

THE  
RESPONSIVE  
COMMUNITY



RIGHTS *and*  
RESPONSIBILITIES

Volume 3, Issue 2 Winter 1993

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## The Healthy Community: Health Care Reform, Rights, and Responsibilities

### A RIGHT TO HEALTH CARE?

It is hard to imagine any theory of social justice that justifies leaving millions of American children without adequate immunizations, or that denies health insurance to those with pre-existing medical conditions. In order to ensure that all Americans have the opportunity to develop into healthy, productive adults, universal health insurance coverage is warranted. These humanitarian concerns and the need to control rapidly rising health care costs are viable rationales to thoroughly revamp our health care system. Recently, however, some have pushed this idea to an extreme, arguing that “health care should be a right and not a privilege.” This idea gained currency during Pennsylvania’s 1991 Senate race between Harris Wofford and Richard Thornburgh. Sen. Wofford, in a now-famous advertisement, said: “If criminals have the right to a lawyer, I think working Americans should have the right to a doctor.”

It may well be that the provision of basic medical care—like education, old age assistance, and other forms of public nurture and support—should be recognized as a settled obligation of the community. But just what that obligation entails—and what specific rights it generates—is at present very uncertain. Rather than invoke our “right” to health care, we should instead examine the extent of our obligations—the degree to which society has an obligation to provide for its members’ health, and the extent to which recipients are obliged to take care of themselves.

Indeed, the language of rights is troublesome because it so often becomes a way of placing issues beyond political discussion. This is one reason many advocates for health care reform, eager not only to achieve

reform but to make it irreversible, have seized on the language of rights. Yet health policy is inherently political. Universal coverage requires public subsidies, which cannot exist absent community dialogue, consensus-building, and political decisions about who should pay. And invoking a right to coverage does nothing to settle the scope of services covered (prescription drugs? psychotherapy?) and under what terms (does everyone have a right to fee-for-service coverage, or can society provide strong incentives for people to join HMOs or managed care plans?). These and many similar matters require political judgments about the relative equities among various populations and the relative benefits of various forms of care.

The assertion of health care as a right, if taken seriously, could push such questions out of the legislatures and into the courtroom. Potential cases are not hard to imagine. If a “right to health care” were to be recognized by the courts, one might imagine suits by individuals claiming the government had a positive obligation to fund additional research on specific diseases, or to purchase expensive imaging technology for every community. Each of these might be worthy initiatives, but they should not be judicially mandated without public consideration of how else such scarce funds might be spent. Asserting a “right to health care” panders to the unlimited demand for health care and aggravates the collision already in progress between skyrocketing health costs and our desire to have more money for wages, public investment, and other needs.

Mary Ann Glendon persuasively argues in *Rights Talk* that the ceaseless invocation of new rights impoverishes our political discourse. It cheapens those procedural rights enshrined in our constitutional amendments. And asserting a positive right to some economic benefit, such as health care, does little to generate the economic resources or tax dollars necessary to sustain that right.

#### AN ARGUMENT FROM EFFICIENCY AND RESPONSIBILITY

What we seek, as health care reformers, is not simply charity care for the poor when they become injured or ill (which, on its face, would satisfy the “right” to health care.) We seek a well-integrated system of health care that creates incentives and opportunities for all consumers to obtain, and all providers to provide, the highest quality care at the lowest

cost. That complex goal suggests an additional rationale for universal coverage, beyond our humanitarian concerns and more politically durable than a simple assertion of a new right; namely: universal coverage is necessary to make our entire health system efficient.

When individuals lack coverage, they tend to forgo or delay needed medical treatment, which can lead to more severe and expensive illnesses. In addition, the uninsured often seek treatment where they will not be turned away, such as in emergency rooms, where treatment is more costly than in doctors' offices. To the extent the uninsured have no means to pay their bills, these higher costs are then shifted onto the bills of paying patients. This cost shifting distorts price signals throughout the health economy. The only way to eliminate these inefficiencies is with universal coverage. The fact that we can restrain over-all health spending over time only by including everyone in the system is likely to hold more weight with those political moderates and conservatives whom reformers presumably need to persuade than the simple assertion of a right.

The language of responsibilities holds more meaning for efforts to achieve universal coverage than the language of rights. Society should be seen as having a responsibility to create ground rules in the health care system that enable all to afford health coverage; that reward prevention; and that enable and preserve consumer choice. At the same time, individuals should be seen as having the responsibility to obtain coverage, to become informed consumers about their health coverage, to seek routine preventive care for themselves and their children, and to engage in healthy behavior.

#### PRICE CONTROLS OR MANAGED COMPETITION?

There are essentially two theories about how to control the health care system's runaway costs. The first is that government should budget the nation's health spending and impose price controls on the health care market. Government already limits the fees doctors and hospitals may charge under Medicare. Many proponents of single-payer and pay-or-play reforms argue that such controls should be extended throughout private medicine. They contend that such public controls on what doctors can charge, combined with steps to reduce administrative waste, can bring health costs back into line with the rest of the economy.

Some might see this as a communitarian approach. They might contend it balances the community's interest in affordable health care against the potentially-unlimited demand of ailing individuals for the best care available. And it is a way of controlling the self-interested decisions of medical practitioners and suppliers.

I believe systems that rely on budgets and price controls have severe drawbacks: they often tend to stifle innovation, lock in inefficient arrangements, require large public bureaucracies, encourage politicization of the system, and ultimately may well fail to control wasteful spending (consider the Gramm-Rudman budgets Congress imposed on its own spending: Congress never met one of its original targets, and exceeded them by over \$250 billion by the law's fifth year).

But, in addition, the communitarian perspective may be better served by a second approach to controlling health care costs—a market-based approach known as “managed competition.” (“Managed competition” should not be confused with “managed care.” The former is a way of structuring the competition among health plans in order to protect consumer interests. The latter is one way that individual health plans may seek to control costs—by overseeing how and when patients utilize specialists, hospital treatment, or medical procedures. Some plans under managed competition might rely on managed care; others might not.) This approach was embraced by President Clinton during the 1992 general election campaign, and is the basis of “The Managed Competition Act,” recently introduced by a group of Democratic House and Senate members.

Managed competition is premised on the belief that consumer choice can lead to lower prices and higher value for health care, just it does for cars or computers. But if health plans are to compete on the basis of value, rather than by trying to screen out sicker and more expensive individuals, as they typically do now, the health market requires a fundamentally new set of rules. Consumers must be able to choose annually among competing private health plans, with no barriers to enrollment for those with pre-existing medical conditions. Consumers must be allowed to pocket the full savings if they choose a less expensive plan, and required to pay the full difference (without existing open-ended tax subsidies) if they choose a more expensive plan. Health plans must report data on health outcomes, so that consumers have a better

basis for choosing among plans, and health providers have better data on what forms of care are most effective.

Under the new rules of managed competition, most consumers will choose their health coverage through a “health insurance purchasing cooperative”—which can give the unemployed, the self-employed, or the employees of small firms the same purchasing power and administrative economies enjoyed by workers in large firms. These cooperatives, which would likely be public or quasi-public regional agencies, would actively manage the competition—for example, to ensure that no health plan is simply skimming the best risks. These cooperatives merge the interests of the individual and the community: consumers retain choice, while the cooperative ensures that all in the community can obtain coverage, regardless of their health or financial status.

#### CONTROLLING COSTS AND INVITING PUBLIC PARTICIPATION

Although it is not well known, this approach is already at work. The Federal Employee Health Benefits Plan (FEHBP) currently covers nearly nine million federal employees or retirees, and their dependents. Under this system, the federal government contracts with a range of private health plans—everything from health maintenance organizations to “fee-for-service” indemnity plans—and then offers enrollees an annual, open choice among these plans. No plan can reject any enrollee, regardless of his or her past medical conditions, and everyone who joins a given plan pays the same premium. Because the government’s contribution toward the cost of health coverage is fixed, enrollees pay more if they choose a more expensive plan, and less if they choose a cheaper one. Plans compete to offer the lowest prices possible (to attract the most enrollees), and then must cover the full health needs of each enrollee within that price for the full year.

This approach controls costs: From 1980 to 1988, prices under FEHBP increased at 12 percent annually, while private sector premiums increased at 14 percent. Similar systems for state employees in California and Minnesota have shown even more impressive results in controlling costs, with premium increases held to about 6 percent in each system during the past year or two.

I see at least two reasons why this approach to controlling health costs is more communitarian than publicly-set budgets and price con-

trols. First, unlike a strategy of price controls, managed competition does not overburden public institutions with decisions that can be made privately. One cause of the breakdown of civic culture in recent years has been the sense that government has become too large and too unwieldy for individual citizens to have much impact. The rise of Ross Perot, with his promise of “it’s just that simple” solutions, was a clear symptom. Those who wish to redeem public faith and participation in civic life should seek to restrict government to those activities essential to achieve public ends.

The success of managed competition systems, like FEHBP, suggests that government need not set and enforce prices for specific medical procedures in order to control costs. Conversely, Medicare, despite its many accomplishments in expanding health care for the elderly, has shown the bureaucratic burdens that come with regulating prices. For every million people covered, Medicare requires approximately 30 times as many pages of statutes and regulations and five times as many public administrative employees as the managed competition under FEHBP. While publicly-run health insurance systems (like Medicare) achieve lower administrative costs than private insurers, this savings must be balanced against not only the inefficiencies created by a price-controlled system, but also the public’s desire for a government that limits itself to inherently public tasks. Determining the relative value of medical providers and procedures is not among them.

A second reason managed competition may be more communitarian than price controls is that it invites public participation on the proper issues. The policy questions at the core of price controls—What is the correct aggregate level of spending on urologists in a given state? What is the correct price of an appendectomy relative to a coronary bypass?—are highly technical and do not lend themselves to broad public participation. Indeed, the only “publics” likely to comment on such rules are the professions affected. By contrast, the policy questions at the core of managed competition—What standard package of benefits should we insist that each plan offer? Should plans be allowed to offer discounts for non-smokers?—are precisely the kinds of value-laden issues on which the public can and should become involved. The cooperatives envisioned in managed competition should be vehicles for public participation in policy-making *as well as* for making individual choices

among health care providers.

Moreover, managed competition addresses the central challenge of health care reform—controlling the system’s runaway costs—with a careful allocation of responsibility between individuals and government. It assigns government the responsibility to create a framework in which all individuals can obtain the health care they and their families need. And it assigns individuals the responsibility to become engaged, price-conscious choosers among health plans. That division of individual and group responsibilities can transform our health care system from a costly source of waste and suffering to a national source of health and pride.

*Jeremy D. Rosner*

## Putting Price Tags On Lives In Oregon

Al Gore was right when he said, as a senator, that the controversy over Oregon’s proposal for rationing health benefits is “the single most important debate on the future of health care in the United States.”

The debate is not over. Although former-President Bush, in the most humane act of his administration, rejected the Oregon plan, there are intimations from below that Oregon may yet get its way if it can sufficiently cosmeticize its proposal so the plan will appear to be in consonance with the Americans With Disabilities Act.

Disability rights advocates accurately condemn the plan because it judges the disabled as having a lower “quality of life,” and therefore they fail the cost-benefit analysis that determines which levels of care will be paid for by Oregon through Medicaid.

The plan covers all of the poor in the state but then removes from the rolls those of the poor whose treatment is too costly in that it is not likely to sufficiently “improve” the patient’s condition or is of insufficient value to society.

Those found ineligible thereby save Oregon the money to pay for those of the poor who are judged to have a better “quality of life.” It is a proposal that Jonathan Swift might have written.

The attraction of the Oregon plan, of course, is that it provides health benefits to those now without medical insurance; and if Oregon is eventually allowed to go ahead, other states will follow. There is bipartisan political support for the plan, and the Oregon Medical Association has also approved it.

The increasing number of physicians and politicians around the country—convinced that money is wasted on people with a low “quality of life”—might think for a moment on the advice of the 18th century German physician Dr. Christoph Hufeland, who was also a professor of medicine. A humanist, he wrote on Goethe and Herder as well as on medicine. Said the doctor:

“If the physician presumes to take into consideration in his work whether a life has value or not, the consequences are boundless and the physician becomes the most dangerous man in the state.”

Not only the physician but also the politician who legislates successfully to base health benefits on a person’s “quality of life.”

In a series of exchanges on the Oregon rationing design during a recent “MacNeil/Lehrer Newshour,” correspondent Lee Hochberg pointed out that an analysis by the Congressional Office of Technology Assessment notes that the plan—with its cutoff point of allowable ailments—fails to treat “a substantial number of medical conditions that in the absence of treatment have serious clinical consequences.”

For example, pulmonologist Dr. Alan Barker of Oregon Health Sciences University cannot understand why chronic bronchitis is not qualified for Medicaid payment under the Oregon plan. Dr. Barker points out that “chronic bronchitis is clearly a treatable condition. Medication is important [and includes] bronchodilators, aerosol steroids, antibiotics...and occasionally oxygen that has to be prescribed.”

But in Oregon, the poor with chronic bronchitis would have to do without treatment and in time, their “quality of life” would be abysmal. Yet, in a lead editorial bitterly lamenting the Bush administration’s rejection of the plan, the New York Times said that the Oregon legislature

had made “an honorable choice” when it approved this approach to giving some of the poor the black spot—for the greater good of the greatest number.

Also on the MacNeil/Lehrer hour was David Robison, who has AIDS and has developed cancer. With less than a 10 percent chance of living more than five years, he would not be eligible for Medicaid in Oregon.

Robison does not see this as an “honorable choice” for him. “So have we decided,” he says, “that if a person has less than a 10 percent chance of living for five years, that’s it, the person’s life is over? I was raised to believe that if a person only has one day left to live, then that one day is very precious to that person, and no other human being has a right to deny that person that one extra day of life.”

And Robison’s doctor, David Regan, adds: “What if he has treatment, his disease is put into remission, and a year from now a dramatic breakthrough occurs?... We can’t turn our back on that group of patients. I think they have a right to try therapy before it’s bureaucratically taken away from them.”

A woman in Pennsylvania once told me of an ancient folk saying: “Once you put a price tag on a person’s life, inevitably it will be marked down.” Not only marked down for a particular individual but for those throughout the society who have to depend on the state for health care.

*Nat Hentoff*

## The Moral Voice of Welfare Reform

In 1963, Nancy A. Humphreys, now dean of the School of Social Work at the University of Connecticut, was a child protective services worker in Los Angeles. One of her clients was a pregnant teenager, a school referral. The girl came from a large and rather troubled family—one sibling was retarded, a couple of her brothers had been in trouble with the law, her father was

disabled, and each of her parents was on a different kind of financial assistance. There were nine or 10 kids in the family.

One day the mother called and invited Nancy Humphreys to their home; they set the time for 2 p.m. on a Thursday. “I was the first one to get there,” Dr. Humphreys recalls. “But one by one, eight other people arrived. I didn’t know any of them. When we were all there, the family went out the back door, leaving us to ourselves. It turned out we were all their social workers, each of us working with one or more people in that family. None of us had ever met or even talked about the case to any of the others.”

The mother had made her point. The nine social workers held a case conference right there in the family’s living room. “It showed me how important system coordination is,” Dr. Humphreys said, “but it also showed me the coping strengths of this family. They were getting mixed messages from all these different service providers. The mother wanted us to get *our* act together so we could better help the family work on theirs.”

*Edna McConnell Clark Foundation, Annual Report 1990*

Since 1963, when the incident Nancy Humphreys described occurred, categorical programs serving disadvantaged children and families have proliferated, so, now, there might be twice as many social workers to call together. In fact, if one tried to collect all the social workers who somehow touch a disadvantaged family over the years, they might not even fit in one room. The costly inefficiency of this atomized approach has been widely lamented; social workers, for example, rarely have the time to get as involved with their clients as they once did. But seldom mentioned is the negative impact of this fractionalization on the *moral* voice of social agencies—and individuals within those agencies—who are free to send their own “message,” whether or not it is consistent with that of others serving the family.

Take as an example the experience of Rebecca Maynard of Mathematica Policy Research, who directed the evaluation of federally-funded demonstration programs for teenage mothers on welfare in Chicago, Illinois, and in Newark and Camden, New Jersey. She describes how the caseworkers in one of the teen centers encouraged the young mothers to seek support from the fathers of their children, only to discover that the welfare department’s caseworkers (who would be responsible for collecting it) were giving the exact opposite advice.

Another example of contradictory signals was discovered during the evaluation of a group of Rockefeller Foundation-funded welfare-to-work projects. Job training caseworkers were actively encouraging the mothers to build specific work skills and look for jobs. But, simultaneously, caseworkers in a community-based project who sought to “empower” these same mothers, told them that they had a right to be on welfare, and that they should take advantage of the opportunities afforded by AFDC to stay home, to take care of their children, and finish their schooling. When social agencies convey such opposing messages, is it any wonder that they have so little success in redirecting the lives of their clients?

#### TEEN MOTHERS AND WELFARE

Long-term welfare dependency is a serious and growing social problem. We often hear that about half of all new recipients are off the rolls within two years. This is true—but only because of the high turnover among short-term recipients. At any one time, about 82 percent of all recipients are in the midst of spells that will last five years or more. And about 65 percent are caught up in spells of eight or more years. The bulk of long-term welfare recipients are young, unmarried mothers, most of whom had their first baby as unwed teenagers. Starting with poor prospects, these young women have further limited their life chances by systematically underinvesting in themselves—by dropping out of school, by having a baby out of wedlock, and by not working. As a result, they do not have the education, practical skills, or work habits needed to earn a satisfactory living.

