she worked forty hours every week and was never laid off. Once her employer deducted Social Security and taxes she was unlikely to take home more than $250 a month. Meanwhile, the median state (Oregon) paid Phyllis and her three children $225 a month, and nine states paid her more than $300 a month. This comparison is somewhat misleading in one respect, however. By 1970 Sharon could also get AFDC benefits to supplement her earnings in the laundry. Under the "thirty and a third" rule, adopted in 1967, local welfare agencies had to ignore the first $30 of Sharon's monthly earnings plus a third of what she earned beyond $30 when they computed her need for AFDC. If, for example, Sharon lived in Oregon, had three children, and took home $250 a month from her job, she could get an additional $78 a month from AFDC, bringing her total monthly income to $328, compared to Phyllis's $225. But Sharon could only collect her extra $78 a

[19] In discussing the effects of rising black school enrollment on unemployment rates, for example, Murray completely ignores the fact that those who enrolled in school were abler than those who dropped out. Because of this "creaming" process, the unemployment rate would have risen among black teen-agers who were not in school even if nothing else had changed. Robert Mare and Christopher Winship analyze this and related issues in "The Paradox of Lessening Racial Inequality and Joblessness Among Black Youth," *American Sociological Review* (February 1984), pp. 39–55.

month by becoming a "welfare mother," with all the humiliations and hassles that implied. Often she decided not to apply. Instead, she nursed a grievance against the government for treating Phyllis better than it treated her.

Upsetting the moral order in this way may not have had much effect on people's behavior. Sharon, for example, usually continued to work even if she could get almost as much on welfare. But this is irrelevant. Even if *nobody* quit work to go on welfare, a system that provided indolent Phyllis with as much money as diligent Sharon would be universally viewed as unjust. To say that such a system does not increase indolence—or doesn't increase it much—is beside the point. A criminal justice system that frequently convicts the innocent and acquits the guilty may deter crime as effectively as a system that yields just results, but that does not make it morally or politically acceptable. We care about justice independent of its effects on behavior.

Yet while Murray claims to be concerned about rewarding virtue, he seems only interested in doing this if it does not cost the taxpayer anything. Instead of endorsing the "thirty and a third" rule, for example, on the grounds that it rewarded work, he lumps it with all the other undesirable changes that contributed to the growth of the AFDC rolls during the late 1960s. His rationale for this judgment seems to be that getting money from the government undermines Sharon's self-respect *even if she also holds a full-time job*. This may often be true, but when it is, Sharon presumably does not apply for AFDC.

On balance, I prefer the Reagan administration's argument against the "thirty and a third" rule. The administration persuaded Congress to drop the "thirty and a third" rule in 1981, substituting a dollar-for-dollar reduction in AFDC benefits whenever a recipient worked regularly. As a result, a mother of three is now better off in seven states if she goes on AFDC than if she works at a minimum-wage job. The administration made no pretense that this change was good for AFDC recipients, or that it made the system more just. The administration simply argued that supplementing the wages of the working poor was a luxury the American taxpayer could not afford, or at least did not want to afford. While this appeal to selfishness is certainly not morally persuasive, it offends me less than Murray's claim that such changes are really in the victims' best interests.

The difficulty of helping the needy without rewarding indolence or folly recurs when we try to provide "second chances." America was a "second chance" for many of our ancestors, and it remains more committed to the idea that people can change their ways than any other society I know. But we cannot give too many second chances without undermining people's motivation to do well the first time around. In most countries, for example, students work hard in secondary school because they must do well on the exams given at the end of secondary school in order to get a desirable job or go on to a university. In America, plenty of colleges accept students who have learned nothing whatever in high school, including those who score near the bottom on the SAT. Is it any wonder that Americans learn less in high school than their counterparts in other industrial countries?

Analogous problems arise in our efforts to deal with criminals. We claim that crime will be punished, but this turns out to be mostly talk. Building prisons is too expensive, and putting people in prisons makes them more likely to commit crimes in the future. So we don't jail many criminals. Instead, we tell ourselves that probation, suspended sentences, and the like are "really" better. Needless to say, such a policy convinces both the prospective criminal and the public that punishment is a sham and that the criminal justice system has no real moral principles.

Still, it is important not to overgeneralize this argument. Many people apply it to premarital sex, for example, arguing that fear of economic hardship in an important deterrent to illegitimacy and that offering unwed mothers an economic "second chance" makes unmarried women more casual about sex and contraception. In this case, however, the problem turns out to be illusory. Unmarried women do not seem to make much effort to avoid pregnancy even in states like Mississippi, where AFDC pays a pittance. This means that liberal legislators can indulge their impulse to support illegitimate children in a modicum of decency without fearing that generosity will increase the number of children born into this unenviable situation.

The problem of "second chances" is intimately related to the larger problem of maintaining respect for the rules governing rewards and punishments in American society. As Murray rightly emphasizes, no society can survive if it allows people to violate its rules with impunity on the grounds that "the system is at fault." Murray also argues that the liberal impulse to blame "the system" for blacks' problems had an important part in the social, cultural, and moral deterioration of black urban communities after 1965. That such deterioration occurred in many cities is beyond doubt. Blacks were far more likely to murder, rape, and rob one another in 1980 than in 1965. Black males were more likely to father children they did not intend to care for or support. Black teen-agers were less likely to be working. More blacks were in school, but despite expanded opportunities for higher education and white-collar employment, black teen-agers were not learning as much.[20]

All this being conceded, the question remains: were all these ills attributable to people's willingness to "blame the system," as Murray claims? Crime, drug use, child abandonment, and academic lassitude were increasing in the prosperous white suburbs of New York and Los Angeles—and, indeed, in London, Prague, and Peking—as well as in Harlem and Watts. Murray is right to emphasize that the problem was worst in black American communities. But recall that his explanation is that "we—meaning the not-poor and the un-disadvantaged—had changed the rules of their world. Not our world, just theirs." If that is the explanation, why do all the same trends appear everywhere else as well?

*Losing Ground* does not answer such questions. Indeed, it does not ask them.

---

[20]Barbara Holmes summarizes changes in black academic achievement during the 1970s using data from the National Assessment of Educational Progress in "Reading, Science, and Mathematics Trends: A Closer Look" (Denver: Educational Commission of the States, December 1982). Black nine-year-olds and thirteen-year-olds gained ground during the 1970s, but black seventeen-year-olds lost ground in both science and mathematics and showed no change in reading. White seventeen-year-olds also lost ground.