

THE
RESPONSIVE
COMMUNITY



RIGHTS *and*
RESPONSIBILITIES

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Toward a National Conversation

Archibald MacLeish, in an essay published in 1949 as a warning against the mounting hysteria of anti-Communism, wrote, “The soul of a people is the image it cherishes of itself; the aspect in which it sees itself against its past; the attributes to which its future conduct must respond. To destroy that image is to destroy, in a very real sense, the identity of the nation, for to destroy that image is to destroy the means by which the nation recognizes what it is and what it has to do.”

The question I raise here is the following: Do we have a clear and an adequate image of ourselves in the post-Cold-War world, given all the threats to political stability and human welfare both foreign and domestic, given the dangerous fragmentation of a world in which the closeness imposed by modern communications and the global economy has reemphasized the differences within the human family? What is the United States going to be *for* in the twenty-first century? What picture of an ideal America is going to inform our struggles with current problems? What notion of shared commitments, mutual obligations, and civic virtues, will help us come together here in the United States, across the fault lines of our cultural diversity, to solve our common problems?

Writing a few months ago in the *New York Times*, Henry Louis Gates, Jr. of Harvard University put the challenge of Minister Louis Farrakhan and his hate-mongering disciple, Khalid Abdul Muhammad, in perspective by quoting Rabbi Yaacov Perrin’s eulogy for Dr. Baruch Goldstein, the man who massacred worshipping Palestinian Muslims in Hebron: “One million Arabs are not worth a Jewish fingernail.”

“But we have heard this voice before,” Gates writes. “It is the voice of messianic hatred. We hear it from the Balkans to the

Bantustans; we hear it from Hezbollah and from Kach. We hear it in the streets of Bensonhurst. And, of course, we hear it from some who profess to be addressing the misery of black America.” Professor Gates goes on to connect these and other examples of murderous utopianism to the weakness of liberalism and to less lethal forms of what he calls identity politics.

“There has been much talk about the politics of identity,” Gates writes, “a politics that has a collective identity at its core. One is to assert oneself in the political arena as a woman, a homosexual, a Jew, a person of color....The politics of identity starts with the assertion of a collective allegiance. It says: This is who we are, make room for us, accommodate our special needs, confer recognition upon what is distinctive about us. It is about the priority of difference, and while it is not, by itself, undesirable, it is—by itself—dangerously inadequate.”

Glancing around our nation does not give much reassurance. Not only does Khalid Abdul Muhammad of the Nation of Islam travel from campus to campus spewing bigotry and leaving divisive squabbles in his wake, but a recent survey of opinion within the African-American community found a majority (62 percent) who found some positive elements in Farrakhan’s message and also detected a rising amount of black nationalism. Shortly before that, the National Conference of Christians and Jews released the results of a survey of race relations commissioned by them and done by Lou Harris. The results revealed, perhaps unsurprisingly, that among European-Americans, African-Americans, Asian-Americans, and Hispanic-Americans, disturbingly high percentages of each group held negative stereotypes of each of the other groups. So much for the myth of the “new majority,” the idea that people of color are united against European-Americans. No wonder the village square these days is full of sound and fury.

As effective as the politics of difference has been in bringing previously excluded groups into the mainstream of American life (one might, in fact, say because the politics of difference has been so effective in giving formerly silent groups access to the national public address system), rancorous debates are increasingly occupying our attention.

Take, for example, the angry debates in state legislatures around bills to make English the official language of the state, an act that is primarily symbolic and is emotionally resisted for that very same reason (19 states have such laws; Maryland just turned down an “official English” bill). The growing debate over immigration policy will be no less clamorous. From South Central Los Angeles to Crown Heights, from Libertyville to the recent assassination on the Brooklyn Bridge, tensions among racial and ethnic groups in the United States are in a volatile condition.

That this is more than academic is clear if one recalls the hand-to-hand combat within school boards involving such issues as bilingual education and Afrocentric curricula, the dispute over the literary canon at the college level, or the court decisions seeking to remedy past patterns of discrimination in voting rights cases by requiring redistricting or changes in the form of local government so as to guarantee the minority community representation in the legislative body. In most of these cases, and others you can probably think of, public authorities are being asked to confer some sort of official status on a particular cultural group. Large parts of the public sense that this form of particularism is a problem in a system based on universal values of individual rights. Simply saying that everyone must respect everyone else’s ethnic identity, therefore, does not solve the problem.

Furthermore, how is one to embrace cultural equality when one is aware of so many practices one does not admire: polygamy, genital mutilation, the subordination of women in various other ways, the rejection of life-saving science, authoritarian social structures, ethnocentric and racist beliefs, and so on. On what occasions and under what circumstances should the practices of cultural minorities give way to the general society’s rules, regulations, and expectations? At the same time, how can an inclusive American identity be defined so as not to obliterate the particular cultural identities that make America’s diversity so enriching? These are complex matters that require careful thought.