According to the Congressional Budget Office, about 50 percent of all unwed teen mothers go on welfare within one year of the birth of their first child; 77 percent go on within five years. Nick Zill of Child Trends, Inc., calculates that 43 percent of long-term welfare recipients (on the rolls for ten years or more) started their families as unwed teens.

A mother’s age and marital status at the birth of her first child are stronger determinants of welfare dependency than is her race. One year after the birth of their first child, white and black unmarried, adolescent mothers have about the same welfare rate. After five years, black mothers have a somewhat higher rate (84 percent versus 72 percent), but various

demographic factors account for this relatively small difference.

Reducing long-term dependency, therefore, requires doing something constructive about the young mothers who are on welfare. If, like Humphreys' client, we called together all the social workers assigned to a teen mother, what message would we want them to give her? To answer that question it helps to ask another: What would concerned parents say to their own daughter?

## THE MESSAGE

The parents' message would probably be quite direct:

1. *Finish your schooling:* If you have not graduated from high school, stay in school; if you dropped out, go back to school.
2. *Take care of yourself and your baby:* Eat well; get medical checkups for yourself while you are pregnant and then for your baby; and do the best you can to meet your child's physical, emotional, and developmental needs.
3. *Work:* After you complete your schooling, get a job, even a part-time one.
4. *Child support:* Tell us who the father is so that we can get him to contribute to the support of the child.
5. *Birth control:* You made a mistake once, don't do it again. Each additional child makes it harder to work your way off welfare since your home expenses will rise faster than your earning ability.
6. *Mutuality:* Throughout, we will help you—as long as you try your best; we will take care of your child while you are in school or at work. If you cannot earn enough to support yourself and your child, we will chip in.

Why don't we give young mothers on welfare this message? A major cause is our fractionated welfare system. Because there are so many different individuals and agencies involved, the process of social support and education resembles an assembly line more than a guiding relationship. But unlike an assembly line, the final product is never put

together—so no one realizes that the pieces do not fit together.

The current system speaks with too many voices to have any impact. Recipients do not hear a clear message about what society expects of them. As a result, they come to believe that there are no expectations, or only confused, if not contradictory ones.

On a system-wide basis, we need to try to do what Humphreys' client asked her social workers to do: integrate the articulated goals as well as service structures of public welfare agencies. This, in effect, is what Bill Clinton implied in his formulation of welfare reform when he stated that welfare programs should "provide people with the education, training, job placement assistance and child care they need for two years—so that they can break the cycle of dependency. After two years, those who can work will be required to go to work, either in the private sector or in meaningful community service jobs."

#### MUTUAL RESPONSIBILITY

Some young mothers will eagerly take hold of the opportunities provided by such an offer to escape from poverty and begin building a better life. But many others will not. Even richly-funded demonstration programs find it exceedingly difficult to improve the ability of these young women to care for their children, let alone to become economically self-sufficient. Earnings improvements in the realm of 6 percent are considered successes. (Most programs don't even try to work with the young fathers.)

This should not be surprising. Even in a strong economy, breaking patterns of behavior that took a lifetime to establish can take years. Thus, after the two years of services that President Clinton would give them, most of these unwed mothers will not be able to support themselves. If they will still be expected to work, as his formulation suggests, a large proportion will end up in semi-permanent "community service jobs," a euphemism for having them work to earn their welfare benefits (usually at the minimum wage).

This kind of "workfare" program, because of added costs for job training, child care (while the mothers work), and administration (to establish and monitor placements), is much more expensive than the current system, at least in the short run. But, in the long run it is the only

way to build job skills and work habits and thus reduce dependency. Inactivity is bad for anyone; it can be devastating for those loosely connected to the labor market. A work requirement also reinforces the mutuality of welfare assistance, which is essential to continued public support.

Most young mothers will not willingly enter such programs, however, and many will drop out. The experience of the teen-mother demonstration programs previously mentioned suggests that, to maintain high levels of program participation, about 50 percent of the mothers will have to be sanctioned with a reduction of benefits at least once. Hence, society, through welfare agencies, must be prepared to monitor compliance with program requirements and to sanction noncompliance.

Key elements of the welfare policy establishment have never liked strong work requirements that force poor mothers to work at very low paying jobs, even if only part-time. To discredit earlier efforts to impose work requirements, they successfully labelled them “slavefare.” For example, according to Lawrence Mead in *Beyond Entitlement*, welfare rights organizer George Wiley had this to say in 1971 about the work requirement that had been attached to Richard Nixon’s proposed Family Assistance Plan: “You don’t promote family life by forcing women out of their homes to empty bedpans. When Richard Nixon is ready to give up his \$200,000 salary to scrub floors and empty bedpans in the interest of his family, then we will take him seriously.”

Such arguments strike a responsive chord among Americans who feel partially responsible for the situation facing these mothers and ambivalent about imposing “further hardship” and “our values” on them. But, if not our values, whose? Certainly not those of a teenager who, by having a child out of wedlock—with no means to support it and largely unprepared to care for it—has already demonstrated that she does not make responsible decisions.

Imposing a clear-cut set of rules on these young mothers acknowledges the desperate need for structure in their lives—and society’s right and obligation to provide it. To take no action is to turn our backs on fellow citizens who need our help and guidance most. As long as these requirements are not pursued in a malevolent or harsh manner, government should enforce the same level of responsible behavior that a loving parent would. Such reforms are needed—for the good of society, the

children and, yes, the mothers.

*Douglas J. Besharov*

## What Baird Did Right

“I have said to all Americans who have watched this hearing that I made a mistake, that what I did was wrong,” Zoe Baird openly confessed before the Senate Judiciary Committee. She repeatedly asserted that she took “full responsibility” for “deliberately breaking the law” by hiring illegal immigrants and not paying various taxes due. These statements may be seen as attempts to appease public furor and Congressional displeasure with her conduct—calculated attempts to try to save her nomination to be Clinton’s Attorney General. Whatever the motive, however, her willingness to acknowledge her wrongdoing up front and to apologize for it makes her stand out as a person of some moral integrity and fortitude. Many who preceded her followed a rather different course: They attacked the laws under which they were charged and the social-moral values that they express.

When Oliver North was convicted of lying to Congress (long before the conviction was overturned), he defended his actions as “patriotic.” He also hinted broadly that it was Congress that was at fault for prohibiting aid to the contras. North was serving the commander in chief and the country—duties, he believed, that entitled him to circumvent the law.

The failure to repent is what made a double loser of President Reagan’s former political director Lyn Nofziger. First, he violated the law by using his White House contacts for influence-peddling during the short period in which such acts by former high government officials were actually prohibited. Then, when convicted, he trivialized the court’s finding (“like violating a stop sign,” he said) and attacked the law as “lousy” and “stupid.”

Nobody can lead a blame-free life. But if we do violate the law or

ethical standards, we can still help to straighten things out and avoid further wrongdoing. We must acknowledge the error of our ways and make amends to those in the community whose legal or moral precepts we have undermined. We should repent by seeking to restore the legitimacy of the code that was broken, paying homage to what is right, even if we had flouted it or were too feeble to live up to it. This is what Zoe Baird did but what eluded John Tower, Robert McFarlane, Jimmy Swaggart, and the Watergate defendants.

True, Baird initially advanced some lame excuses, first suggesting that she acted on the advice of legal counsel and then arguing that it was all done out of love for her children. However, with her and her husband's legal training and combined earning power, these "explanations" offer little in the way of mitigating circumstances. Given her income, she could have paid double the wages, and would have surely been able to find enough legal child care to fill her roomy mansion. Yet, whatever motives she declared (and all those who violate the law presumably have some), she eventually did come clean.

Another point in her favor is that she did not try to conceal or fudge the evidence. There were no 18-and-a-half minutes of gaps in her tapes, no predating of documents (as Nixon did in his donation of papers to a public library, presumably to gain a tax deduction), nor any attempts to erase computer memories (as did North).

Moreover, it was Baird who came forward and alerted the transition team that she was in violation. It might be said that she did so only when she felt that the FBI was closing in on her. But the FBI is not perfect and many others would have taken their chances, hoping not to be caught or banking on this particular violation being lost in the lengthy report that the FBI compiles.

Make no mistake about it. I do not suggest that her upright repentance should have stopped President Clinton from sending her back to Aetna. It is hard to imagine an Attorney General taking office after she acknowledged violating a law, especially one that she is entrusted with enforcing, and at the onset of a new administration that stresses ethics. But her dismissal should not obscure that she set a model on how to conduct oneself when called for public office.

Moreover, given her strong credentials, and assuming that this is an

isolated incident and there is no pattern of wrongdoing, she should not be eternally branded and lost to public service forever. Now that she has paid her dues twice over (fines to the IRS and a public spanking of the highest order), after a proper period, say seven years, she should be called back. There are many in public office who have conducted themselves much more poorly and who are much less deserving.

*Amitai Etzioni*

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CORE VALUES

## The Failings of Neutrality

JOHN GRAY

## TOLERATION UNFASHIONABLE BECAUSE IT STRESSES HUMAN IMPERFECTIBILITY...

Toleration has lately fallen on hard times. Old-fashioned toleration—the toleration defended by Milton, and by the older liberals, such as Locke—sprang from an acceptance of the imperfectibility of human beings, and from a belief in the importance of freedom in the constitution of the good life. Since we cannot be perfect, and since virtue cannot be forced on the people but is rather a habit of life they must themselves strive to acquire, we were enjoined to tolerate the shortcomings of others, even as we struggled with our own. On this older view, toleration is a precondition of any stable *modus vivendi* among incorrigibly imperfect beings.

If toleration has become unfashionable in our time, the reason is in part to be found in the resistance of a post-Christian age to the thought that we are flawed creatures whose lives will always contain evils. This is a thought subversive of the shallow optimistic creeds of our age, humanist or Pelagian, for which human evils are problems to be solved rather than sorrows to be coped with or endured. Such pseudo-faiths are perhaps inevitable in those who have abandoned traditional faiths but have not relinquished the need for consolation that traditional theodicy existed to satisfy. The result, however, is a world-view according to which only stupidity and ill-will stand between us and universal happiness.

... And Because it is Inherently Judgmental and Therefore Objectifiable to Relativists

Toleration is unfashionable for another, more topical reason. It is unavoidably and inherently judgmental. When we tolerate a practice, a belief or a character trait, we let something be that we judge to be undesirable, false or at least inferior; our toleration expresses the conviction that, *despite* its badness, the object of toleration should be left alone. So, on a grander scale, we tolerate *ersatz* religions, such as Scientology, not because we think they may after all contain a grain of truth, but because the great good of freedom of belief necessarily encompasses the freedom to believe absurdities. Toleration is not, then, an expression of skepticism, of doubt about our ability to tell the good from the bad; it is evidence of our confidence that we have that ability.

The idea of toleration goes against the grain of the age because the practice of toleration is grounded in strong moral convictions. Such judgments are alien to the dominant conventional wisdom according to which standards of belief and conduct are entirely subjective or relative in character, and one view of things is as good as any other. A tolerant man, or a tolerant society, does not doubt that it knows something about the good and the true; its tolerance expresses the conception of the good life that it has in common. Insofar as a society comes to lack any such common conception—as is at least partly the case in the U.S. and Britain today—it ceases to be capable of toleration as was traditionally understood.

#### NEUTRALITY NOT TOLERATION THE NEW POLITICAL IDEAL

Toleration as a political ideal is offensive to the new liberalism—the liberalism of Rawls, Dworkin, Ackerman and suchlike—because it is decidedly non-neutral in respect of the good. For the new liberals, justice—the shibboleth of revisionist liberalism—demands that government practice *neutrality* not toleration, in regard to rival conceptions of the good life. Although in the end this idea of neutrality may not prove to be fully coherent, its rough sense seems to be that it is wrong for government to discriminate in favor of, or against, any form of life animated by a definite conception of the good.

It is wrong for government to do so, according to the new liberals,

because such policy violates an ideal of *equality* demanding equal respect by government for divergent conceptions of the good and the ways of life that embody them. This is radical stuff, since—unlike the old-fashioned ideal of toleration—it does not simply rule out the coercive imposition of a conception of the good and its associated way of life by legal prohibition of its rivals. It also rules out as wrong or unjust government encouraging or supporting ways of life—by education, subsidy, welfare provision, taxation or legal entrenchment, say—at the expense of others deemed by it, or by the moral commonsense of society, to be undesirable or inferior. It rules out, in other words, precisely a policy of toleration—a policy of not attaching a legal prohibition to, or otherwise persecuting, forms of life or conduct that are judged bad but which government tries by a variety of means to discourage. What the neutrality of radical equality mandates is nothing less than the *legal disestablishment of morality*. As a result, morality becomes in theory a private habit of behavior rather than a common way of life.

#### THE INCOHERENCIES OF NEUTRALITY—REVERSE DISCRIMINATION

In practice things are rather different. The idea of the moral neutrality of the state with respect to different ways of life, considered as a political ideal, faces the problem of what is to count as a *bona fide* way of life. If it has any clear sense at all, the idea of neutrality among different ways of life or conceptions of the good tells us that the way of life of the smoker, the drinking man, or the man devoted to pleasure even at the expense of health should not by any government policy be disprivileged, disfavored or otherwise discriminated against; but these categories of people have been afforded no protection from the New Puritanism—the Puritanism that is inspired, not only by ideas of right and wrong, but by a weakness for prudence that expresses itself in an obsession with health and longevity. The smoker of unfiltered Turkish cigarettes or the would-be absinthe drinker will get short shrift if he argues that these pleasures are elements in a way of life animated by a definite conception of the good that deserves equal protection along with those of the jogger and the non-smoker. At the level of theory the problem of identifying genuine ways of life is insoluble, since it requires an evaluation of human lives that will inevitably be non-neutral among some ideals of the good. The life of the drinking man may be stigmatized as alcoholism,

which is not a way of life but an illness; or the life of a housewife may be characterised as a form of oppression—not an embodiment of any coherent conception of the good. In practice, favored minorities will obtain legal privileges for themselves while unfashionable minorities will be subject to policies of paternalism and moralistic intervention in their chosen styles of life that earlier generations of liberals—including John Stuart Mill—would at once have rejected as intolerable invasions of personal liberty.

The practical, legal, and political result of these newer liberal ideas is found in policies of reverse or positive discrimination and in the creation of group or collective rights. For those who have constituted themselves members of a cultural minority group, to be the object of a policy of toleration is to be subject to a form of disrespect, even of contempt or persecution, since they are thereby denied equal standing with mainstream society. More, what is needed to remedy this discrimination, in their view, is not merely parity of treatment, but a form of differential treatment in which their group is accorded privileges over the majority, or over other minority groups. Some who may not hitherto have considered themselves members of a cultural minority—such as many homosexuals—are encouraged by such practices to constitute themselves as one, thereby transforming a sexual preference into a culture or a way of life that demands protection or privilege along with those of selected ethnic minorities. In all these cases, as with quotas created for women in American universities, it is group membership that now confers rights. Indeed, the rights of groups may well now often trump those of individuals when they come into conflict with each other.

#### NEUTRALITY BREEDS INTOLERANCE—THE CASE OF HOMOSEXUALITY

These departures from the old-fashioned ideal of toleration are all too likely to breed more old-fashioned intolerance. The case for toleration appeals in part to the fact that our society contains a diversity of strong and incompatible moral views. Consider the case of homosexuality. There are those, such as some traditional Christian, Jewish, and Muslim believers, who hold that homosexuality is immoral in itself; others, such as myself, regard it merely as a preference that by itself raises no moral issue of any kind; and yet others who regard it as a form of cultural identity, with its own lifestyle and literature. These are deep differences among us, since they reflect not only divergent judgments on moral

questions but also different views as to what is the subject matter and character of morality itself. An attempt to give legal force to any one of these views, in circumstances of deep pluralism of the sort we have now, is likely to fragment us, and to evoke more intolerance among us. A policy of toleration, in which homosexuals have the same personal and civil liberties as heterosexuals and in which neither bears burdens the other does not, seems the policy most likely to issue in a peaceful *modus vivendi*. Such a policy might involve remedying anomalies and abuses to which homosexuals are still subject. It is at least arguable that the difference in the age of consent for homosexual acts is anomalous; the pretence that homosexual activity does not occur in prisons is both absurd and—in a time when prophylaxis against AIDS is vitally important—harmful; and discrimination by insurance companies against homosexuals (and others) who have responsibly had themselves tested for the HIV virus and proved negative is plainly unjustifiable and should be the subject of legislation.

What a policy of toleration would *not* mandate is the wholesale reconstruction of institutional arrangements in the U.S. and Britain such that homosexuals acquire collective rights or in every context (are) treated precisely as heterosexuals. As matters stand, there is a single form of marriage entrenched in law in Britain. Complete neutrality between heterosexuality and homosexuality would entail legal recognition of polygamous marriage. If we go this route, we are not far from the radical libertarian *reductio ad absurdum*—the abolition of marriage itself and its replacement by whatever contracts people choose to enter into. This is not to say that the current law of marriage is fixed for all time, any more than the rest of family law, such as the law on adoption, is so fixed. Nor is it to say that future changes in family law, reflecting changes in society at large, may not in time extend recognition to homosexuals within family law. It is to say that any such changes should be a part of a policy of toleration rather than applications of a doctrine of radical equality. Further, it is to say that such extension of legal recognition would not be to homosexuals as a group but to individuals regardless of their sexual orientation.

#### THE NECESSITY OF A COMMON BASIC CULTURE

It is in the area of multiculturalism that a policy of toleration is most needed, and ideas of radical equality and positive discrimination most unfortunate. We have already noted one disadvantage of policies of

affirmative action—that they are applied on the basis of group membership and so entail the collectivization of (at least some) group rights. Policies which result in the creation of group rights are inevitably infected with arbitrariness and consequent inequity, since the groups selected for privileging are arbitrary, as is the determination of who belongs to which group. The nemesis of such policies—not far off in the United States—is a sort of reverse *apartheid*, in which people's opportunities and entitlements are decided by the morally arbitrary fact of ethnic origin rather than by their deserts or needs.

There is a deeper objection to policies of multiculturalism that issue in the creation of group rights. This is that a stable liberal civil society cannot be radically multicultural but depends for its successful renewal across the generations on an undergirding culture that is held in common. This common culture need not encompass a shared religion and it certainly need not presuppose ethnic homogeneity, but it does demand widespread acceptance of certain norms and conventions of behavior and, in our times, it typically expresses a shared sense of nationality. Where multiculturalism and toleration diverge is in the recognition within the ideal toleration that stable liberty requires more than subscription to legal or constitutional rules—it requires commonality in moral outlook, across a decent range of issues, as well. We can live together in deep disagreement about abortion, but not if we also disagree about the propriety of using force on our opponents.

The example of the United States, which at least in recent years has been founded on the belief that a common culture is not a necessary precondition of a liberal civil society, shows that the view that civil peace can be secured solely by adherence to abstract rules is merely an illusion. Insofar as policy has been animated by it, the result has been further social division, including what amounts to low-intensity civil war between the races.

#### MULTI-RACIAL PEACE DEPENDS ON COMMON CULTURE

An upshot of the forgoing reflections is that a society that is multiracial is likely to enjoy civil peace only if it is *not* at the same time radically multicultural. By contrast, the multiculturalist demand that minority cultures—however these are defined—be afforded rights and

privileges denied the mainstream culture in effect delegitimizes the very idea of a common culture. Indeed, the very idea of a common culture comes to be seen as an emblem of oppression. Accordingly, the largely healthy pressures on minority cultures to integrate themselves into the mainstream culture are represented as inevitably the expression of prejudice, racial or otherwise, and so condemnable.

We reach a crux now in the idea and practice of toleration—its bearing on the idea and fact of *prejudice*. The idea of prejudice is, perhaps, not as simple as it looks, but the essence of prejudice as a practice seems to be the discriminatory treatment of people on grounds of their belonging to a group of some sort, where this is not relevant to the matter at issue. Now there can be no doubt that prejudice of this sort can be a great evil—witness the long history of Christian antisemitism and the different treatment accorded to members of diverse racial groups by police and judicial institutions under the *apartheid* system in South Africa—and that is an evil against which there can, and ought to be, legal remedies. It is worth noting again, however, that policies of positive discrimination or affirmative action involving quotas are also condemned by any ideal that condemns prejudice. A consistent rejection of policies based on prejudice would be one that was blind to race, gender and sexual orientation, rather than one that merely revised earlier or pre-existing prejudicial policies.

#### TOLERATION CANNOT SUPPORT THE MODERN PROJECT OF THE ABOLITION OF PREJUDICE

There is a deeper question for the ideal of toleration posed by the reality of prejudice. As it is commonly understood, prejudice connotes not only discriminatory practices, but also, and more generally, conduct and perception based on stereotype or emotion rather than a dispassionate grasp of the facts. Radical liberals have seen in prejudice of this fundamental sort an evil that must be attacked by legislation—by laws against sexist or racist stereotypes in advertising or children’s books, for example. For these liberals, prejudice is an evil that issues, in part at least, from a distortion of the cognitive faculties, which is to be remedied by a destruction of the offending stereotypes. What, then, does the supporter

of the old ideal of toleration say of prejudice of this sort? He will not deny that it is often an evil. There nevertheless remains a question about the radical liberal project of abolishing prejudice.

Is the abolition of prejudice desirable, or even possible? A school of conservative thought, taking its cue from Edmund Burke and Michael Polanyi, finds positive value in prejudice, conceiving it as a repository for tacit or practical knowledge—knowledge embodied in habits and dispositions rather than in theories—we would not otherwise have at our disposal. This view makes an important point in noting that much of our knowledge is possessed and used by us without ever being articulated. It is not entirely convincing as a defense of prejudice, if only because our fund of tacit beliefs contains tacit error as well as tacit knowledge. It was part of the fund of tacit belief of many Russians and Germans, in the last century, and in our own, that Jews poison wells and perform ritual sacrifices; and this falsehood made antisemitic policies more popular in those countries.

It does not follow, however, that the project of banishing prejudice from the world is a sensible one. Prejudice does serve a cognitive function that is ineliminable in expressing beliefs that have been acquired unconsciously and that are held unreflectively and unarticulated. The idea that we can do without such beliefs, whatever their dangers, is merely another rationalist illusion. The life of the mind can never be that of pure reason, since it always depends on much that has not been subject to critical scrutiny by our reason. The project of abolishing prejudice is hubristic in that it supposes that the human mind can become transparent in itself.

A humbler, and more sensible approach—one suggested by the old-fashioned ideal of toleration, with its insights into the imperfectability of the human mind—would be one that accepts the inevitability of prejudice and acknowledges that it has uses and benefits, while at the same time being prepared to curb its expression when this has demonstrably harmful effects. A policy of toleration, in other words, will even be one that tolerates the many false beliefs we have about each other—providing these do not result in the deprivation of important liberties and opportunities. When prejudice does have such an effect, it is usually the liberties and opportunities it threatens that we should aim to protect, rather than the prejudice we should seek to eradicate.

A policy of toleration with regard to all but the most harmful prejudices makes sense for another reason: there is not much agreement among us as to what counts as a prejudice. For some, the idea that heterosexuality is the norm from which homosexuality is a departure is quite unproblematic; for others it embodies unacceptable prejudice. This deep difference of view amongst us exemplifies a pluralism in our society that is perhaps deeper than ever before in our history. Our society harbors conceptions of the good life and views of the world that, though they may overlap, are sometimes so different as to be incommensurable: we lack common standards whereby they could be assessed.

#### THE RADICAL TOLERANCE OF INDIFFERENCE NOT ADEQUATE—OLD-FASHIONED TOLERATION STILL NECESSARY

An analogous situation holds in moral life. As has already been observed, among us there is disagreement not only about answers to moral questions but also about the subject matter of morality itself. For some, sexual conduct is at the very heart of morality; for others, it is a matter of taste or preference and acquires a moral dimension only when important human interests—such as those of children—are affected. For those who hold the latter view, such as myself, the appropriate approach to homosexuality, say, is not toleration but the radical tolerance of indifference: I have no more reason to concern myself about the sexual habits of others than I do about their tastes in ethnic cuisine. It is this tolerance that homosexual activists should be aiming at, rather than the divisive project of group or cultural rights, if they remain dissatisfied with old-fashioned toleration.

The radical tolerance of indifference has application wherever there are conceptions of the good that are incommensurable. If there is an ultimate diversity of forms of life, not compatible with one another and not rankable on any scale of value, in which human beings may flourish—an idea defended in our time by Isaiah Berlin—then the adoption of one among them is appropriately a matter of choice or preference. Nevertheless, several important caveats are worth making. First, the claim that there may be, and are present among us, conceptions of the good that are rationally incommensurable is *not* one that supports any of the fashionable varieties of relativism and subjectivism, since it allows, and indeed presupposes, that some conceptions of the good are

defective, and some forms of life simply bad. One may assert that the conceptions of the good expressed in the lives of Mother Teresa and Oscar Wilde are incommensurable, and yet confidently assert that the life of a crack addict is a poor one. Secondly, the radical tolerance of indifference is virtually the opposite of old-fashioned toleration in that its objects are not judged to be evils and may indeed be incommensurable goods. Very different as they undoubtedly are, these two forms of toleration seem no less necessary and appropriate in a pluralistic society such as contemporary Britain or the U.S. But thirdly, and most importantly, recognition of the value of the radical tolerance of indifference does not mean that we can do without a common stock of norms and conventions or the older virtue of toleration. A common culture—even if one defined thinly in terms of the practices and virtues that make up a liberal civil society—is essential if we are not to drift into chaos; and even such an attenuated common culture will be renewed across the generations only if it is animated by a shared sense of history and nationality. For these reasons, the tolerance of indifference can never be the dominant form of tolerance in a free society; it must always be a variation on the very different, and inescapably judgemental, tolerance I have called old-fashioned toleration.

#### BEING LEFT ALONE IN PEACE

We return to the thought with which we began. Toleration is a virtue appropriate to people who acknowledge their imperfectibility. Such people will not demand that their preferences be accorded special rights or privileges, or expect that their style of life will receive universal respect. They will be satisfied if they are left alone. In this they are recognizing a profound truth, suppressed in the Panglossian liberalism that dominates political thought today—that freedom presupposes peace. As George Santayana, a neglected political thinker of our time, expressed it in *Dominations and Powers*:

In order to be truly and happily free you must be safe. Liberty requires peace. War would impose the most terrible slavery, and you would never be free if you were always compelled to fight for your freedom. This circumstance is ominous: by it the whole sky of liberty is clouded over. We are drawn away from irresponsible play to a painful study of facts and to the endless labour of coping with probable enemies.

We are most likely to enjoy an enduring liberty if we moderate our

demands on each other and learn to put up with our differences. We will then compromise when we cannot agree, and reach a settlement—always provisional, never final—rather than stand on our (in any case imaginary) rights. Oddly enough, we will find that it is by tolerating our differences that we come to discover how much we have in common. It is in the give-and-take of politics, rather than the adjudications of the courts, that toleration is practiced and the common life renewed.

The virtue of toleration is of universal value because of the universality of human imperfection. It is, nevertheless, of special value for us. With us, the skein of common life is often strained where it is not already broken, and our danger is that of ceasing to recognize one another as members of a common form of life. We will achieve a form of common life that is tolerable and stable, most reliably, if we abandon the inordinacy of radical neutrality and cultural rights and return to the pursuit of a *modus vivendi*, shifting and fragile as it may be, in the practice of toleration.

#### **The Right to Be Ticketed Properly**

In Laguna Beach, California, a man was issued a ticket for driving at 65 miles-an-hour in a 45-mile-an-hour zone. His attorney argued that the ticket was invalid because the officer who wrote it was riding a blue motorcycle, and the city code requires that it be black and white. The judge upheld the code.

National Public Radio, Morning Edition, 11/16/

## Communitarian Search and Seizure

DAVIDSCHUMAN

### INTRODUCTION

The founders of this nation considered the government's power to conduct searches to be such an invitation to tyranny and abuse that they subjected it to strict and explicit limitations in the original constitutions of all thirteen colonies. By comparison, only two of those constitutions limited the government's power to censor speech or the press. Yet today, survey after survey shows that the American public stands willing to relax or abandon the constitutional constraints on some official searches. If drug testing, AIDS screening, drunk-driving checkpoints, and weapons frisks diminish our freedom from governmental scrutiny—requiring us to urinate on command and under observation, surrender our blood and breath along with their many secrets, submit to intimate prodding and fondling—a growing number of Americans nonetheless regards these measures as a reasonable price to pay for an increased sense of security.

Meanwhile, they are unable to translate this desire into policy through the normal channels of lawmaking—channels which would involve public discourse, debate, and an ultimate decision by politically accountable legislators—because the body of law governing the government's power to search derives largely from the rulings of the United States Supreme Court in cases interpreting and enforcing the Fourth Amendment's command that no search take place without a warrant and probable cause.

These cases not only exist outside of the political process, they also, unfortunately, constitute a body of law marked by incoherence, logical inconsistency, and intellectual dishonesty. For example, under this

jurisprudence police officers peering from a hovering helicopter into an enclosed shed in a citizen's fenced backyard are not conducting a "search." The cases tell us that no search occurs when police use a powerful telescope to look from an airplane into the outdoor storage area of a private business, or when they paw through a citizen's bagged garbage. In the brave new world of contemporary Fourth Amendment law, police can search an open field at will, and an open field need be neither a field, nor open. A police officer, in order to protect himself from assault, may search the pocket of a suspect's jacket, even when the suspect is handcuffed outside his car and the jacket is lying on the back seat. Police may question a traveler whose only suspicious act is fitting a "drug courier profile," which at times includes such traits as carrying heavy luggage, and, at other times, *not* carrying heavy luggage.

Contemporary search law thus fails in two ways: By permitting truly unreasonable searches of criminal suspects, it fails to protect them from the kind of official lawlessness our founders abhorred; and by providing no mechanism for the rest of us to authorize *reasonable* searches, it fails to protect us from the terrifying epidemics of modern life. How has this double failure come about, and can what can we do about it?

#### LIBERAL SEARCH AND SEIZURE: RIGHTS FIRST, LAW SECOND

Contemporary search law derives inevitably from the nation's most fundamental liberal individualist assumptions. These pervasively cast "the individual" with his or her "rights" in an adversarial stance against "the state" and its "interests." In this vision, democratic self-rule is merely a bargaining process conducted in legislatures, where the most powerful aggregations of interest-maximizing individuals prevail—they succeed in making their interests the state's interest. This process, however, must meet one constraint: It must not interfere with the natural endowment of all individuals—their rights. These are listed in the Constitution, and they receive super-protection from a judiciary beyond the influence of transitory coalitions of interest-driven constituents.

These liberal individualist presumptions about the proper function of legislatures (deciding which preferences prevail) and courts (protecting individual rights) determine the circumstances under which search-and-seizure lawmaking takes place: prosecutions in which a citizen

seeks judicial vindication of his individual rights by demanding that the judge suppress evidence obtained by the state allegedly in violation of those rights. Unfortunately, the citizen seeking vindication of rights is usually a guilty criminal; otherwise there would be no incriminating evidence to suppress. Thus the Framers' ringing phrases guaranteeing freedom from unreasonable searches, intended to promote the general security and protection of all citizens, are turned upside down, taking on the function of a magical incantation that those who threaten the general security may use to avoid retribution. Courts are placed in the delicate position of upholding that centerpiece of American liberal jurisprudence, the individual right, on behalf of individuals who seemingly scorn the values of the society from which they now seek protection.

These are difficult cases, and not surprisingly, they make bad law. In honoring the basic Fourth Amendment right without at the same time depriving the state of its authority to punish wrongdoers, the court will typically genuflect before the Constitution, then pronounce a fact-specific "exception" to the general rule that no search may proceed without a warrant issued on probable cause. And as the public has become increasingly threatened by crime in our communities, such judicially-framed exceptions have become increasingly profuse and inclusive. One recent commentator identified thirty. Indeed, it is a rare case in which the prosecution cannot find one or another of them to justify the admission of evidence—even when it is seized in flagrant disregard of standards which the ordinary citizen would never abandon if the subject of the search were not a criminal caught, as it were, red-handed.

And this reveals precisely what is lost when we insist on regarding limits on government agents in terms of protecting the individual rights of criminals: public discourse, issuing in legislation, about the power government agents might deploy against us, their employers. Surely there is a better alternative.

#### COMMUNITARIAN SEARCH AND SEIZURE: LAW FIRST, RIGHTS SECOND

To the communitarian, a constitution quite literally *constitutes* a people, primarily by authorizing and distributing political power and by defining how citizens can participate in the inherently ennobling

process of self-rule. A constitution sets forth a collection of rules and procedures that by consensus have the power to consecrate an ordinary utterance, changing it into one backed by legitimate collective authority.

For purposes of search and seizure law, communitarian constitutionalism has three key features. First, it conceives of public policy as the result of a deliberative, inclusive process seeking to discover a common vision of the good, and not as the outcome of an adversarial bargaining transaction. Second, it conceives of the state as an enabling and constitutive body, and not as a coercive or limiting one. Third, it consequently de-emphasizes individual rights, as well as judicial review as their guardian, substituting instead a conception of rights as fallback provisions, grounded in tradition and consensus, invoked by courts only when public policy decisions deviate from fundamental constitutive principles.

Because it possesses these features, communitarian search law would differ significantly from existing law in important ways. Proceeding from the assumption that law enforcement is a facet of community self-rule, communitarian search law would express the relationship between citizens and their own agents, the police. It would maximize the role of public deliberation by requiring that searches be presumed *unlawful* unless specifically authorized by general rules formulated by citizens themselves or their politically accountable representatives.

Communitarian search law would thus be administrative in nature, with police searches treated as acts by executive agents, not unlike the acts of tax collectors, school administrators, or health inspectors—agents who operate under express legislative authority and express legislative constraints, whose actions are evaluated first according to whether they are within that authority, and only then according to whether that authority meets some constitutional standard. The governing presumption would be that the citizenry, through the legislature, must define, authorize, and limit in advance specific categories of police conduct such as inventory searches of abandoned automobiles, brief and unobtrusive breathalyzer tests at drunk-driving roadblocks, or pat-downs of individuals who are reasonably suspected of carrying concealed weapons or contraband. These authorizations and limits would be based on the citizenry's own rational determination of what sorts of scrutiny it wants to be subjected to, and what sort of community it wants

to be.

This principle shifts responsibility and initiative to legislative bodies and simultaneously reduces the importance of courts. Judges would typically perform two functions. First, they would suppress evidence obtained in unauthorized or improperly authorized police searches, and continue suppressing such evidence, even if the searches do not violate any constitutional rights, until legislators provide guidelines to police officers and other officials.