America, of course, has always been diverse, and its diversity has always been problematic, which is the reason for our motto, “E Pluribus Unum.” We take pride in the fact that our nation rests upon a commitment to individual equality and democracy, rather than

upon ethnicity, but we worry about cohesion, and we bounce back and forth along the continuum between the assimilation implied by the “melting pot” myth and the persistence of pre-American cultural identities assumed by the metaphor of the national quilt or the mosaic.

What is our image of the America of the twenty-first century? What kind of America do we wish to be? Is America to become, as Arjun Appadurai of the University of Chicago worries, a collection of exiled groups whose members have loyalties only to their own group, or perhaps to the homeland, rather than a nation of immigrants? Should our image be of an undifferentiated America of “melting pot” individuals without any hyphenated identity? Can it be an America of shared values and commitments that nonetheless retains the modulations of cultural differences, an America in which we are all American *and* something else? Can we define what Henry Louis Gates calls “humanism,” which starts not with a particular identity “but with the capacity to *identify with*. It asks what we have in common with others, while acknowledging the diversity among ourselves. It is about the promise of shared humanity.”

Can we identify those values and commitments we need to share if we are to be a successful society? Is a belief in the Constitution and our political system enough to hold us together without violent friction between members of different groups? To what extent can any inclusive national identity enlist our loyalties if it does not squarely face the issue of social justice? If equal opportunity is to be part of the American ideal, shouldn't we talk about the extent to which it does not exist and how to bridge the gap between ideal and reality?

There is not one of our considerable number of social ills that would not be considerably improved if each of us felt a sense of responsibility for the whole. I was in Savannah, Georgia not long ago, visiting some National Endowment for the Humanities (NEH)-funded projects, and I learned about an oral history project that is reclaiming the past of a residential community called Cuyler-Brownsville. One of the people interviewed remembered his childhood in that neighborhood. His memory was that it was the kind of place where everyone looked out for everyone else, or, as he put it,

“everybody’s mamma could whip everybody’s kid.” I can’t think of a better definition of community or of civic virtue than that. Everyone feels responsible for everyone else. It would be utopian to aspire to the same level of community spirit on a national level, of course, but might we not aspire to some analogous sense of individual identification with the whole?

Two things are required if each of us is to be willing to subordinate our individual self-interests on occasion to the good of the whole: we must feel a part of the whole, and we must see in that whole some moral purpose that is greater than the individual. Our problem is our inadequate awareness of what might be called the sacred order that underlies the social order and is the source of legitimate authority in the social order.

For example, at an earlier defining moment in the nation’s history, on the eve of the outbreak of the Civil War, Abraham Lincoln, speaking between his election and his inauguration in Philadelphia’s Independence Hall—where the Declaration of Independence and the Constitution had been drafted—found the meaning of America in its mission of being the exemplar for the world of the ideals of human freedom and equality set forth in those great documents.

On that occasion, Lincoln said, “I have often inquired of myself, what great principle or idea it was that kept this [Union] so long together. It was not the mere matter of the separation of the colonies from the mother land; but hope to the world for all future time. It was that which gave promise that in due time the weights should be lifted from the shoulders of all men, and that all should have an equal chance.” The speech was not only about slavery but about slavery as a violation of the principles of democracy and the sanctity of the Union—because with the Union rested the world’s hope for democracy.

The Civil War thus became a test of whether democracy, with its promise of liberty and equality, could survive and whether the last best hope on earth could endure. Returning to this theme two-and-a-half brutal years later, at the dedication of the military cemetery in Gettysburg, Lincoln declared that defending the Union was worth the sacrifices exacted by that terrible struggle because the sacrifices made possible “a new birth of freedom.”

The challenge of our time is to revitalize our civic life in order to realize a new birth of freedom. All of our people—from left, right, and center and from all walks of life—have a responsibility to examine and discuss what unites us as a country, what we share as common American values in a nation composed of so many divergent groups and beliefs. For too long we have let what divides us capture the headlines and sound bites, polarizing us rather than bringing us together.

The conversation that I envision will not be easy. Cornel West, for instance, writes that, “confused citizens now oscillate between tragic resignation and vigorous attempts to hold at bay their feelings of impotence and powerlessness. Public life seems barren and vacuous. And gallant efforts to reconstruct public-mindedness in a balkanized society of proliferating identities and constituencies seem far-fetched, if not futile. Even the very art of public conversation—the precious activity of communicating with fellow citizens in a spirit of mutual respect and civility—appears to fade amid the backdrop of name-calling and finger-pointing in flat sound bites.”

Despite the difficulties, the conversation must proceed. The objectives are too important to neglect. What I envision is a national conversation open to all Americans, a conversation in which all voices need to be heard and in which we must struggle seriously to define the meaning of American pluralism. It is a conversation that is desperately needed, and the NEH is in the process of encouraging that conversation: through a special program of grants, through a film intended for national broadcast on television but which will also be repackaged for use in the nation’s classrooms through a bulletin board on the Internet, through the ongoing activities of the state humanities councils, and through creative programming partnerships with organizations throughout the country, including museums that can help to stimulate and facilitate the discussion among citizens from all walks of life.

This will be a risky enterprise, because the NEH comes only with questions—not answers. The outcome is therefore unpredictable, contingent as it is on the course of the discussion and on what we learn from each other as we talk.

However large the challenge, I believe we must reconstruct public-mindedness in America. Without a sense of shared values, individuals are not willing to subordinate personal self-interest to the common good. Our first step out of the moral nihilism of our public and private lives is to define our common identity and to find in it a moral purpose that is worthy of our loyalty.

Sheldon Hackney

Babies' Rights, Mothers' Responsibilities, and AIDS

I introduced New York State Assembly Bill Number 6747 during the 1993 session of the legislature; it provides for the unblinding of test results of newborns who have tested positive for the HIV antibody. This legislation brought me face to face with a condition that was chilling beyond belief. When the issue was first raised in a conversation with the State Medical Society, I was sure there was some missing link that would make the current policy more rational and less ruthless.

Babies in New York State are routinely tested at birth for HIV in a program initiated in 1987 to track the epidemic. Since 1987 approximately 10,000 infants have tested positive for HIV (1,900 in 1992 alone). Incredibly, those babies who test positive are sent home with their HIV status undisclosed to their parents. My proposed legislation would have required the Health Department to notify parents of the HIV status of their babies.

Since introducing this legislation, I have received lectures from people who know with godlike certainty that by not revealing HIV test results, the state is acting in the best interests of mothers. They assure me that the mothers really don't want to know their own status and that telling them their babies', in effect telling them their own,

would constitute an invasion of their privacy and an infringement on their right not to know.

These privacy enthusiasts completely ignore the fact that these mothers are each now answerable for another human life, one whose right to medical care—and, indeed to life—is being violated.

Interestingly, too, some of the same individuals who are demanding access to AIDS treatments still unapproved by the FDA assure me that it doesn't make much difference if HIV babies aren't treated until the disease first manifests itself six months or a year after birth.

But it does make a difference. Seventy-five percent of the newborns who test positive at birth are not true AIDS cases. They have their mother's antibodies, but their own bodies throw these off in a matter of months. If the mother is aware of the condition and exercises caution, the babies can escape the virus.

Under no circumstances should HIV mothers breast-feed their babies. The New York State Department of Health has issued pamphlets recommending that if a woman is known to be HIV-positive, she should be warned about the risks of HIV transmission through breast milk and advised not to breast-feed. The Centers for Disease Control recommended in 1985, because of documented HIV transmissions through breast-feeding, that HIV-infected women not breast-feed their infants. Can you imagine the horror these mothers will experience when they discover that their babies have AIDS and that they may have needlessly transmitted the virus out of ignorance of their own infections?

In the past we have successfully protected confidentiality in cases of sexually transmitted disease, and we can certainly keep all the same safeguards in place. But any reasonable person must allow that a baby's right to survive trumps the mother's right to live in blissful ignorance of her HIV status.

Regarding the 25 percent of the newborns who do have the virus and will actually develop AIDS, recent medical developments have led the CDC and the New York State Department of Health to conclude that early diagnosis of the infection is essential in determining the course of treatment. One of the major concerns in infant HIV is pneumocystis carinii pneumonia (PCP), so doctors emphasize the

importance of PCP prophylaxis to protect the newborn. Mortality rates for these infants is high—the median survival time from the first episode is only one to four months. But many of these early deaths can be prevented. Prophylaxis is available and involves administering antibacterial medication before the onset of PCP. Because PCP strikes so early, however, health care providers lose the chance to prevent it if they have no idea that an infant is HIV-positive.

Another reason for knowing an infant's status at birth or soon thereafter is that HIV infants are subject to a different immunization schedule from normal infants. For example, you wouldn't use the Sabin or live polio vaccine, since this puts the baby at risk for superinfection by the polio virus. HIV children also require a more aggressive approach to everyday childhood diseases, which can be fatal to children with defective immune systems.

I have been repeatedly assured by well-meaning people that if mothers really wanted to know their own HIV status, they would get themselves tested. It sounds logical—but it's wrong. It takes a certain kind of strength to volunteer for testing, particularly when you believe you might have a serious illness. Too many high-risk women don't display that kind of strength. In addition, most individuals just assume their doctors would tell them about anything that may be wrong. Unfortunately, the doctors themselves are not privy to the results of the babies' HIV tests and unwittingly assure the mothers that everything's fine.