Once politically accountable bodies learned to prescribe appropriate investigative practices, the judiciary could resume its second and more traditional institutional role: reviewing the constitutionality of the legislation itself, rather than passing judgment on particular police encounters with individuals. In jurisdictions whose constitutions contain a requirement that searches be “reasonable,” the court would decide if a legislatively-authorized category of searches fits this description. The court would base these evaluations on existing evidence of what the community traditionally and consensually has regarded as reasonable. For example, in deciding whether official searches of garbage are reasonable, the court might examine questions of property law (who owns garbage? at what point does ownership pass from the discarder to the collector?), substantive criminal law (is taking discarded material a crime? was it a crime at common law?) and tort law (if discarded garbage caused injury to a bystander, would the discarder be liable?). In evaluating the legality of drug testing by random urinalysis, sociological and anthropological insight into community attitudes toward physical modesty and bodily integrity might be relevant.

In this way, the court would stand as safeguard against legislation resulting from capture or corruption by special interests such as prosecutors, radical libertarians, or gun fanatics. Surely a statute purporting to authorize random body-cavity searches at the discretion of line police officers, or a law prohibiting officials from seizing firearms, fails the requirement of “reasonableness” that most constitutions allow courts to enforce. But this judicial safeguard would not frequently be necessary; while many legislators fail truly to represent their constituents, these failures typically occur with respect to issues involving financial interests. When special interest groups do become heavily involved in social as opposed to economic legislation, their influence is at a minimum in

situations such as the ones here proposed, when the legislation implicates the rights not of a vulnerable minority, but of the majority itself. And of course in those states with one or another form of plebiscite, the people themselves can always defeat legislation that fails to represent their will.

This approach has practical advantages. Most obviously, it would provide police officers and other government agents with clear guidelines instead of the profuse, abstract, and frequently inconsistent ad-hoc decisions from which we currently expect them to extract a workable rule, often under circumstances not conducive to deliberation.

Other advantages are more subtle and more important. Because current search and seizure doctrine situates decision-making in the context of a criminal prosecution, with the defendant asserting rights “versus” the state, it perpetuates the impoverished libertarian presumption that the interests of “government” are inimical to “individuals.” In the communitarian context, if a court decides that officers have indeed operated within the community’s grant of authority, the subsequent claim of unconstitutionality—that the grant of authority itself failed to conform to the polity’s foundational precepts—would allege not merely that the majority’s search rule tyrannized an individual, but that in formulating that particular rule a transient majority, operating perhaps under some distorting influence or irrational fear, had lost sight of traditional shared constitutive notions of privacy.

The judicial role in the creation of search doctrine, then, would be to prod the legislature into responsible policy-making, and then to review that policy for conformity to the constitutive values embodied in the text, structure, and history of the constitution itself, and in widely shared and accepted traditional community norms. Yet despite its practical, logical, and ideological benefits, this re-conceived law of search and seizure is unlikely to emerge from the federal courts, where liberal individualist legal doctrine enjoys near hegemony. A likely and appropriate forum for the renewal of communitarian principles does, however, exist: state courts, interpreting state law—including state constitutional law.

#### STATE CONSTITUTIONS AS SOURCES OF COMMUNITARIAN SEARCH AND SEIZURE LAW

The Warren Court and the civil rights movement convinced a generation of American lawyers, scholars, and politicians that the federal judicial system was the forum of choice for the unbiased and sympathetic adjudication of constitutional claims. The post-Warren generation, however, confronting a federal judiciary of Republican appointees, is now of necessity rediscovering a fundamental feature of American constitutional law: that states are free to offer their citizens more constitutionally protected rights than those guaranteed as a minimum by the federal constitution.

Reliance on state constitutional analysis as a vehicle for communitarian reform is more than an ideological strategy to circumvent federal jurisprudence or a concession to antiquated notions of federalism. As currently practiced, federal judicial review is the wrong procedural vehicle for any kind of communitarian revival. It operates at the national level, the very scale of which exacerbates the difficulty of finding shared values. Further, federal judicial review is not only non-participatory, in that judges are appointed rather than elected; it is anti-participatory, allowing those unelected officials to countermand, in the name of pre-political rights, the actions of the citizenry's elected representatives.

By contrast, state constitutional law is more attuned and responsive to local concerns. State constitutional law is also well suited to the expression of communitarian principles for historical and structural reasons. Existing state constitutions, including state guarantees against unlawful searches, derive from the earliest state charters. Those documents, predating the federal constitution, were framed during a period of intense republican sentiment, and gave voice to that sentiment by encouraging citizen participation, creating powerful legislative branches and institutionalizing a number of mechanisms for ensuring public deliberation of community policy.

Although this "first wave" of explicitly communitarian state constitutions ultimately gave way to reformed charters reflecting a less participatory, more federalist theory of government, not all communitarian influences were expurgated. Even today, state constitutions reflect their heritage by imposing legislative procedures insuring more openness and deliberation than the federal constitution requires of Congress.

More importantly, the dynamic character of modern state constitutions makes them appropriate vehicles for communitarian reform. Except for those few occasions when their representatives vote on actual amendments or on controversial Supreme Court nominees, citizen participation in federal constitutional law is symbolic at best. The Constitution itself, preserved under glass in the nation's capital, is as remote and iconic as a fragment of the True Cross. State constitutions, by contrast, have remained relatively unmystified and accessible. Since 1776, at least 232 state constitutional conventions have been held (36 since World War II), producing approximately 150 versions of state constitutions. The enactment of state constitutional amendments has reached almost epidemic proportions: nearly 5,200 have been adopted, many through such methods as popular initiative and referendum. Further, state court judges are typically elected officials, so that even judicial interpretations of constitutionality are subject to an indirect but real popular influence.

Because of both their heritage and their present natures, state constitutions are simultaneously *constitutional* and *accessible*. They are constitutional in that they construct, authorize, and constrain a government—they constitute a polity. They are accessible to citizens because they can easily be reformulated. And these reformulations, though frequent, are not trivial; studies indicate that ordinary citizens participating in constitutional revision and amendment ascribe an exceptionality to the process, and respond with conduct that rises above partisan or interest-driven politics. It is apparent, then, that state constitutional search law provides a legitimate and auspicious opportunity for reintroducing communitarian precepts. One state court, at least, is taking advantage of that opportunity.

#### THE OREGON EXAMPLE

In Oregon, an evolving law of search and seizure strongly demonstrates the possibility of translating communitarian precepts into a coherent and workable state legal doctrine. In text, Oregon's constitutional search provision differs only slightly from its federal counterpart, yet Oregon has developed an independent interpretation, one which, intentionally or not, represents basic communitarian principles.

Some of these principles manifest themselves in Oregon's threshold decision about what qualifies, for constitutional purposes, as a search. Under federal law, a search has occurred when government actions have intruded upon a citizen's expectation of privacy, but only if society regards that expectation as reasonable or legitimate. The federal inquiry begins with the individual and his or her expectations; traditional prerogatives and community norms enter the calculation only after the fact, by means of an unexplained judicial determination of whether the individual's expectation is acceptable. Because this determination occurs in the context of a trial against a defendant who was caught with incriminating evidence, there is a tendency in the federal courts to find the defendant's expectation *un*reasonable and *i*llegitimate.

By contrast, as defined by the Oregon Supreme Court, a search is any activity which, "if engaged in wholly at the discretion of the government, will significantly impair [Oregonians'] freedom from scrutiny." This formulation, albeit judge-made, differs from the federal court's formulation in subtle but significant ways. Rather than testing the legitimacy of the privacy rights and expectations of an accused individual against the court's assessment of what society would find reasonable, the Oregon court begins and ends with a declaration of shared community norms, deduced from such existing evidence as well-settled common-law doctrine, established statutes, and even such non-traditional sources as social science research.

Such a determination can and should be made in advance, wholesale or categorically, and, for a given type of situation, reduced to a rule. For example, the Oregon court has decided that putting a beeper on cars in order to track them from the air is a search, because Oregon citizens would find such activities, if pursued by police at will, a significant reduction in their freedom from scrutiny. Absent the even more desirable mechanism of legislative formulation of such rules, judicial formulation according to *community* values (as opposed to the subjective values of a particular accused criminal) represents a significant step toward a communitarian outlook.

The genuinely radical, innovative, and arguably communitarian turn in Oregon search law has occurred in the area of administrative or regulatory searches. When conducting searches for any purpose other than the investigation or prosecution of crimes, Oregon officials are

guided by a unique set of legal rules, all of them calling for policy making by accountable legislative bodies.

For example, in 1987, the court dealt with a constitutional challenge to a drunk-driving checkpoint, and took the opportunity to assert the precept that a legislative body could authorize administrative searches conducted without individualized suspicion of wrongdoing, by establishing a program “providing sufficient indications of the purposes and limits of executive authority, and . . . carried out pursuant to a properly authorized administrative program, designed and systematically administered to control the discretion of non-supervisory officers.”

The significance of this opinion is that it grounded the requirement for such legislation in the implicitly communitarian concept of political authorization by elected deliberative bodies. In rejecting the traditional idea that *judicial* oversight is the sole protector of individual citizens’ rights in search situations, the court assigned the duty to articulate the rules governing these state-citizen interactions to *legislative* bodies—the politically accountable organs of government. Essentially, the court told the people of Oregon that if they wanted to subject themselves and their fellow citizens to certain types of privacy invasion—for example, if they thought certain intrusions were a reasonable price to pay to control drunk driving or drug abuse—then the people themselves would have to articulate that policy choice, and not leave it to the discretion of minimally-accountable law enforcement professionals or judges.

Of course, this does not mean that Oregon citizens could authorize campus security officers to conduct body cavity searches as a condition of admission to football games, or pass legislation allowing midnight “regulatory” raids on private dwellings. Authority from a politically accountable body would be necessary but not sufficient. No legislative body can authorize unconstitutional conduct, and Oregon courts retain the power to review legislative authorizations for constitutionality. An Oregon court does so, however, by reference to (or extrapolation from) the traditional and existing public policies of the relevant constituency: statutes or ordinances, common-law doctrine, and community custom. In Oregon, the question of proper community authorization, which by definition must emanate from a deliberative, politically accountable body, always precedes the question of individual rights, and rights themselves find their source in constitutive community values.

In interpreting its own state constitution, the Oregon courts have shown a preference for legislative restraints on official discretion, while disfavoring reliance on individual-rights-based judicial ones. Whether intentionally or not, these courts have developed administrative search and seizure jurisprudence along legiscentric, communitarian lines. However incomplete or transitory this development may eventually prove to be (as in the case of the U.S. Supreme Court, the legal philosophy of a state supreme court evolves with changes in personnel), it has already demonstrated that communitarian precepts—socially, politically, and legally principled—can move from the realm of theory into the real world.

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## The De-Regulation of Family Law In Whose Best Interests?

MARY ANN MASON

The revolution in family law which has been sweeping the nation since 1970 was designed to promote parental freedom and to break free from traditional gender roles in a traditional family. In the last 20 years, all states have fundamentally revised their divorce and custody laws to allow for a shift to no-fault divorce and the abolition of maternal preference in custody. Yet this revolution has had unintended consequences: mothers and children, previously protected, have found themselves in increasingly precarious positions in the last two decades.

Following the lead of California's innovative Family Law Act of 1969, all states offered some form of no-fault divorce by 1985. In some states one disgruntled party may simply complain that the marriage has reached a point of "irretrievable breakdown" with no requirement of proof; in other states "incompatibility" or "irreconcilable differences" must be demonstrated if one party objects, but it is considered sufficient proof if one partner chooses to walk out and live separately for a specified period of time. In still other states, living apart for a period of time (from six months to three years) is deemed adequate ground for divorce. The result is that in every state either the husband or the wife can leave a marriage at will.

In the 1970s and 1980s, on the heels of no-fault divorce legislation, most states rushed to eliminate the judicial presumption in favor of mothers as custodians for children of tender years. Currently only seven states give mothers an automatic preference through case law. Many states rewrote their statutes regarding custody to present a gender neutral standard. This created a judicial problem of choosing between legally equal parents. California again led the way in innovation by

amending its Family Law Act in 1980 to place joint physical custody on an equal footing with sole custody as a legislative preference. This amendment was accompanied by the requirement of mediation in any custody dispute, and the rule that joint custody could be judicially imposed against the wish of one parent. By 1988, 35 states followed California's lead, initiating some form of joint custody law, although not necessarily giving it first preference or imposing it on a protesting party.

The no-fault revolution effectively deregulated divorce. As a society, we abandoned control and left the determination of divorce to individuals. The egalitarian ideal underlying the introduction of no-fault divorce was to treat the marital partners as equal autonomous adults with the ability to make decisions without the intrusion of the courts, thereby avoiding messy court battles. The transformation in custody law, away from maternal preference toward equal parenting, was the extension of this ideal. Increasingly, courts attempted to remove themselves from custody decisions by promoting out-of-court mediation.

The deregulation of family law suited the ideological and economic climate of the 1970's and 1980's. It was widely favored by feminists and progressive groups as a way of promoting individual freedom. The concept fit well with women's search for equality through rejection of the patriarchal family. It also matched the need for men to move out of their role as protector and breadwinner in an economy where it was increasingly difficult to succeed as the breadwinner.

We have now had about 20 years of experience by which to judge the effects of this revolution in family law. While some might argue that the egalitarian no-fault model has effectively promoted the individual freedom of adult marriage partners, it is difficult to argue that it has benefitted children in familial relationships which might best be described as triangular rather than linear.

The old laws frankly promoted the nuclear family. This preferential treatment stemmed from a widely held belief that the nuclear family was the best vehicle for raising children, and therefore it was in the best interests of society to support it. The old laws also assumed that mothers were the appropriate custodians for young children. Regardless of the veracity of these assumptions, the motive behind the rules was child protection.

These laws also presumed that the state had a legitimate role in protecting the family from frivolous or immoral conduct by one of the partners. If one party deserted or committed adultery, he or she would be severely punished in the property settlement and spousal support arrangements. The law set the tone for public opinion well beyond the family circle. In recent history, public opinion turned against the 1964 nomination of Nelson A. Rockefeller for president when he left his wife of many years for another woman.

Conceived in the heyday of self-preoccupation, the no-fault model is anything but child-protective. The effects of the deregulation of family law on children are not fully known, but current research does not provide good news. Lenore Weitzman's figures on the relative economic status of men and women following divorce in the no-fault era have become familiar to us. According to her California study, within the first year following divorce, divorced men experience an average 42 percent rise in their standard of living, while the standard of living for divorced women and their dependent children declines by an average of 73 percent. These figures alone do not describe the life changes faced by the children. Most often the economic fallout of divorce includes the sale of the family home, and an involuntary move (on the part of the children) to less expensive accommodations. In the first five years following the introduction of no-fault divorce in California, the number of court orders to sell the family home rose from one in ten to one in three.

The long-term impact of changed custody laws on the well-being of the children is only now being studied in a systematic fashion. We do know from the studies of Judith Wallerstein (*Second Chances*) and others that the negative effects of divorce on children, regardless of the custody arrangements, are often long-lasting and serious. Without doubt, by providing a comparatively easy way out, the new divorce laws have created a far larger class of children who are experiencing the effects of divorce. The original enthusiasm for joint custody as a solution for easing the effects of the conflict of divorce on children has waned. A recent long-term study of joint custody by Richard B. Strauss in Middlesex County, Massachusetts, has shown that in the long-run, this arrangement produces significantly more, rather than less, continuing litigation between parents than sole custody arrangements do.

Evidence also suggests that the new custody laws have contributed

to a litigious approach to custody determination that more often than not places mothers at a disadvantage. Abolishing laws that favor mothers has created conflicts which are not immediately apparent when looking at overall custody statistics, in which mothers still gain custody in the great majority of the cases. Under a standard that declares both parents equal, and offers a loose “best interests” guideline, or in some states a presumption in favor of joint custody, the mother can be threatened with the loss of custody of a small child by a father who has no real desire for custody, but uses the threat to bargain away property rights, spousal support, or child support responsibilities. According to family law experts Henry Foster and Doris Freed, “custody blackmail” has become commonplace. The frightened mother may agree to an unfair economic arrangement which will result in a lowered standard of living for herself and her children.

#### WHAT IS FAMILY LAW?

If we accept that current divorce law is focused more on the individual rights of the parents rather than on the well-being of the children, must we then ask whether we can or should focus family law once again toward child protection rather than adult liberties? I believe that we can do this, and as a society it is our obligation to concern ourselves with the well-being of the near majority of our children who will experience at least one divorce during their childhood. I would argue further that the primary, and perhaps the only legitimate purpose of family law, is child protection. This concern should extend toward affirmatively supporting children in intact families as well. At the same time, I believe it is possible to craft a family law policy which is also considerate of the needs of adults, and does not unnecessarily restrict their freedom.

Perhaps the first step in a new commitment to family law is to consider whom the law should cover. Should the law focus only on families where there are children, regardless of age, and undertake little or no regulation for relationships where there are no children? If the purpose of the law is to protect children, this makes sense. All childless relationships could be encouraged to negotiate fully informed private contracts. Whether these relationships are registered with the state as marriages or under other titles, and what other legal rights accompany this registration, is open to debate. The point is that individual freedom,

rather than legal regulation, could be the governing principle in childless relationships. It might be useful to rename the laws that govern these relationships, and carve out a new legal area called something like “relationship law” to distinguish it from situations where there are children.

When children are born, or come into a relationship through remarriage, the state has a critical interest in protecting the children, even when the union is intact. This not only means that the state should act in the child’s best interests in cases of abuse or neglect, but that it should enact affirmative policies to support functioning families as well. We think of family law in terms of divorce, rather than in terms of laws that encourage keeping families intact. The many laws which could support families, particularly those with two working parents, have become part of our national debate; now they should become part of a national vision of an integrated family law which focuses on the well-being of children at all times.