The public health workers who handle HIV cases express the sincere belief that more money and staff for counseling could solve the problem. Unfortunately, studies by the Health Department indicate that counseling and voluntary testing initiatives have been largely unsuccessful. Between 1 July and 30 September 1993, for example, in 24 high risk hospitals in New York State where voluntary testing programs are already in place, 226 newborns tested positive for the HIV antibody in the anonymous testing program. Of those 226 babies, only 38 were identified by the voluntary counseling programs. Though some women already knew their own HIV status without the help of the counseling programs, almost 60 percent of these HIV babies left the hospital without their mothers' knowing their status and without being directed into treatment.

It must be obvious that once we undertake to test newborns, we cannot walk away from the results. Those babies, if they were able to give consent, would be pleading for protection from the AIDS virus, just as adult AIDS victims are insisting on state of the art medical treatment. We make medical decisions for those infants, and our highest priority must be their lives.

Nettie Mayersohn

Gun Sweeps: A National Lesson

It is no accident that the gun sweeps in Chicago's public housing projects have caught the nation's attention. The legitimacy of these sweeps has profound implications for the future of civility in American society. We have become so inured to violence that the 15 shootings and eight fatalities during one far-from-atypical weekend in the Robert Taylor Homes do not faze us. We tend to forget that in civil societies children can play outside, all people can walk the streets with impunity, and gunfire is the exception, not the rule. Indeed, if anything resembling such conditions as are now common in inner cities developed in one of our fancy suburbs, S.W.A.T. teams, if not the National Guard, would quickly be called out. The poor and largely black people of the Robert Taylor Homes are treated as second-class citizens, but not, as Congressman Henry B. Gonzalez (D-TX) claims, because of the gun sweeps. They are treated as second class citizens because they are denied the most elementary protection any state owes to its citizens: protection of life and limb.

But, argue civil libertarians, the Chicago Housing Authority (CHA) violated the individual rights of residents with warrantless sweeps. It is here that the national importance of the CHA's situation comes into focus. We are now engaged in a nationwide debate about what sort of measures public authorities may use to enhance public safety. The issues, even in the Robert Taylor Homes, encompass more than apartment searches; the same civil libertarians also try to block

the use of resident photo IDs and screening gates at public housing entrances, two other measures essential for the protection of public housing residents from gangs and drug lords. Elsewhere, the ACLU and its ilk oppose schools that search lockers, neighborhoods that set up drug checkpoints, and so on, ad nauseam.

In all these cases, the underlying issue is a recognition that a civil society requires a balance between carefully observing individual rights and attending to the common good. *Rights are not absolute.* Even the right to free speech, which many consider the most absolute, is clearly curbed by the notion that one may not shout fire in a crowded theater—such shouts endanger the public. Civil libertarians could argue that this ruling violates the right of the shouter to express himself, but such limitations of rights for the sake of the common good are a major component of America’s constitutional tradition. Indeed, while we hear frequent references to the Bill of Rights, much attention should also be paid to the statement with which the founding fathers opened the Constitution: “We the People of the United States, in Order to form a more perfect Union...*promote the general Welfare...do* ordain and establish this Constitution for the United States of America.” This dual attention to both individual rights *and* the good of the community is at the foundation of the American legal tradition.

Precisely for this reason, the Fourth Amendment reads, “the right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* search and seizures, shall not be violated,” of course implying that there are searches that are acceptable. The courts have long upheld warrantless searches that show themselves to be in the public interest. Every time you fly (and often when you enter court buildings and legislative chambers) you pass through screening gates, backed by armed guards, that search you and your effects without warrants. This is exactly what safety at the Robert Taylor Homes requires. In other cases judges have allowed the use of warrantless searches of persons, school lockers, and homes, under a “special needs” doctrine that defines a special need as a compelling public interest (more about this in Steven Yarosh’s essay on page 29).

True, Judge Wayne R. Andersen recently stopped the sweeps. But he objected to searches that take place 48 hours or more after the

shootings. Forty-eight hours leaves police plenty of time to obtain warrants. Even this ruling, which might well be reversed, might be different next time if the searches followed the shootings more closely. Hot pursuit, after all, is considered a legitimate reason for warrantless searches. Indeed, Judge Andersen stated that his ruling does not prevent the CHA from “conducting searches in response to an existing emergency or clear and present danger....”

The “special needs doctrine” must be carefully curbed and circumscribed. Otherwise, whenever police want to search a home, they would only need to declare a special need. Three criteria for limiting such declarations come to mind. First, there should be a clear and present danger (a claim that killer bees from Mexico are attacking us doesn’t quite cut it, at least not yet). Second, an effort to find solutions that do not entail searches should be made (making ownership of guns by all but hunters and collectors illegal would be such a move). Third, any intrusion should be as limited as possible. Other criteria may need to be developed as well.

Note that support for sweeps is not based on majoritarianism, although overwhelming public support for sweeps does exist in embattled communities. In the Chicago case, only four residents lined themselves up with the ACLU attack on the sweeps, while 5,000 signed a motion requesting that sweeps continue. The petition was circulated by a communitarian group, the American Alliance for Rights and Responsibilities. The fact is that the sweeps are in the public’s interest, and the public that will benefit from sweeps includes the minority that opposes them. Even the gang members—insofar as they are frequent victims of gunfire—will benefit. Dead people, after all, have very few opportunities to exercise their rights.

Civil liberties are most directly endangered when sweeps are *not* allowed to take place, when gangs are free to terrorize neighborhoods, and when public authorities stand by helplessly. This is not to declare an open season on the Bill of Rights or suggest that anything goes for law enforcement, but under clearly established limitations we must give more leeway to provide disadvantaged citizens with what affluent Americans always insist on and still largely have in their neighborhoods: elementary public safety.

Amitai Etzioni

HUDDLED MASSES

**Immigration and Political Community
in the United States**

DANIEL J. TICHENOR

Illegal immigration and the arrival of unprecedented numbers of asylum-seekers both haunted American policymakers in the 1980s. Our nation's borders had become porous and inadequately regulated, and as always, racial issues loomed large in American immigration politics. By 1980 non-white newcomers from Asia, Latin America, and the Caribbean dominated all forms of migration to the U.S. Europe, once the origin of nearly all immigration to America, has accounted for only ten percent of total immigration since the 1970s. The uninvited influx of asylum-seekers and illegal immigrants prompted a decade of polarizing debate among policymakers over the entire structure of American immigration and refugee policy. Two major laws, the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990, and their subsequent judicial and administrative interpretation, represent the culmination of this period of policy change. The treatment of aliens in this burst of policymaking reveals both a promising inclusiveness and a disquieting enervation of the responsibilities and perceived worth of citizenship.

A BREAK WITH THE PAST

The widespread support during the 1970s and 1980s for curtailing immigration was nothing new in American politics. Policymakers have long sought to restrict or bar outsiders of non-European races or ethnicities from entering the country. For example, the exclusion of

Chinese in the 1880s and the National Origins Quota system of the 1920s were both efforts to block entrance to all but Northern and Western European newcomers. Policymakers also historically have responded to worrisome illegal immigration by launching campaigns to seize and deport undocumented aliens (particularly Mexicans) en masse. Operation Wetback in 1954 led to the expulsion of over one million Mexican aliens, many of whom were legal residents. The Hart-Celler Act of 1965 stripped away racist national origins quotas, but most reformers intended a new emphasis on family reunification to limit dramatically the number of visas available to Third World immigrants.

Recent immigration reform represents a decisive break with this nativist tradition. The 1986 and 1990 laws made no effort to stop non-white, non-European migrants from dominating immigration into the U.S. Not only did these laws not restrict “new immigration,” they also allowed significant increases in migration from these regions. The IRCA dealt with the illegal population residing in the country by granting legal status to over 3 million illegal aliens. The Immigration Act of 1990 granted stays of deportation to family members of aliens legalized under the IRCA. The 1990 law also raised the cap on legal immigration and allowed even that ceiling to be exceeded by relatives of citizens. In short, immigration reforms expanded alien rights and increased migration to the U.S., even though the original impetus for the law had been restrictionist.

Immigration reform also produced an ideological convergence in favor of sustained immigration. This development was undergirded by two important forces in American politics: the legacy of the Civil Rights movement and the resurgence in the 1980s of free-market economics. The first extensive federal regulations on immigration were enacted amidst the drastic economic and social dislocations of the late nineteenth and early twentieth centuries. As ties between members of the national community assumed greater importance, an agitated society directed its venom against emancipated blacks and new immigrants both from Asia and from Southern and Eastern Europe. These were people whom white America largely saw as imperiling the American way of life. Although the Jim Crow laws produced by this racially exclusive nationalism were undoubtedly more pernicious than immigration restrictions, immigration policy

was linked thereafter in the minds of progressive politicians and activists with the black struggle for full citizenship.

As 1980s immigration advocates on the Left sought to grant entry and protection to powerless alien groups (particularly non-white illegal aliens and refugees), free-market immigration advocates sought to unfetter the labor market and allow the labor supply to accommodate the demands of employers. Conservative think tanks and editorial pages encouraged not simply the free movement of goods, technology, and capital, but the free movement of people across borders. Hudson Institute scholar Stephen Moore praised immigrants for “their propensity to start new businesses” and “their contribution in keeping U.S. businesses internationally competitive.” The key goal of the expansionist Right was to provide American businesses greater access to the immigrant labor market and relief from new regulations such as employer sanctions and job antidiscrimination protection for aliens.