When trouble occurs in a family with children, it is in the interest of the state to discourage divorce as the only solution. Required counseling and a long (two years?) separation before divorce are possible suggestions. Even if it were desirable from a child-protective point of view, it is probably no longer possible to require fault as a requirement for obtaining divorce. It may be feasible, however, to reconsider desertion or other grievous acts in determining a property division, as long as this does not negatively affect the welfare of the children.

In dividing the property and determining support obligations, the first issue should be the welfare of the children, not which spouse contributed what; or, in community property states, how property can be scrupulously divided equally. Mary Ann Glendon is one of the leading proponents of this idea, referred to as a “children first” approach. As she describes it in *Abortion and Divorce in Western Law*, “All property, no matter when or how acquired, would be subject to the duty to provide for the children. Nor would there be any question of ‘spousal support’ as distinct from what is allocated to the custodial spouse in his or her capacity as physical custodian.”

The standard of “providing for the children” in my opinion, should be to continue to provide, as far as possible, the lifestyle and education,

including higher education, that a child could have expected had no divorce occurred. While this may seem, in our current individualistic climate, to place an unfair burden on the noncustodial spouse, it is the obligation that one assumes when one has children. Surely it is not fairer to expect the child to give up his or her opportunities for a full life.

There will, of course, be variations on the theme of “providing for the children.” Marriages where there are children from previous marriages will become a subset of marriages with children, with separate rules which recognize the variety of parental obligations. In marriages where the children are grown, the partner who has provided the majority of caregiving and is in a weaker economic position would be equitably compensated. A major feature of a child protection policy must be to protect the caregiver as well. A mother or father who turns away from a career to spend years raising children must be assured that they will not be left penniless following a late-life divorce. Should there be restrictions on remarriage if a parent is not able to handle the child support obligations in two families? This is one of the many questions that needs to be addressed.

#### A RECONSIDERATION OF A MATERNAL PREFERENCE

Determining child custody is perhaps the most difficult issue in a newly considered family law policy. However, since the rapid departure from maternal preference toward parents as equals came about as part of political movement toward an egalitarian standard rather than as a reasoned response to child welfare research, we must seriously reconsider a maternal preference.

A judicial presumption which favors mothers over fathers has several factors in its favor as the best promoter of child welfare. First, in most states, the abolition of the presumption in favor of mothers as the best custodians for young children has left only the vague guideline of the “best interests” of the child. Our society lacks any clear-cut national consensus on what the best interests of the child are, and the judge must make a determination based on a confusing legislative laundry list of factors to consider. Not only does this make it difficult for the judge to make a decision, it encourages litigation, since the determination is unpredictable. As noted, it also leaves the door open for custody blackmail.

Second, men and women are clearly “not similarly situated” biologically for parenthood. Nor are they “similarly situated” in terms of social reality. (“Not similarly situated” is the term used by the U.S Supreme Court to support laws that treated women differently than men. See *Michael M. v. Superior Court of Sonoma County*, and *Rostker v. Goldberg*.) Biologically, the indisputable fact is that mothers carry a child for nearly a year, and give birth; fathers do not. The facts that are in dispute are whether mother and father are “similarly situated” following birth. Until recently, there was little dispute among scientists that the mother-child bond in children under five was the focus of the young child’s existence and that separation from the mother would harm the child to a degree that separation from its father would not. Margaret Mead (*Male and Female*) expressed the views of a generation of social scientists who looked at mothers and fathers across cultures:

We should phrase the matter differently for men and women — that men have to learn to want to provide for others, and this behavior, being learned, is fragile and can disappear rather easily under social conditions that no longer teach it effectively. Women may be said to be mothers unless they are taught to deny their child-bearing qualities. Society must distort their sense of themselves, pervert their inherent growth-patterns, perpetrate a series of learning-outrages upon them, before they will cease to want to provide, at least for a few years, for the child they have already nourished for nine months within the safe circle of their own bodies.

Just as traditional gender roles have been increasingly scrutinized in the last two decades, a number of scholars have questioned long-held beliefs about roles ascribed to mothers and fathers. The thrust of the research which questions gender differences is *not* that the mother-child bond is the same as the father-child bond in our culture, but that, under different social circumstances, a father could take the role of the mother. Even among those researchers who believe fathers could act as mothers, few, if any, believe that there are *no* differences between fathers and mothers in their response to children. They differ on what those differences are, and how important they may be.

This is by no means the opinion of all scientists. Evolutionary psychologists and biologists emphasize the maternal role in the promotion of the species. For most Freudian psychologists, the mother-infant attachment is still the most important attachment in the infant’s life.

Many scientists, such as Erik Erikson, firmly believe there are biological differences, hormonal and otherwise, which prepare women for giving birth and promote their strong interest in mothering. This scientific controversy has certainly confused judges and added momentum to the drive for gender neutral laws. As the New York Family Court concluded in *Watts v. Watts*, “the simple fact of being a mother does not, by itself, indicate a willingness or capacity to render a quality of care different from that which the father can provide.” Further, “scientific studies show that the ‘essential experience for the child is that of mothering,’ regardless of who is performing the mothering function.”

But this scientific controversy is based on the supposition, “If men were mothers,” when in fact women already *are* mothers and in the great majority of households perform most of the mothering. Even when women work outside the home, as they do in increasing numbers, they still continue to take the lead role in raising children. Family law should be reformed to reflect these prevailing familial patterns by reinstating maternal preference.

There are, of course, cases where the father is indeed the more nurturing parent. However, a maternal preference is a rebuttable presumption that could give way to a preponderance of evidence demonstrating that the father has in fact played the “mothering” role and that it would be in the best interests of the child to continue this relationship. Presumably, only fathers who really function in this way would attempt to rebut the presumption, since the burden is upon them to provide the evidence. This should hold down the number of cases that are actually litigated and reduce the incidence of threatened litigation.

Brief mention should be made of the currently fashionable “primary caretaker” standard, which has the status of a legal presumption in at least two states. As David Chambers, noted proponent of this theory, has explained it, “[t]hey should define the primary caretaker as the parent, if there is one, who has performed a substantial majority of the caregiving tasks for the child that involve intimate interaction with the child.” This standard is appealing for two reasons: it appears to be an attractive gender-free alternative to a “maternal preference,” and it purports to offer a quantifiable basis on which to determine the most fit parent.

On both these counts, however, a “primary caretaker” presumption falls short of a “maternal presumption” in providing for the best

interests of the child. First, unlike the “maternal presumption,” which puts the burden of proof on the father to prove that he is indeed more fit, the “primary caretaker” preference forces the mother (and the father) to compete in each case. Where judicial indeterminacy is paramount, as it is in deciding between competent parents, the likelihood of litigation increases. Here also, as with a pure “best interest” standard, the threat of litigation can intimidate the mother. This can lead to custody blackmail, and result in a lowered standard of living for mother and children. Second, child caretaking is not an easily quantifiable task. Nurturing cannot be counted in minutes, and emotional bonds cannot be counted at all. If one were to determine the primary caretaker strictly on time spent, in many, if not most post-divorce families where parents must work full-time, the winner would probably be the child-care worker or baby-sitter.

This brief exposition by no means precisely presents the details of a new family law policy, but it does suggest an outline. Rather than yield the messy field of divorce and custody proceedings to the adult players, we should intervene on the side of the children who have been sidelined too long. When children are not part of the relationship, we could encourage adults to play their own game.

How many people were murdered in New York last year? (p. 66)

## Ethnicity in New York City: Pulling Together through Adversity

DENNIS DELEON

We, the Commission on Human Rights, have people on the streets in many different communities throughout the city. What we do is we try to identify in each community leaders of both races, ethnic groups, religious leaders, and find some common issue that these groups can rally behind. Sometimes the common issue is the city, against the city—sometimes the common issue is against the federal government, sometimes the common issue is some positive project, like closing off an alleyway to have a free space in the community. But in just about every community where we work we find some common issue to bring leadership together on.

And what happens is that people begin working side by side on something other than race. On something other than, “I’m black, and you’re white: and what does that mean?” And when we’re able to pull this off, it works very well, because what you build is the kind of relationships so that when there is friction, when there is tension, you have people who know each other responding to it. You have people who had actual personal relations.

And what was really underscored for me when I was talking with people involved with the American Jewish Committee and other organizations that had substantial investments of personnel in the area of race relations and improving intergroup relations back in the 60s—that those programs are all but gone now. That when you look at the money

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Dennis DeLeon delivered this speech at the Second communitarian Teach-in in New York, May 1992.

that was being spent by a lot of organizations on intergroup relations, it basically tapered off during the 80s and late 70s. There were up to 24 separate masters-degree programs throughout the country with various names but basically the main thrust was intergroup relations. And people could have gone to school and learned how to become experts at dealing with these issues. Now, to the best of my research, there is one program like that in the country. In short, we've lost interest in the issue. We've lost institutional interest, we've lost educational interest, and we've lost programmatic interest. And the effect of that is that we don't have those relationships at the community or at the larger area levels.

There was a time when there were at least strong links between the white and black communities, and primarily with the Jewish community at a certain time, because there was a black-Jewish issue at the time, there was a concerted series of efforts, and people who emerged as community leaders. For example, David Dinkins played a prominent role in the 70s as being a leader around improving black-Jewish relations.

I was very impressed by an effort in Houston where they actually began to address the issue of re-establishing those personal connections in a way that would be useful later through a series of rather extended retreats among African-American and white leadership for a period of 3 days. And there were things to do—there were issues to discuss in the community, issues to discuss around a common agenda—but the main thing that emerged from that is that people came out of it with personal relationships with each other, that will serve that community well into the future.

People ask, "Why didn't New York blow up, why wasn't there a riot in New York?" I think a large part of it is due to the fact that we've been through so much over the last two years. But in the process of going through so much, in the process of these little disputes, and some not so little, there have been links established. So when something happens in Williamsburg, Rabbi Niederman knows to call David Santiago or Luis Garden Sacosta. When something happens now in Williamsbridge, the Superintendent of Schools now has a linkage among black organizations to call.

By coming through these little mini-conflicts—we have established those linkages. That really is what's missing, and that's really what I

believe was more in presence and more around us in the late 60s and early 70s.

There was a time when there was a thing called street-workers. Does everyone remember what street-workers were? They were people whose job it was to engage the communities in real programs and to have a sense of what's happening on the streets in those communities. That doesn't exist anymore. The closest it comes to street-workers are the 40 people in the Commission on Human Rights who are out there doing this work. What you have now is programs funded to do "x" thing, or "y" thing, with deliverables by a certain date.

Now admittedly there were abuses but there was a real street presence. So we had at a certain time and we have to recreate a street presence for people who actually are knowing what's going on in the communities; we have to recreate that person-to-person experience and leadership before we're going to see a difference—in New York City at least, and, I think, nationally.

One of the things you sense when you deal with different racial and ethnic and sexual and lifestyle communities is that everybody feels *they're* the most deprived. They're getting the rawest end of the stick, they're the biggest victim. And what's interesting is that very few groups will concede that anybody else has pain even equal to their pain.

What we've tried to do at the Commission is to use that real deep-seated feeling that "my rights have been violated" to establish links between organizations. For example, there was a synagogue that was burned in Bath Beach in Brooklyn. And we brought together Asian leaders in that area, we brought together some gay leaders, we brought together some African American leaders—people who themselves have experienced bias, people who themselves have experienced hate, to say, "We stand with our brothers and sisters in this community over their experience of bias crime"—so we try to use bias crime as a way to link people in a common understanding.

Because the moment people begin to see their own sense of victimization as the primary victimization, the moment they get in that discussion of "my rights, then your rights, then my rights, then your rights," it *is* a stalemate, and nobody moves off the board. The other way, aside from the community organizing around other issues, is we've sought to bring people together on bias. So what that has meant is getting organizations—the American Jewish Congress, the Anti-Defamation

League, the National Association for the Advancement of Colored People, the Anti-Violence Gay and Lesbian Project—to show up for each other’s pain, to appear on behalf of each other when something happens.

I was at a synagogue in Brooklyn where there were swastikas on the doors recently. I tell you, it was very painful, because the synagogue members left the swastikas on the doors. As painful a symbol as that was, they left them on the doors for ten days, so people could come and bear witness. But in talking to the group, I sought to show that the commonality of pain—the deprivation and the discrimination suffered by the Jewish community—should enable them, should inform them, and make it easier to understand the pain of African-Americans.

These are all just ruminations. The beginning part has to be with developing leadership, and developing leadership who is there for each other. And we’ve lost at least two generations to that. We’ve lost two generations because of the lack of investment in our streets, the lack of investment in good community work, and the lack of investment in a serious educational approach.

1/2 page ad

## The Libertarian Conundrum: Why the Market Does Not Safeguard Civil Rights

Richard A. Epstein: *Forbidden Grounds: The Case Against Employment Discrimination Laws*.

Cambridge: Harvard University Press, 1992.

Reviewed by Alan Wolfe

Here is a quick quiz, designed to see if the reader is familiar with the twists and turns of contemporary legal theory. What position would someone committed to the University of Chicago brand of law and economics—which holds that legal rules ought to be fashioned to facilitate the self-interest of individual parties—take on the burning issue of affirmative action? The somewhat surprising answer is that he would be *for* it, so long as the quotas and goals designed to encourage minority hiring were voluntarily promulgated by private firms or individuals.

This brief example gives as good an introduction as any other to the way Richard Epstein thinks about civil rights laws. Affirmative action is such a contentious issue because it brings into direct conflict two moral goods: the imperative of overcoming past discrimination and the belief that innocent individuals living in the present should not pay a price for the sins of others who lived in the past. What is interesting about Epstein's treatment of this issue is that *both* moral positions are bypassed; indeed all moral positions, save for the sanctity of individual freedom, are bypassed. Every question for Epstein turns on the issue of who is to regulate what. Private individuals ought to regulate themselves through the contracts they establish with each other. If they want to bind themselves to hiring quotas, that is their business. If they do not want to, that is also their business. The only rule here is that the state cannot adopt an affirmative action program because its actions are not voluntary and contractual.

## AN ATTACK ON INTELLECTUAL COMPLACENCY

In *Forbidden Grounds*, Epstein proposes to abolish the laws that attempt to prohibit discrimination in hiring. He does not advocate this position timidly. Nor does he expect his position to be an influential one. The Supreme Court would never adopt his position even if the Republicans had remained in power until the end of the century. (Chief Justice Warren Burger wrote the first important affirmative action decision; Chief Justice William Rehnquist has never urged repeal of the Civil Rights Act of 1964). Epstein is not writing to influence policy directly. “Consensus may be indispensable for ordering political life,” he writes, “but it is dangerous for intellectual work.” Writing as an intellectual, Epstein is determined to show the rest of us how wrong-headed, counter-productive, and confused we are if we believe that employment anti-discrimination laws—not only the 1964 Civil Rights Act, but laws that ban discrimination against the handicapped, the elderly, people with AIDS, or, for that matter, people with blue eyes—ought to be allowed to override the private wishes of two parties to a contract.

Let it be said right from the start that Epstein’s attack on intellectual complacency is welcome. And it is welcome not only because every position, no matter how justifiable, ought to be subject to debate. For the truth is that the regulation of discrimination is a far more complex matter than we sometimes picture it, and Epstein has indeed found soft places to attack. Can we really expect that anti-discrimination laws will protect all workers irrespective of how old they become? Even if we should want to protect everyone’s job irrespective of old age—a goal I for one do *not* share—what will be the costs of the resulting discrimination against the young? Is statistical discrimination the same as behavioral discrimination? If so, ought every firm to have the same proportion of workers as the population of the country, the state, or the local neighborhood? If a small firm that has some minority workers but fewer than we would like is forced to go out of business because of the costs of improving its racial balance, is the overall goal of racial justice served or harmed? Is pregnancy a disability? Should men and women compete on the same sports teams? In the same sports? If they compete on different teams, what is the difference between such practices and the doctrine of “separate but equal” invalidated by *Brown v. Board of Education*? It ought not be surprising that the achievement of any morally desirable goal presents complications. The failure of advocates of anti-discrimination laws to

acknowledge such difficulties gives critics such as Epstein something of an open field in uncovering holes in the way we think about discrimination.

Yet aside from winning an occasional debating point, Epstein does not, in the end, make a convincing case that laws against discrimination ought to be repealed. His book, rather, has the same unanticipated consequences as many of the laws he examines, for in setting out to convince the reader that the Civil Rights Act of 1964 was a mistake, he reopens the wounds that only healed once we as a society fashioned a consensus on the importance of abolishing discrimination—a consensus that, in the more contentious 1990s, seems unfortunately to have weakened a great deal. Epstein ought to be thanked by those who believe in legislation against discrimination for returning us to those less complicated times when eliminating discrimination seemed so simple a moral command. In so doing he reminds us that, although we may disagree on the question of affirmative action, we rarely disagree—Epstein of course is the exception—with the idea that society took a giant step forward when it outlawed arbitrary and invidious discrimination.

#### THE MORAL CLAIMS FOR ANTI-DISCRIMINATION LAWS

There are two major reasons why we ought to deny individuals the freedom to conclude contracts that are premised on prejudice. The first is that private individuals, given enough freedom, are capable of doing lasting harm to others, harm so pernicious that the social and moral costs of regulating them are far less than whatever economic costs—if there are significant economic costs—result. The second is that the very values so admired by Epstein, especially the freedom of the individual, is a social value, made possible, and reinforced, by the culture, symbols, and norms of the society in which such values are appreciated. Private practices that weaken the symbolic or cultural framework of society weaken everything, including the ability of private individuals to engage in those very practices.