Significantly, the ideological convergence in favor of sustaining robust immigration generated not consensual politics, but a new divide between market-oriented and rights-oriented expansionists. The locus of conflict seemed to shift from a question of *whether* there should be expansive immigration, to a struggle over *who* should benefit from an opening of the gates. In the legislative arena, free market expansionists secured sharp increases in employer-sponsored and skilled-worker visas, as well as cheap alien labor for the agricultural, garment, and hotel sectors. Rights-oriented expansionists secured a generous amnesty program for illegal aliens, a new civil rights agency charged with combating job discrimination against aliens, new protections for temporary farmworkers, legal status for previously excluded refugee groups, generous allocations of family reunification visas, and the removal of many ideological and sexual orientation restrictions.

Obscured among these initiatives was the original purpose of reform: to curb illegal immigration and regain control of porous borders. Instead of representing the centerpiece of immigration reform, the enactment of an immigration control mechanism in 1986—employer sanctions—was clearly subordinate to the decade’s expansionist reforms. Civil rights activists and market libertarians

successfully opposed the creation of a new counterfeit- and tamper-resistant employee identification system. When a pilot program was proposed by Senator Alan Simpson (R-WY) in 1990 to use driver's licenses in conjunction with employer sanctions, it was defeated on the House floor by members of the Hispanic Caucus who likened it to South Africa's apartheid system of passbooks for blacks. Free-market expansionists exempted small businesses from employer sanctions, which the Reagan and Bush administrations viewed as another regulatory burden on U.S. businesses and never enforced strictly. Dampened briefly after the IRCA was enacted, illegal immigration soon returned to peak levels of the pre-reform era.

NOTHING NEW

These distinct rationales for expansive immigration are hardly novel. In his *Report on Manufactures*, Alexander Hamilton noted that it was in the national interest "to open every possible avenue to emigration from abroad." Consistent with his vision of commercial empire, Hamilton perceived aliens as "an important resource, not only for extending the population, and with it the useful and productive labor of the country, but likewise for the prosecution of manufactures." Almost a century later, Andrew Carnegie praised open immigration as "a golden stream which flows into the country each year." He added crassly: "these adults are surely worth \$1500 each—for in former days an efficient slave sold for that sum."

Whereas Hamilton emphasized the financial empire to be reaped from open immigration, Thomas Jefferson's enlightened idealism expressed a special obligation to newcomers. Although he had opposed immigration as a young man, Jefferson wrote in 1817 that the U.S. should be a new Canaan where outsiders would be "received as brothers and secured against...oppression by participation in...self-government." In contrast to Carnegie's economic pragmatism, Ralph Waldo Emerson exalted in 1878 that "our whole history appears like a last effort of the Divine Providence in behalf of the human race." He extolled American opportunity—"opportunity to civil rights, of education, of personal power"—which he saw as an "invitation to every nation, to every race and skin."

The American political community is often characterized as lagging well behind the industrial democracies of Europe in terms of welfare rights. Sociologist Ann Shola Orloff, for instance, emphasizes that the American framers' penchant for dividing political authority has produced an attenuated, even anemic, system of social welfare that pales in comparison to its European counterparts. "Against the backdrop of European welfare states," Orloff writes, "the American system of public social provision seems incomplete and belated." But the issue of how a nation treats those from outside its boundaries reminds us that inclusivity and benevolence encompass more than welfare provision. At the same time, the potential for immigration to erode feelings of mutual economic obligation in a political community and to hurt the nation's poorest citizens most, underscores the limits of viewing immigration policy as a measure of a polity's benevolence.

THE EUROPEAN COMPARISON

The fact that the U.S. permitted increases in alien admissions and extended new rights to non-citizens is striking compared to the political response of many west European nations. European politicians struggled between "national identity" and obligations owed to foreigners residing and working within their borders. In the midst of stunning postwar economic growth, Britain, France, Switzerland, West Germany, and other nations recruited millions of foreign guestworkers (from the Middle East and Northern Africa) to prevent labor shortages and to keep wages in check. In the 1970s, a time of employment scarcity among citizens, anti-immigrant voices began challenging the presence of guestworkers. The politicization of immigration was fueled further by waves of asylum seekers and illegal aliens seeking entry into these culturally homogenous societies. Many people began to wonder whether European civic cultures were capable of assimilating new ethnic and racial groups. New restrictionists in Europe warned that aliens undermined the solidarity and loyalty that common ethnicity and historical experience engenders. As German scholar Kay Hailbronner notes, Germans "think of their nation not as a political unit but as a cultural, linguistic, and ethnic unit."

Several political parties (most notably the National Front parties of France and Great Britain and the *Republikaner* party in Germany)

emerged as standard-bearers of this new breed of nationalist politics. “These movements were built, not surprisingly, on the edifice of anti-immigrant, racist and xenophobic appeals,” writes political scientist James Hollifield. Jean-Marie Le Pen, leader of the French National Front, garnered at least ten percent of the vote in elections throughout the 1980s, sounding the battlecry “La France aux Français” (France for the French).

As a result, the European mainstream was forced to accommodate the Right’s attitude toward immigration. Le Pen’s consistent appeal, drawing on nationalist subcultures of Jacobinism on the Left and Gaullism on the Right, prompted other parties in France to shift their immigration position. The National Front in Britain was weakened not only by a strong two-party system and stout resistance from Prime Minister Margaret Thatcher, but by the co-opting by the Conservative Party of the National Front’s anti-immigrant stance. Britain’s 1981 Nationality Act established gradations of citizenship for immigrants from former colonies. It also instituted conditional birthright citizenship; children born in Britain to parents without permanent residency status are no longer guaranteed full membership. Even Sweden and Denmark, known for their generosity to refugees, imposed strict denial rates on asylees. As immigration scholar Lawrence Fuchs notes, “Europeans generally [have] asked about foreigners, How can we get these outsiders to go home? or, failing that, How can we keep them outside the polity a while longer even as they work among us?” Significantly, the resurgence of restrictive nationalism occurred when most of the migrants seeking membership were non-whites.

Though the U.S. is currently absorbing a similar influx of non-white, Third World nationals, nativist voices reminiscent of the Know-Nothings, American Protective Association, and the Immigration Restriction League were largely muted in the 1980s. Whereas European policymakers restricted the flow of immigrants and refugees to their countries, summarily deported illegal aliens and asylees, and denied full membership to foreign guestworkers (regardless of how long these “guests” lived and labored in their societies), their American counterparts increased alien admissions, made citizenship easier to gain, and expanded the opportunities and protection of illegal aliens and temporary workers.

One can overstate the generosity of pro-immigration reforms. After all, the new employer-sponsored and skills-based visas reflect more strongly a concern for labor-market demands than one for the well-being of newcomers. But pro-immigration reforms certainly reflect an inclusive vision of membership as well as self-interested economic calculations.

THE DOWNSIDE

If the recent expansion of alien admissions and rights demonstrates a promising inclusiveness of outsiders, it also describes an enervation of the bonds between Americans. During the Great Depression, John Dewey argued that freedom in the 20th century required government to secure not only the natural rights of individuals, but also their economic well-being. This new social contract, the heart of the New Deal, raises the question of whether certain obligations owed to disadvantaged members of a political community must be met before newcomers are granted admission and membership goods.

The agenda of rights-oriented expansionists focused resolutely on the compelling needs of individual aliens, yet ignored how increases in alien admission might affect disadvantaged citizens. At its most absurd extreme, political champions of the special lotteries and “diversity” visas, which had been designed principally to benefit Irish aliens, defended those programs using civil rights language and described European immigrants as “disadvantaged” persons.

Absent from this calculus is any serious consideration of policy costs or trade-offs. The absoluteness of rights-based arguments often derails meaningful deliberation of contending claims: whether the presence of numerous unskilled and vulnerable foreign workers perpetuates a segmented labor force, for example, or whether it forces unskilled domestic workers to choose between low-wage jobs with poor working conditions or unemployment. These are questions that never figured prominently in policy debate. Nor were the civic merits of asking U.S. companies (or the state) to retrain citizens to fill skilled positions fully weighed by most policymakers.

The responsiveness of immigration policy reform to the rights claims of aliens and American employers also caused it to ignore how

reforms affected the nation's poorest citizens, of whom a disproportionate number are African-Americans. While economists for several decades had shown that immigrants contribute to the overall economic well-being of American society, less attention has been devoted to their impact on the economic underclass. Significantly, several observers suggest that many Americans are more partial to Asian, Central American, European, and Mexican newcomers than to urban blacks. For example, sociologist William Julius Wilson found in 1992 that the loss of manufacturing jobs in Chicago affected blacks and new immigrant groups very differently. Though less formally educated than black workers, Mexican and other immigrants still lost fewer jobs. When displaced from blue-collar jobs, immigrant workers found new employment faster. Wilson discovered in interviews with Chicago-area employers that employers viewed these groups very differently one from another. Inner-city blacks (especially young black males) were seen as "uneducated, unstable, uncooperative, and dishonest." Mexicans and other Third World immigrants, by contrast, were "perceived to exhibit better 'work ethics' than native workers" largely because they endured poor working conditions, meager pay, and few opportunities to advance. Wilson suggests that the unwillingness of many native blacks to tolerate these wages and conditions has shaped employer attitudes. His findings are supported by a General Accounting Office report claiming that janitorial firms in Los Angeles replaced unionized black workers with non-unionized immigrants.

The preference for immigrant labor is not a new development. More than a century ago, Frederick Douglass lamented that "every hour sees the black man elbowed out of employment by some newly arrived immigrant." Stanley Lieberman's study of job competition in the expanding urban labor markets of the late nineteenth century suggests that new immigrants were preferred over southern blacks who had migrated north.