What caused anti-discrimination laws in the first place? The conventional answer is fairly clear. As a result of slavery, black Americans

were brought to this country against their will and their fundamental humanity was brutally denied. Even a war to free the slaves did not bring about true freedom, for the South established a system of Jim Crow in which blacks were treated as separate and less equal than whites. The Jim Crow system was upheld by the Supreme Court in *Plessy v. Ferguson* (1896), but a series of legal battles whittled away that precedent until, finally, the Court in 1954 upheld the claims of “simple justice.” *Brown* established the national consensus that then made possible the passage of the Civil Rights Act of 1964. Although national policy in the wake of that act has been fractured, the result of the Act was a significant decrease in the amount of racism in American society.

#### EXCESSIVE GOVERNMENT TO BLAME

Epstein challenges every step in this story, but for my purposes here, only one of his many points needs to be examined. Jim Crow, Epstein claims, was *not* a result of private racism or discrimination but represented one more needless and obnoxious example of governmental interference in the private affairs of individuals. The South’s failure to grant full membership to blacks was a failure of the market, not the state. Southern whites wanted integration, in this account, at least those businessmen rational enough to want to serve every customer they could. But the losers in the economic struggle were not powerless; controlling state legislatures, they forced the adoption of racial segregation precisely to limit the economic power of those whose practices would have produced a modern, and integrated, social fabric throughout the South.

Epstein goes further. He points out that *Plessy* was decided only nine years before *Lochner v. New York*, the case that overturned New York State’s efforts to regulate the number of hours that bakers could work. Both these decisions are generally considered reactionary ones, among the worst in the history of the Supreme Court. Not so, Epstein argues. For *Lochner* could have provided a more appropriate vehicle for dealing with discrimination than *Plessy*. Laws that call for segregation are one more example of the inappropriate police powers of the state. Just as the court was right to abolish a law telling employers how many hours their workers should work, it would have been right to overturn a law telling

employers only to hire whites (or blacks). It is as if the wrongs committed by private individuals are never laid on their own shoulders, so long as some form of governmental action can be found, which, in the modern world, is always possible.

#### DOES MARKET ENCOURAGE OR DISCOURAGE DISCRIMINATION?

But one need not develop a history counter to the one offered by Epstein to see why private individuals discriminate. If there are occasions when discrimination may be irrational, there are other occasions on which it is rational. Hence Epstein—who is far more committed to rationality as he understands it than to any position on discrimination—argues at some points in his book that markets *will* encourage discrimination, and that this is as it should be. Spot markets, in which individuals come together to make a quick transaction only to depart, do not encourage discrimination because the individuals involved have so little to do with each other. But the employment contract is another matter entirely. This is a long-term commitment, one that welcomes a person into a firm, its culture, and its already-present employees. Because large firms with many members have diverse tastes, imposing a single preference on everyone will always cause friction. Hence “the temptation to discriminate, which makes little sense in a world of spot transactions and perfect information, makes a great deal more sense in a world of continuous relationships in which the costs of the legal system are often high and sometimes prohibitive.” Voluntary markets will often be segregated markets, in which different firms do things in different ways in response to different customers, clients, or employees.

Epstein wants us to believe that “self-interested businessmen will be loath to practice discrimination when it hurts the bottom line” *and* that “the partition of the market into specialized and well-defined niches should increase the satisfaction of all customers.” His economic history and theory contradict each other. If we listen to his history, we must conclude that the South would have abolished discrimination if only the state had stayed out and let the market rule. But if we listen to his economic theory, we must conclude that a market system will invariably result in segregated practices. It seems as if Epstein wants to be on both sides of the issue, turning the argument one way or another—but in all cases concluding that the state should stay out.

On this point, I think his economic theory is superior to his history. Markets do encourage a kind of “natural” segregation, and there is no reason in theory why such segregation cannot work to the persistent disadvantage of a group, solely on the basis of that group’s skin color. Moreover, as Epstein is the first to suggest, such segregation is more likely to be thorough, not in the purchasing of soft-drinks and lunches, but in the finding and keeping of jobs that put food on the family table.

Finally, as once again his economic theory says, the individuals who are members of the group that experiences segregation from the dominant markets will themselves be denied the opportunity to maximize their own self-interest. The point would need to be made, except that Epstein makes it himself, that not all segregation is the result of what the state does. (Although Epstein never discusses the matter, boycotts by private individuals and firms that were tempted to break Jim Crow’s strictures were a common feature of *economic* life in the South). If the market, for whatever reason, segments and divides by race, but if the elimination of racial barriers will enhance profits by maximizing customers or clients, then the market needs to be regulated in order to make the market function effectively. *In short, even within the terms of rational self-interest, there are perfectly good reasons why we might want a Civil Rights Act roughly like the one passed by Congress in 1964.* Indeed the lack of such a policy encouraged highly irrational economic behavior, which was not stopped until government put an end to it. As this example shows, Epstein tends to reason from his conclusions backwards to his analysis. This is not only unfortunate, it also stands in contrast to the way the Chicago School of Economics once offered surprising, if usually somewhat outrageous, theories.

For all the rigor offered by the law and economics approach, *Forbidden Grounds* stands on shifting grounds; if one argument against outlawing discrimination does not work, Epstein simply finds another. If discrimination is not found, the market is doing its job. If discrimination is found, the market is doing its job. There is nothing wrong with discrimination. At the same time, efforts to eliminate it will fail. One can find all these arguments in Epstein’s book, even though some of them stand in tension with others. Such are the problems with a book that is far more interested in marshalling evidence for its conclusion than in persuading the reader that the conclusion might have some validity.

## THE CRITIQUE OF PRIVATE UNIVERSITIES

Another, and more serious, example of Epstein's tendency to shift ground involves his thoughts on affirmative action in universities. Epstein, as I showed earlier in this essay, wants to tone down the war over affirmative action by granting it to those who want it and by exempting those who do not want it. Yet when he turns to universities, especially the elite universities, he clearly does not like what has been done in the name of affirmative action. (He joins those who argue that the politicization of race, class, and gender will destroy what makes great universities great). But on what basis can Epstein criticize what private universities do? One could hardly imagine a better example of a private market operating with minimal government regulation than America's elite universities. If they are far too politicized for Epstein's taste, such is the way markets in ideas, faculty, and students work.

Moreover, the strongest arguments against affirmative action are made by those who support the Civil Rights Act of 1964, not those who oppose it. Not only was the possibility of affirmative action foreseen by the advocates of the 1964 law, it was repeatedly denounced by them. The 1964 Act strives toward, even if it cannot quite achieve it, the principle of color-blindness. If one rejects that principle, one has no strong basis on which to oppose affirmative action. Epstein is more consistent when he argues in favor affirmative action. But this just makes his comments about private universities seem gratuitous and out of keeping with the logic and argumentation of his book.

The same principle holds true for the argument against an active government trying to reform people's moral character. As Andrew Kull demonstrates in his important book *The Color-Blind Constitution*, the problem with race-conscious policies is that they enable the judiciary to craft public policy actively. Conservative pessimists, those who do not think government can or should do much to reform society, should prefer an explicit statement by the Supreme Court that the Constitution must be color-blind, a statement that the Court has never given, Kull argues. If Congress were to listen to Epstein and to repeal the Civil Rights Act of 1964, we would likely have an even more active judiciary—and therefore an even more active government. The conservative position should be that Congress did not go far *enough* in 1964 in insisting on color-blindness. What could be more conservative—or more cognizant

of individual freedom—than a law which forbids discrimination both as a way of perpetuating racism *and* as a way of correcting for it?

Epstein stands proudly outside the mainstream. One reason he does is that most people look at the realities of inequality and discrimination rather than at hypotheticals that seem self-serving. In real life, discrimination is caused by both economic and political behavior, which means that efforts to eliminate it have to be two-pronged. In reality, if not in Epstein's book, those who are harmed by discrimination will use whatever branch of government they can to ease the harm; if it is not Congress, it will be the courts. In the real world, private and public depend on each other, the latter defining the scope of the former, the former establishing the priorities of the latter. It is because reality counts in any intellectual debate that so many individuals, who disagree over so much else, nonetheless find consensus in the Civil Rights Act of 1964. Those who would, as Epstein does, condemn such laws as "a new form of imperialism that threatens the political liberty and intellectual freedom of all" simply have not persuaded very many people that their point of view ought to be taken seriously. As Epstein would surely acknowledge, there are winners and losers in every market. Epstein is one of the losers in the marketplace of ideas about discrimination.

#### A STATE WITHOUT SYMBOLS?

"Given the limits of our knowledge," Epstein writes in the conclusion of his book, "I believe that the best way to take into account the full range of symbols, good and bad, noble and vain, is for the legal system to *ignore* them all—mine and yours alike." One wonders exactly how the legal system will do this. What symbols will it use to abolish symbols? In what language, using what words, and appealing to what unifying principles will we agree to allow everyone to go his own way? Who will establish the consensus that we ought not to seek consensus? "Symbols are, in a sense, too important and too volatile to be either the subject of, or the justification for, direct government regulation," Epstein writes.

On the contrary. Because symbols are both important and volatile, government will always be in the symbol business. There is, indeed, no more important task facing government than to reinforce—and if necessary regulate—what bonds Americans hold in common. In America, we

lodge our most powerful symbols in a document called the Constitution. If we follow Epstein's arguments in favor of symbolic neutrality, we would have to repeal, not only the Civil Rights Act of 1964, but the Constitution itself. Epstein's views on symbols, if taken seriously, would put him well to the right of strict constructionists such as Robert Bork. They want the symbols to have one meaning only. Epstein seems to be saying that symbols should have no meaning at all.

The absurdity of what Epstein says about symbols can be illustrated by asking what would be necessary to create a regime in which the principles of the law and economics approach would apply. We would, first of all, seek to create a set of rules that make the pursuit of self-interest the major value of our society. Then we would create a set of institutions, which we would call markets, the main mechanism for reaching those goals. Finally we would, when practices conflict, give preference to those practices that most contributed to the pursuit of profit. One can like or dislike such a regime; Epstein likes it, while I dislike it. But surely we can agree that such a regime would be filled with symbols sanctioned by some political authority. A free-market system would compel us to recognize the powerful symbol of the market; there can, in other words, be a free market in everything but symbols themselves. A government that upheld freedom of contract would not be symbolically neutral. In situations of conflict, all those symbols reinforcing individual freedom would be chosen over all those seeking to abolish racial discrimination. It is never a question of symbols versus no symbols, always a question of which ones we value.

#### DISREGARDING THE COMMUNITY

There is no question that there can be too much governance, just as there is no question that social conformity can be stifling. We would surely not wish to live in a society that so insisted on only some symbols that those for whom other symbols were important would be treated as pariahs. The trick of finding ways in which different people can live together is working out those things that must be held in common as well as those in which diversity can and should flourish. Epstein's symbolic neutrality helps us little, and not only because there is no such thing. It solves the problem of trying to balance the individual and the social by

avoiding the problem entirely.

It is surprising that, in a period characterized by Arthur Schlesinger, Jr. as “the disuniting of America,” a writer like Epstein would agree so much with the advocates of race, class, and gender consciousness he so thoroughly attacks. For, like them, Epstein encourages sub-communities to flourish at the expense of the larger community that makes them possible. We have, in America, two intellectual movements that tend to be hostile to the importance of community, one from the left and one from the right. Those who believe that the claims of particular ethnic groups for their own history, language, and culture should take precedence over national symbols and identities are not all that different from libertarians such as Epstein, with the exception that the latter seeks freedom for individuals rather than the groups to which they belong. The world of law and economics—an academic offshoot of the libertarian conservatism that flourished in the 1970s—has this much in common with the leftist multiculturalism that flourished in the 1980s: both posit entities who care primarily about themselves, choosing with whom and on what terms they will deal. The law and economics perspective is one more symptom—one more symbol, if you wish—of the degree to which Americans are losing a sense of their obligations to the society of which they are a part.

Americans at the moment are bitterly divided over whether the United States went too far, or not far enough, in the civil rights policy that followed the 1964 Act. Should gender have been included in the bill when it was gratuitously offered by the bill’s opponents to defeat the legislation? Ought the executive branch and the courts to have been so determined to shift to race-conscious policies? Was the Americans with Disabilities Act a good idea? Epstein views the debates over these issues as so impassioned and irreconcilable that we ought to bypass them entirely. But it is the existence of such debates, more than the way they are resolved, that makes democracy a system worth having. We would be less of a society if we were not allowed to argue over such issues because the market took care of them for us. If we were ever tempted to build a society on Epstein’s principles, we would not only be intellectually poorer, we would also be telling relatively powerless groups that they would have no recourse against unfair and discriminatory treatment. Some ways of making life simpler ought to be avoided.

Someone from the law and economics perspective could have written an important book about legislation that seeks to regulate discrimination. There is little doubt, at least in my mind, that the language of rights, including the language of civil rights, is both essential to the good society but destructive of community if asserted in such a way that everything else must give way before it. Our national preoccupation with race, and the harms caused by racism, would be improved by any realistic and original effort to understand these things anew. The trouble with *Forbidden Grounds* is that seeking such an understanding is not one of its major objectives. It knows where it wants to go and will use any route to get there. As a result, the important national dialogue currently taking place, one that is trying to find a way of healing our racial wounds, will not include Richard Epstein.

#### ESPECIALLY NOTED

*Compiled by David Brown*

Joan DelFattore, *What Johnny Shouldn't Read: Textbook Censorship in America*. (New Haven and London: Yale, 1992). 200 pp.

Joan DelFattore uses several recent federal lawsuits to examine the proliferation of textbook censorship by ultraconservative religious fundamentalist groups, and some ultraliberal groups. She traces how local disputes over educational issues mushroom into national debates when sophisticated national political organizations intervene. Regional decisions over textbook content become national in scope, she submits, when profit-minded publishers unload these same books on the national market.

George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships*. (New York and Oxford: Oxford University Press, 1993). 175 pp.  
was: 2,020.

The principles that govern Western nations both philosophically and economically are driven by an ethic of impartiality and objectivity. Yet in a society now rife with political and economic instability, Fletcher argues we must make room in our belief systems for the primacy of loyalty and moral commitment. In this extended essay, he discusses the place of loyalty in our relations to our loved ones, our country, and God.

Gerald Graff, *Beyond the Culture Wars: How Teaching the Conflicts Can Revitalize American Education*. (New York: W.W. Norton & Company, 1992). 214 pp.

Gerald Graff debunks some of the conservative myths about the perils of multiculturalism. He suggests that the so-called culture wars are historically endemic to universities; that the current trend to a more inclusive curricula merely reflects English departments' becoming responsive to a diversifying student body rather than succumbing to an abandonment of standards. To remedy the culture wars, he suggests that teachers focus on the ideological battles that frame these debates.

Richard John Neuhaus, *Doing Well and Doing Good: The Challenge to the Christian Capitalist*. (New York: Doubleday, 1992). 312 pp.

Father Richard John Neuhaus offers an argument for reconciling Christian faith with the ethos of the free market and capitalism. Neuhaus builds his case on an interpretation of Pope John Paul II's "Centiesimus Annus," wherein, he suggests, the moral foundation for a free economy is presented. Neuhaus, a leading neoconservative, not only provides a moral justification for democratic capitalism but explores some of the cultural and moral issues—such as consumerism—that can be attributed to such a system.

Charles Ogletree, *Popular Culture: Rage, Rights and Responsibilities*. (Columbia University, "Socratic Seminars": Public Broadcasting Service, 12/1992)

Panelists discuss the limits of free speech and responsibility in the various media of popular culture. Guests include actor Richard Dreyfuss, Representative Barney Frank (Dem., Massachusetts), rapper Michael Franti, Def-Jam Records president David W.

Harleston, and ACLU president Nadine Strossen. Fred Friendly introduces the program.

Richard Rodriguez, *Days of Obligation: An Argument With My Mexican Father*. (New York: Viking, 1992). 230 pp.

In this collection of magazine articles written over the past several years, Richard Rodriguez examines the relationship between his Mexican heritage and the American ideal of assimilation. He touches on a number of subjects in this work including AIDS, multiculturalism, and the cultures of Mexico and America.

Edward Ziegler and Susan Muenchow, *HEADSTART: Inside America's Most Successful Educational Experiment*. (New York: Basic, 1992). 274 pp.

Edward Ziegler, who was present at the outset of Head Start, teams up with Susan Muenchow to provide an insider's glimpse at the history of one of our nation's most popular and enduring education, health, and anti-poverty programs. The chronology traces the survival of the program through conservative *and* liberal administrations, and the authors provide recommendations for the future evolution of the program.

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## What's Next—A Manual on How to Set Up Concentration Camps?

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## AUTHORITARIANS, LIBERTARIANS, AND COMMUNITARIANS

*Compiled by Sarah Horton*

### From the Authoritarian Side:

Voted Democratic? Must be Subsidized. . .

The Carter, er, Clinton honeymoon is over, so far as I'm concerned. Even before his inauguration, Bill Clinton had exhausted our patience with his reckless comments on throwing the doors open to AIDS-carrying Haitians and admitting sodomites into the military. The sociopaths of the American press were in ecstasy, now that they had the chance to talk about buggery, day in and day out.

Before and after the election, I met a number of otherwise ordinary people who voted for Clinton. By ordinary, I mean straight white males (and their womenfolk) with no obvious deformities to qualify them for government subsidy. . .

*Thomas Fleming, Chronicles, February 1993*

The New World Conspiracy

Indeed, it may well be that men of goodwill like Woodrow Wilson, Jimmy Carter, and George Bush, who sincerely want a larger community of nations living at peace in our world, are in reality unknowingly and unwittingly carrying out the mission and mouthing the phrases of a tightly knit cabal whose goal is nothing less than a new order for the human race under the domination of Lucifer and his followers. . . .

Americans are appropriately shocked when they find that the one-worlders of the early twentieth-century American Money Trust have financed the one-worlders of the Kremlin, not realizing that both groups hold larger goals and aims for the world that apparently complement one another. Until we understand this commonality of interest between left-wing Bolsheviks and right-wing monopolistic capitalists, we cannot fully comprehend the last seventy years of world history nor the ongoing movement toward world government. . . .

What the average man and woman find so difficult to understand, however, is how a Wall Street banker such as Jacob Schiff of Kuhn, Loeb and Company could personally transport \$20 million in gold to help salvage the near-bankrupt, fledgling communist government of the new Soviet Russia—or how a man like Lord Milner of the British Round Table could provide funds in 1917 to get them started again—or how United States industrialists and bankers could repeatedly assist them in receiving massive private and governmental aid over the decades that followed. . . .

Lincoln's plan to print interest-free currency, called "greenbacks," during the Civil War—instead of issuing bonds at interest in exchange for bank loans—was so revolutionary that it would have destroyed the monopoly that European bankers exercised over their nation's money. There is no hard evidence to prove it, but it is my belief that John Wilkes Booth, the man who assassinated Lincoln, was in the employ of the European bankers who wanted to nip this American populist experiment in the bud.

*Pat Robertson, The New World Order, 1992, p. 37, 71, 73, 265.*

### Execution Is Not Enough

If condemned murderers were *required* to donate their organs, we could transcend the reciprocal mentality of a "death for a death" and add something beneficial to society, argues Graeme Newman, a professor of criminal justice at the State University of New York at Albany.

While [the murderers] cannot bring their victims back to life, they can save the life (and perhaps lives) of others. They could donate their body parts....I would go as far as to say that the condemned murderer should be *made* to give up his body organs. The social and moral good could be enhanced tremendously by this practice.

As Newman says, this would help remedy the current organ shortage. "This is true community service, while at the same time preserving the punitive element of the punishment."

*Chronicles, May 1992*

## From the Libertarian Side

## Magaziner the Dictator?

You never know what they'll mandate next, says Virginia I. Postrel, the editor of a publication called *reason*. She argues that President Clinton's proposal to require employers to spend at least 1.5 percent of payroll on worker training is just the beginning of excessive regulations on business. A 1990 report from the Commission on the Skills of the American Workforce, headed by Ira Magaziner, recommends that such training be in the form of accredited programs, provoking Postrel to huff: "A new 1.5-percent payroll tax would be a minor intrusion compared to having Washington dictate just how to manage your own workplace." Lest she be criticized for overstating her case, Postrel continues: "A lot is at stake, starting with the very existence of small businesses. No, a single training mandate won't wipe them out. But the attitude behind it will."

And who is behind Magaziner? Postrel believes:

To figure out the likely details of a training mandate, you have to go to the source—a highly publicized 1990 report from the Commission on the Skills of the American Workforce. The commission's head was Ira Magaziner, a business consultant and key Clinton adviser. Hillary Clinton sat on the board of the sponsoring National Center on Education and the Economy. The report makes clear just what's behind the training plan: a deeply held belief that every employee in America should be centrally managed by Ira Magaziner and his friends.

*reason, December 1992*

## The Sexual Contract

The "Consensual Sex Contract" was created and distributed by the National Center for Men, an organization in Brooklyn, New York, dedicated to the "fight for men's equal rights." According to a press release that accompanied the contract, the agreement should be signed before the couple has sexual intercourse as a safeguard against accusations of rape.

AGREEMENT BEFORE LOVEMAKING entered into by \_\_\_\_\_  
and \_\_\_\_\_, this \_\_\_ day of \_\_\_\_\_, 199\_\_.

WHEREAS, the parties to this agreement want to be sexually intimate,

but also want to avoid the misunderstandings that sometimes occur after sex,

Now, THEREFORE, the parties enter into the following agreements (check one declaration from each pair):

- r We want to have a relationship that may lead to sexual intercourse.
- r We want to have sex but without intercourse.
  
- r We want to have sex as a way of expressing an emotional commitment that may eventually lead to marriage.
- r We want to have a sexual relationship but we're not ready for marriage.
  
- r We want our relationship to be monogamous.
- r We both want the freedom to see other people.
  
- r We want to have sex in order to conceive a child.
- r We're not ready to be parents now. If an unplanned pregnancy occurs, neither one of us will try to force the other into parenthood.
  
- r We want our sexual encounter to be discreet.
- r We want the whole world to know about our love for each other.

Neither of us may claim to be the victim of sexual harassment or assault or rape as a result of the acts which are the subject of this agreement. By signing this contract, we acknowledge that the anticipated sexual experience will be of mutual consent.

We understand that this contract may be terminated at any time by either one of us *except* during the sexual activity contemplated by this agreement.

We understand that no provision of this agreement relieves us of the obligation to treat each other with caring and mutual respect.

IN WITNESS THEREOF, the parties execute the aforementioned agreement.

(Man's signature)

(Woman's signature)

The Consensual Sex Contract, 1992

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U.S. Laws = Communist Laws?

More government programs? David Boaz, the executive vice presi-

dent of the Cato Institute, wonders when the American people are going to figure out that government control tends to cause more mayhem than good: a failing educational system that seems to gobble up funds with no results; a welfare system that produces dependents; a drug regulation program that keeps sick people at bay while it conducts tests and pushes paper.

When I hear American politicians proposing to turn our health care over to bureaucrats, or to pour more money into the failed war on drugs or the stultifying public school system, or to shackle our financial system with more regulations designed to solve problems of the past, I can only think, "Get a clue, man. Boris Yeltsin has figured out that government control doesn't work. How long is it going to take us?"

Cato Institute Policy Report, *January/February 1992*

Kueper is Free to Stop Smoking. . .

Can a cigarette company be held responsible for a smoker's health? A case involving an Illinois man dying of lung cancer who sought monetary compensation from the tobacco industry was dismissed in January. This was the first such case concluded since the Supreme Court ruled that warning labels on cigarette packages do not exempt the industry from lawsuits claiming personal injury.

The prosecution for Charles Kueper—like a good communitarian—argued that the tobacco companies displayed "utter indifference to the suffering of others" by concealing the health-risks involved in smoking, withholding research information, and disseminating deceptive advertising.

The defense—like a good libertarian—countered that it was Kueper's own decision to smoke more than a pack and a half a day since his youth. "The ultimate issue in this case is whether or not someone who chose to smoke despite warnings over 20 years and withstood warnings from family and friends. . . ought to be able to come in here and say, 'Give me damages,'" stated Paul Crist, an attorney for R.J. Reynolds Co., in his closing arguments.

At least 60 such cases are yet to reach the courtroom, say legal experts.

### What About a Citizen's Responsibility?

Drawing on more than 20 contributors, numerous consultants, and a huge budget from the Pew Charitable Trust, the Center for Civic Education and the Council for the Advancement of Citizenship have produced *CIVITAS: A Framework for Civic Education*. The monograph, which consists of 665 tightly printed pages, finally addresses the role of the citizen on page 611. The page is divided into two treatments: "RESPONSIBILITIES OF THE CITIZEN," AND "THE RIGHTS OF THE CITIZEN." So far so good.

The treatment of Topic 1, though, is given less than one page. Half of that page reads:

*Citizens have rights (the liberal-democratic tradition).* This view holds that the rights of citizenship are important primarily because they enable citizens to protect themselves from the government and to advance individual liberty and interests. It emphasizes that whether or not one assumes some or all of the traditional obligations of citizenship is a matter of choice. Citizens have the right to choose the degree of involvement they wish to have in civic affairs and, therefore, have a right not to be involved at all, to be slightly involved, or to be fully active participants. Although participation is entirely voluntary, it would be imprudent for citizens not to keep watch through some degree of participation over those placed in office to safeguard their rights.

Then follows a section on citizens' *rights*. . .

*Civitas*, 1991

### A Right to Choose Pepperoni?

Last November, Rep. Dan Glickman (D-Kan.) proposed, and Congress passed, a provision that exempts Pizza Hut from inspection of its meat-topped pizzas for school cafeteria consumption.

The provision, which would block inspection by the U.S. Department of Agriculture, allows Pizza Hut to enter the \$500 million-a-year market which was previously off-limits to all fresh-pizza makers because of safety restrictions on the meat toppings.

Glickman, in whose district Pizza Hut is headquartered, maintained that the safety regulations hindered schoolchildren's freedom of choice in selecting pizza toppings. He called the old law "(b)yzantine, outdated, and quite honestly, an anti-competitive regulatory structure" that denied children the right to choose their lunches.

The Washington Post, *November 29, 1991*

### Hands Off "Bush Killa"

Oakland rapper Paris has released a song, "Bush Killa" on the album *Sleeping with the Enemy*, that portrays him stalking and killing President Bush, whom he blames for setbacks in racial inequality and neglect of urban and minority issues.

The album's inner sleeve depicts Paris awaiting Bush in ambush in front of the Capitol, and the song climaxes with a Bush speech interrupted by gunfire.

Anticipating objections that the song violates statutes criminalizing threats against the president's life, the ACLU issued a statement to accompany the album's release, saying that any moves to suppress or censor Paris' work would be "politically wrongheaded and constitutionally indefensible." The song, the ACLU contends, is a political protest, not a "meaningful threat."

The Washington Post, *December 2, 1992*

## From the Communitarian Corner

### How Imminent Does "Imminent Danger" Have to Be?

Larry Hogue is probably the best-known man on West 96th Street, Manhattan—to residents, police officers, and mental health officials alike. One resident reports the mentally ill and chemically addicted homeless man hurled part of a stone park bench through her car window. Police officer Heidi Higgins has wrestled with him on the sidewalk. And he assaulted a local teen-age girl and threw her into moving traffic, where she was almost run over by a Con Ed truck.

In the seven years Hogue has been on West 96th Street, he has been

in and out of the mental health system about 30 times and has been detained by police more than 40 times. One resident summoned the police after a violent encounter with Hogue, only to be assaulted by him again seven hours after he had been carried away in a straitjacket.

Once in a mental institution and off drugs, Hogue's condition improves, and mental officials release him to the streets again. This has become a recurring pattern that is legally impossible to halt, says Richard Surles, New York's Commissioner for Mental Health: "The fact that once he becomes a citizen again he elects to use drugs. . . is not grounds for me to hold him."

New York City Assistant Deputy Attorney Paul Schectman has told the court he thinks Hogue should be involuntarily committed to a mental institution in order to put an end to his assaults and to the revolving-door treatment. But, as Schectman explains, Hogue must be proven an "imminent danger to himself or to others" for such action to be legally viable. "And I say, 'Geez, when we know that he's going to do it tomorrow, isn't tomorrow imminent enough?'" Asks Schectman. "And the answer seems to be, 'Imminent means now.'"

60 Minutes, *December 13, 1992*

### Converting Crime into Service

In Manhattan, petty offenders who once left Criminal Court unpunished are now pitching in to clean up the city. Under a new program, defendants in Criminal Court are discharged on the condition that they perform up to ten days of public service for the city without pay. The crimes range from shoplifting to soliciting prostitutes; and the punishments, from cleaning subway platforms and joining sanitation crews to helping out at homeless shelters.

From this source of volunteer labor, the city has generated an average of 275 work assignments a week. One out of six offenders tried in Criminal Court walks away with a public service mandate.

Charles H. Solomon, the supervising judge of Criminal Court, said the new program has introduced punishments that finally fit the crime. "Before we did not have any choice in cases involving quality-of-life crimes and petty offenders because fines and jail sentences were not

going to work," he said. "[But] these people are no longer going to be allowed to walk away free. Of course, a corollary benefit is that streets get cleared and parks picked up."

Previous alternative sentencing programs were not successful because they lacked the support of all institutions involved. Yet this program has not only a sound plan but also the cooperation of the Manhattan District Attorney, the New York State Office of Court Administration, and the office of the Deputy Mayor for Public Safety.

The New York Times, *March 8, 1992.*

### Stopping Drugs with Barricades

Karen Daden has watched her neighborhood in Bridgeport, Connecticut, deteriorate into a growing drug market. The burned-out buildings and vacant lots have earned the community the name "Beirut." According to city officials, there have been 55 murders and 3,000 burglaries here in the past three years. And this is due largely, city police say, to out-of-towners exiting the highway for a convenient drug-stop on their way elsewhere.

"They pull over, get their drugs and head back to the highway. Meanwhile, we've got older people in this neighborhood who . . . can't go out because not only is there gunfire every night, there's gunfire in the daytime, too," says Daden.

Meanwhile, city officials have concocted a plan to stem such traffic: barricades throughout the Bridgeport community that will discourage quick pick-ups and maybe even increase the number of buyers arrested.

"People are not likely to come to this city if they know they'll be driving all over looped streets, stopping and turning around, trying to find drugs with the possibility of having their nice cars, their jewelry, their money ripped off as they look," explains Captain Hector Torres of the Bridgeport police.

Police hope the barricades will also mobilize residents to take back their streets. A neighborhood police station has already been installed, and block watches, street cleanups and community gardens are next on the agenda, officers say.

The New York Times, *October 29, 1992*

## A Community-Oriented Plan to Ration Health Care

Faced with spiraling costs, an aging population, and ever more advanced—and expensive—medical technologies, a Dutch government committee pondering health care options has raised a now-familiar question: how to structure a health care system that serves the community's greater good while making difficult choices about what procedures or operations should not be covered? Adopting a plan similar to Oregon's rationing proposal, the committee has attempted to outline a blueprint for such choices, drawing the line short of homeopathic medicines, dental care for all adults, and *in vitro* fertilization; while allowing for care for sports injuries and custodial care of the elderly in nursing homes.

What is new about the proposal is that the committee does not assume that every Dutch community will adopt these suggestions. Using a "community-oriented approach," the plan allows for variation in the various forms of care covered, so long as there is consensus on the principle that the needs of the community must precede those of the individual.

Under this plan, the first step is to identify categories of treatments and rank them according to the community's priorities. The second step is to take into account the cost-effectiveness of each combination. And the third is to determine which combinations should be covered by a basic health care package, using the following criteria:

- is the care necessary from the community's point of view?
- is it demonstrated to be effective?
- is it efficient?
- can it be left to individual responsibility?

Hastings Center Report, *January-February 1993*

# The Community's Pulse

## Deficit Reduction

When confronted with a full range of choices in a manner paralleling the congressional budget process, beginning with a budget resolution exercise to reduce the deficit, a random sampling of the public would not eliminate but would deeply cut the deficit, by an average of **62%**. However, when confronted with eight major revenue items and twenty major spending items, those interviewed would back down to a smaller net deficit cut of **23%**.\*

Percent that favor increases in the following taxes to cut the deficit:

- 72%** pollution taxes
- 71%** tariffs
- 64%** *taxes on alcohol and tobacco*
- 59%** taxes on corporate income
- 50%** taxes on user fees

**Two out of three** would want to keep social security and personal income taxes the same; and only a small minority are for cutting them, 14% and 18%, respectively.

Percent that favor spending increases in the following areas:

- 23%** for new energy sources
- 6%** for education and job training
- 5%** for arts, humanities and public broadcasting
- 4%** for the environment
- 2%** for veteran's benefits

Percent that favor spending cuts in the following areas:

- 75%** cuts in military foreign aid
- 66%** cuts in the CIA and other secret intelligence agencies
- 63%** cuts in nuclear warhead production and maintenance
- 63%** cuts in national defence
- 49%** cuts in spending on embassies and diplomatic service
- 52%** *cuts in the space program*

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\* Responses are from a December 1991, national, random telephone survey of 1000 adults, part of a bipartisan series sponsored by the Americans Talk Issues Foundation and conducted by the Public Interest Polling project of the Congressional Institute for the Future. Americans Talk Issues Survey #18, November 12, 1992.

## Redefining Politics, Part II

I am in sympathy with important elements in the Communitarian Platform. Against the thin, contractual, and rights-driven language of the liberal view of politics, communitarians point to the need to focus on reciprocity, our common engagements with each other as citizens. Against the state-centered view of public agency that has characterized conventional welfare-state theory and policy, communitarians resurface the concerns of thinkers like John Dewey and Jane Addams for community organizations like family, religious congregations, and voluntary associations as seedbeds in which mutuality, attachment, and personal responsibility are nourished and cultivated. Finally, against the polarized, moralistic clashes in our time—where every issue (abortion, affirmative action, crime, the state of the inner cities, the environment) tends to become the occasion for battles cloaked in the language of absolute good and evil—communitarians seek to develop a “middle ground” that balances contending principles of free expression and development with social obligation and meaning. This, of course, also constitutes an effort to find a politically viable point of view. These themes are all welcome, indeed.

But we disagree about the ends and nature of citizenship and politics. Etzioni, like other communitarians, sees citizenship as most importantly involving questions of values and morality that derive from our attempt to forge a common way of life. This perspective has recently emerged across the political spectrum in counterpoint to the liberal view of citizenship and politics, which focuses on rights and allocation of resources and has a limited, institutional conception of the citizen’s role. I am convinced, however, that neither an institutional nor a values-oriented approach is sufficient. We need to renew an understanding of citizenship as serious stakeholding in the nation. People *become citizens* as they do practical politics, defined as the work of citizens in solving public problems.

In the liberal view, politics is mainly about the protection of rights (or “negative liberty”) and the allocation of scarce resources (claims to which have increasingly taken on rights language as well—the “right” to housing, the “right” to medical care, and so forth). Allocative politics has become the actual practice in America. The professionalism of our society has changed citizens into clients. We have lost Lincoln’s government “of the people, by the people and for the people.” People look to politics to generate benefits.

A liberal, institutional view of politics puts citizens on the sidelines as claimants and as aggrieved, righteous, innocent spectators. But this stance also creates a growing crisis. The nation fragments into a myriad of contending interest groups with often conflicting rights claims: young workers against older Americans on social security, taxpayers in suburban communities against inner cities needing services, blacks against whites, the Moral Majority against the advocates of “Peace and Justice.”

Against this background, the Communitarian Platform proposes a shared set of values that stems from the proposition that we all live in community. Etzioni seeks to distinguish the civic involvements of daily problem solving and moral concern from “politics,” which he defines in a government-centered sense. Other communitarians reintegrate politics and values more directly after the fashion of John Dewey. For instance, Jeffrey Bell, former Reagan speechwriter and a conservative, communitarian voice in this discussion, argues in *Populism and Elitism* that “the setting of a society’s standards is, in the final analysis, what politics is about.” The dilemma presented by a communitarian, values-oriented view is that there is no transcendental ground from which to determine *whose* values, virtues, and understandings of the community are to be accepted as the norm. Left, right, and center all advance their own views.

Yet there is another current in American history: practical politics. Politics (from the Greek, *politicos*, meaning “of the citizen”), always entails resource allocation and matters of morality and justice. But it is best understood in different terms, essentially as the process of public problem solving: the give-and-take, messy, everyday activity in which citizens set about dealing with the issues of our common existence, the general issues of the public world. I and my colleagues in Project Public Life, the citizen-education initiative I direct, find that politics and

citizenship take on life when people learn to understand their own problem-solving efforts as political and to “map” and negotiate the politics of their environments. Challenging young people to connect their own problem-solving efforts to the larger world of public politics is far more effective civic education than exhortations to this generation about civic virtue and obligation. Moreover, we have seen that unless young people learn politics, their projects and their “leadership development” can lead them to painful conflicts with their institutions and to further alienation.

American public life is deeply troubled today because we have largely lost practical politics. This loss, in turn, is a consequence of the breakdown of the places in which it was practiced. “Mediating political institutions” like political parties, settlement houses, ethnic organizations, public-minded churches and synagogues, active unions, and neighborhood schools once connected people’s everyday lives to larger arenas of governance. They were different from insular community institutions, charities, and other groups which have social use in cultivating mutuality—and have implicit connections to public problem solving—but which were not open, diverse, or public in character (a distinction that renders the fuzzy idea of “civil society” not very helpful in diagnosing our political crisis). Mediating political groups, for instance, were settings in which young people, mentored by adults, once learned public skills: how to form productive public relationships; how to negotiate with people they might not agree with; how to analyze decision making; how to recognize different interests; how to negotiate, bargain, and engage in public give-and-take.

Most of these institutions still exist, but they have become professionalized. As a result, they have lost their public, open, diverse character. Today, people look to specialists to solve problems and, on the larger canvas, to do politics. But while professionals—like politicians—have important roles in solving the problems of our society, they cannot begin to solve them alone.

Etzioni and I agree on the need for Americans to find overarching commonalities. But we differ on *how* such discovery is best achieved. In Etzioni’s terms, people come to awareness of things in common through appealing to each other in a “moral voice.” In my experience, respect and awareness of commonality among diverse groups are more frequently

the products of pragmatic work, not efforts to produce understanding. Blacks in the Woodlawn area of Chicago and white ethnics in Cicero, for instance, have different views of racial justice, based on different histories. Seeking common understanding is liable to deepen the awareness of the divide, without any mechanism for bridging it; in contrast, finding ways to work together on issues like housing and crime notably improves race relations. Similarly, moral voices of Jewish pro-choice women and Hispanic Catholic pro-life women in New York can drown out the possibility of collaboration on problems like teen pregnancy. When groups with divergent understandings of justice and morality develop practical work together out of different *interests*, it can teach mutual respect. Our nation is fractured because we have lost the means through which in the past groups engaged in the messy process of negotiating their way in the world, realizing through that process that their world was held in common.

Finally, practical politics highlights a different way of understanding the “encompassing context” of smaller, local communities. To rebuild mediating institutions and to reintegrate a badly fractured nation, the language of the *public* is more fruitful than the language of *community*.

Community implies density, trust, and lasting relations. The romantic fuzziness associated with the term is heightened by its application to widely different relationships: business community, national community, world community. Moreover, invocation of the national community is fraught with dangers that conservatives like William Schambra have observed: the melting and consequent obliteration of the particular, traditional, and historically grounded. Schambra contrasts the language of “great community” employed by 20th-century progressives with the language of particular communities employed by Ronald Reagan. Yet Reagan’s vocabulary lacked a context-naming concept to help citizens and groups map their relation to public governance. Hence, it was sentimental, like Bush’s “thousand points of light.”

In contrast, the concept of public arena reintroduces a distinction between public life and private experience that modern therapeutic language (“shared feelings”, “self-esteem”) and protest language (where every issue becomes the occasion for a Manichean division between good and evil) both obscure. Such a distinction is based not on the classic

republican ideal of civic virtue detached from private interests. It grows instead from recognition that although people's self interests lead them to public action, the best principles of action in public are different from those in private. Moreover, through productive, practical politics one's interests can broaden. In public we can learn to work with people with whom we disagree sharply and do not want to live "in community."

Thus, the concept of public is more effective than community in generating an understanding of shared fate and common principles, precisely because it is less hortatory and more pragmatic. It creates a space for different communal moralities. A public arena draws attention to the notion of a "commonwealth," a reciprocal exchange of public obligations and public goods. But it recognizes different interests, values, and trajectories, and the ways people learn to engage the public world in their distinctive styles, through their own experiences.

*Harry C. Boyte*  
*Senior Fellow, Humphrey Institute of Public Affairs*

There is no inherent contradiction between moral voice and working out differences; both are necessary for community-building. Indeed, one enhances the other. "Worked out" patterns that are deemed to be legitimate create much more community building than those that do not. And moral consensus that is invested in shared interests is stronger than consensus that is not so invested.

True, moral voices can grow shrill. But the polarization between the extremes of the abortion debate is not typical. On most issues, from the environment to smoking, from civil rights to government regulation, we work out compromises that often do not satisfy the diehards but reflect the consensus of the community. Just as one should not abandon cars because some drive them recklessly, so one should not give up on the moral voice because some raise it too dogmatically.

I fail to see why the term "public" draws more attention to shared interests than the term "community." Indeed, most experts on public opinion keep reminding us that there is not one public but only various

segmented publics. At best the term is amorphous and ephemeral. Who is in the public? Who is entitled to speak for it? What sways it? It seems often like a big blob that is pushed around by the media and politicians— unless it is anchored in a community and its mediating institutions.

As to the fact that people use the term “community” to refer to the social networks and moral voices of various constituencies, or to their yearning to extend those further (even worldwide), I fail to see why that should trouble anyone. As long as these communities see themselves as constituting parts of still more- encompassing communities and, hence, open to and cooperative with one another communities (rather than be hostile to them), community bonds will work against belligerent groups. And the moral voice of communities will work against those who abandon their children, discriminate, sexually harass, or otherwise violate values which we seek to affirm.

*Amitai Etzioni*

*This is the last of a two-part Dialogue between Harry C. Boyte and Amitai Etzioni.*

**Nothing New Under the Sun**

Freedom is but the negative aspect of the whole phenomenon whose positive aspect is responsible-ness. In fact, freedom is in danger of degenerating into mere arbitrariness unless it is lived in terms of responsibility. That is why I recommend that the Statue of Liberty on the East Coast be supplemented by a Statue of Responsibility on the West Coast.

Viktor E. Frankel, *Man's Search for Meaning*,

p. 210

# Community Bulletin

## Community Service & Health Care

*Preserving a Tradition of Service* (Order Code: ISBN 0-87125-162-0; #730, price: \$7.50) is the Catholic Health Association's (CHA) examination of issues pertaining to tax-exempt status and whether institutions are fulfilling their charitable tax-exempt purposes as not-for-profit organizations. It will assist healthcare providers in becoming informed participants in the tax-exempt status debate.

*Social Accountability Budget for Not-for-Profit Healthcare Organizations* (Order Code:

ISBN 0-87125-187-6/

#816, price: \$27.50) has been adapted from CHA's *Social Accountability Budget: A Process for Planning and Reporting Community Service in a Time of Fiscal Re-straint*.

To order either publication, write: CHA, **Publication Department**, 4455 Woodson Road, St. Louis, MO 63134.

## The Communitarian Network

If you share some of the ideas expressed in this journal and are interested in joining a movement of like-minded people and organizations who have come together to shore up our moral, social and political environ-

ment, contact: *The Commu-*

*The Responsive Community Bulletin* provides community groups, organizations and individuals with an opportunity to reach others with news of events, publications and general interest. To use the *Responsive Community Bulletin*, contact: *The Communitarian Network*, 2130 H Street, NW, Washington, DC., 20052. Tel: (202) 994-7997. Fax: (202) 994-1939. (The cost is \$1.50 per word, with a minimum of 20 words per entry. If four or more entries are ordered, the cost is \$1.25 per word. Payment must accompany all orders.)

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## COMMENTARY

### Klein's Ad—Beyond the Pale?

We want to express our disgust for one of the advertisements that we saw recently. We cannot imagine why you would allow your company's advertising to sink to such vulgarity.

The advertisement displayed a young male grabbing his crotch, a seemingly popular and disgusting behavior all too often expressed by some music idols.

You have allowed your company name to be linked to offensive public sexual exhibitionism. We hope that you will have the sufficient integrity to re-evaluate the judgement of your advertising management. Surely the success of your company does not depend upon resorting to blatantly decadent advertising.

*Charlotte Dowell  
Burlington, Iowa*

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I believe that companies such as yours, who enjoy the reputation of being a household word, have a particular responsibility to that group which bestows on them that luxury. The 'particular responsibility' which I refer to here is in advertising.

I will not pretend to know the demographics of the group The Calvin Klein Company directs its advertising, however, I do believe it is broad and it is young.

Your advertising continues to become more debasing to both sexes. Ads for women's jeans that barely show the garment and place women as objects to own. Young men grabbing their genitals is an insult to the audience you seek to sell. Crude advertising, directed at young people that may be too young to know they are being used and insulted.

Give us a break—give ‘it’ a break. Advertise as if you care about the consumer that made your name a household word.

*Karen Perkins-Butzien  
Portland, Oregon*

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Give me a break with your “squeeze my organ” ad—a wonderful contribution to the vulgarization of the U.S.

*Marvin Zonis  
Chicago, Illinois*

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We find the attached advertisement offensive. Surely you can find more alluring ways to peddle your underpants than to resort to surly, crotch-grabbing, rappers. We have bought Calvin Klein in the past—bought into your “style” so to speak—but as a result of your increasingly vulgar definition of “style” we will not be buying your products in the future.

Just a quick note to let you know what we are and are not so you cannot comfortably stereotype us. We are young professionals, both 28, parents of a two-year old boy. Like most everyone else we enjoy fine things and dress and decorate with style. We are not humorless, Christian fundamentalists, hell-fire bent on censoring your right of expression. Neither are we heads-in-the-clouds types opposed to the marketplace. But we do believe that society needs a strong moral dimension. Like a growing number of mainstream Americans we are concerned that Madison Avenue is polluting everyone, but especially our youth, with meaningless amoral trash.

*Roger Still and Cherise Still  
Independence, Missouri*

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Your recent advertising campaign featuring Marky Mark grabbing his crotch is vulgar, tasteless, and in at least one case—mine—self-

defeating. Barring a complete turnaround of your company's attitude toward its responsibility to the society that sanctions its activities, I will never again purchase Klein products.

Of course, you will crow about freedom of the press and your First Amendment rights. But your willful neglect of your First Amendment *responsibilities*—to uphold bare minimums of civility and to respect the most elementary community standards—actually hastens the day when those rights are curtailed by force of law.

This country doesn't need more bureaucrats and regulations, but I will cheer the day when a Bureau of Advertising Standards (don't laugh, they already have one in England) is created to curtail the reckless excesses of those few companies unable to police themselves. Perhaps your Marky Mark series will be the catalyst for just such an agency.

*Ben Morehead*  
*Arlington, Virginia*

Is your product good enough to make it without absurd commen-  
tary? Cotton is cotton!

*John B. Gilman*  
*Green Bay, Wisconsin*

Drawing by Bob Mankoff; © 1993 The New Yorker Magazine, Inc.

## Art Can Constitute Sexual Harassment

Amitai Etzioni was wrong to exclude works of art from prosecution under sexual harassment law. In his article, "Sexual Harassment, Second Degree" (Winter 92/93) he berated a school teacher who complained that the display of a work by Goya constituted sexual harassment. By making art not actionable, Etzioni puts us into the unnecessary quandary of having to define and exclude from prosecution displays of art.

A work of art can be pornographic, and therefore, constitutes a form of intimidation and display characteristic of sexual harassment. To believe that simply because something constitutes a work of art, it cannot be sexist, degrading, or offensive is naive.

The law cannot define the artistic quality of the sexually suggestive display. The California Educational Code requires only that the display have "the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment." Displays of sexist, pornographic materials have this effect, and Goya's works are definitely sexist, pornographic works of art.

While one could distinguish aggravated types of sexual harassment, as Etzioni has, where a person is pressured to have sex under duress, from other forms of sexual harassment, the net effect of displaying pornographic materials is just as hostile. The display speaks loudly, and the whole environment is affected negatively. Such "mass harassment" doesn't seem any less harmful than the aggravated type Etzioni singles out.

Those trying to define sexual harassment as "not art" exist in a historical and political vacuum. The community has the right to address this negative and harmful impact created by sexist behavior and public displays, in the workplace and elsewhere, of pornographic,

i.e. sexually degrading, materials. If anything, the sexual harassment laws need to be expanded and expounded upon, not limited.

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## Sustaining the Politics of Hope

Ben Barber writes (“What is Communitarianism Anyway: Review of Robert Booth Fowler’s *The Dance with Community*,” Winter 1992/1993) that he is “grateful” to Booth Fowler; I’m glad. I wish I could feel as grateful to Professor Barber. But his caricature of the public role of religious faith—especially Christian faith—leaves me, I must confess, in a distinctly uncharitable mood.

Surely it is time for even American academics of a decidedly secular cast of mind to stop reading the history of Christianity as if its only high points (so to speak) were the Crusades, the Inquisition, and the Salem witchcraft trials—none of which, it should be noted, produced anything remotely resembling the human suffering caused by the “artificial” political communities spawned by Marxism-Leninism. But the point is not comparative horror stories; the point is historical accuracy. In recent years, for example, Roman Catholicism (which one suspects Professor Barber would regard as the apotheosis of an “authoritarian” religion) has been a powerful force in forming communities of democratic social change in venues as various as Santiago de Chile, Manila, Krakow, and Prague. Why does the Catholic human-rights revolution get such short shrift in discussions of communities for social change? Dare I suggest a certain myopia at work here?

And what is this business about a “secularized, disenchanted world” in which “secular communities of cooperation around common material goals” are “perhaps” the only “healthy” models of community we have?

First of all, *who* are these secularized masses? They certainly don’t show up in the survey research on American beliefs, attitudes, and values. You may find a lot of secularized disenchantment in the Modern Language Association, the Screen Actors Guild, the *New York Times*

editorial board, and the CBS lunch room; you're not likely to bump into it on the streets of Indianapolis, Wichita, or Atlanta. Moreover, if Professor Barber is really looking for models of "healthy" community, I have some suggestions for a bit of academic tourism on his part: Spend a day at the Northwest Crisis Pregnancy Center in Washington, D.C. Or a Sunday at Fourth Presbyterian Church in Bethesda, Maryland. Or a week at feisty and independent Messmer High School in Milwaukee. Or a month at either Damien Ministries—a Catholic AIDS ministry—or with Chuck Colson's Prison Fellowship. America does not lack models of "healthy" community: they are all around us. And some of these communities, to use a favorite word of Professor Barber's, are very "thick" indeed.

Ben Barber rightly reminds us that democratic politics is a politics of hope. But the hope that sustains democratic politics for tens of millions of Americans is not a hope for salvation through politics: it is a hope that, by placing its salvific expectations in a coming Kingdom of God's making, relativizes the claims of the political and thus creates the social space for a politics of consent, rather than of coercion. It is, in short, a religiously-grounded hope, based on Jewish and Christian convictions about the human person, human community, human history, and human destiny.

It is a community-forming and world-transforming hope to which communitarians might well pay very careful attention indeed.

*George Weigel*  
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#### **Which is the Bigger Mess?**

RAND's Institute for Civil Justice (ICJ) recently released a study examining the effectiveness of Superfund, the program started by Congress in 1980 to make businesses bear the financial burden of cleaning up their waste sites. The question ICJ asks is: how much money is actually spent on cleaning up a site and how much spent on litigation to determine who should pay? The answer: in 1989 the insurance industry spent \$470 million on cleanup claims, 12 percent of which went to the actual cleanup. The other 88 percent, totalling \$410 million, went to lawyers defending policyholders against suits or contesting coverage issues with policyholders.

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