Competition for employment is compounded by the fact that immigrants place special strains on government services in major cities and metropolitan areas. Six cities and metropolitan areas—New York, Los Angeles, San Francisco, Chicago, Miami, and Houston—account for the settlement of three-quarters of current immigration. For much of this century, the problems of urban America—

school decline, limited tax revenues, crumbling infrastructure, an economic underclass—have been largely the problems of black America. While studies indicate that immigrants pay more in taxes than they cost in government services, newcomers do place great burdens on city and state services such as education and emergency health care. The Los Angeles County Board of Commissioners found that providing services to legal immigrants, amnesty aliens, and illegal aliens represented an estimated 31 percent of the county's costs in 1991–92. And San Diego County officials discovered that two-thirds of emergency medical funds for the poor were spent on aliens.

Ironically, even as immigration reform drew residual energy from the civil rights movement, policymakers showed a profound inattention to the most intractable problems of African-Americans. This quality of immigration policymaking seems to exemplify a political community of citizen-strangers, in which many white members express a greater affinity for and identification with newcomers than with fellow black members. Moreover, the estrangement of citizens is reinforced by the flight of white citizens from cities to fortress communities offering safe havens from urban problems. It is worth adding that those aliens whom black citizens most hoped to see admitted—Haitian refugees and African immigrants—benefitted least from immigration reform.

All this is not to say that new immigration has to represent a zero-sum game, in which the economic and political ends of newcomers are at odds with native blacks. Alliances between black and Hispanic leaders may produce important economic and political cooperation. But it is profoundly disturbing that policymakers never thoroughly examined so many fundamental questions about how immigration reform might affect the nation's urban poor.

ALIENS AS SCAPEGOATS

The economic burdens posed by new immigrants and refugees on a few key cities and states have contributed significantly to new restrictionism in American public opinion and politics. Immigration policymaking of the 1980s was an insulated process, dominated by organized groups, professional lobbyists, and policymakers in Washington. Recently, however, policymakers have played to public fears

about crime, welfare dependency, and unemployment by using aliens as convenient scapegoats. Indeed, it has become a popular sport in Congress to propose amendments denying aliens (even legal, taxpaying aliens) income support, health care, educational benefits, disaster relief, and other forms of public support. Many legislators have also called for sweeping reductions in immigration. Despite having championed a foreign guestworker program when he was a senator in the 1980s, California's governor Pete Wilson has blamed immigrants for unemployment and budgetary woes in his state. Some California and Texas politicians have called for a wall of troops to guard the U.S.-Mexican border, while others advocate a constitutional amendment denying the children of undocumented aliens birthright citizenship.

Tellingly, this new burst of restrictionist populism has shown as much disdain for informed public deliberation as did the last decade of immigration politics. Recent political efforts to scale back total immigration and alien rights have discouraged discussion of several important questions concerning the nation's social and humanitarian goals. Given that most immigrant visas are distributed to relatives of American citizens and permanent residents, are we willing to sacrifice the social goal of family unity for that of having fewer immigrants? Are we willing to apply strict numerical ceilings on refugee admissions, regardless of the persecution asylees may be fleeing? The last time our nation stridently rejected humanitarian obligations to refugees, millions died at the hands of Germany's Nazi regime. Likewise, is it just to deny public benefits to *all* aliens, including those who are legally admitted and pay taxes? Do we owe special obligations to the children of illegal aliens, whom the Supreme Court has recognized as "innocents" and many of whom are U.S. citizens? And how far are we willing to go in denying health care to undocumented aliens? Would that include such necessities as prenatal or emergency care?

Recent immigration politics also have obscured important information that might elevate the debate. In their haste to reap political gain at the expense of newcomers, "born-again" restrictionist politicians conveniently fail to make critical distinctions between the economic and social characteristics of legal and illegal migratory streams. For example, several economic studies show that legal

immigrants are far less likely than illegal aliens *or citizens* to become welfare dependent. Nevertheless, legal immigrants and refugees have been held political hostage largely because of a continued failure to curb illegal immigration.

CONCLUSION

Several observers see the latest wave of Third World newcomers as a formidable threat to American culture. These observers often focus their concerns on Latin Americans, drawing attention to linguistic separatism and dramatically low levels of naturalization. This is nothing new. Throughout American history, natural-born citizens blamed new immigrant groups for failing to become fully integrated members of society. Political scientist Rodolfo de la Garza offers an alternative explanation for why Mexican-Americans and other Hispanics have been slow to embrace American culture: "Mexican-Americans have retained a 'Mexicanness' only because they were so long denied access to American institutions." For most of the nineteenth century, new immigrants were incorporated into the political community by Martin Van Buren's compromise between republican virtue and modern democracy—decentralized political parties. These imperfect "civic associations," to borrow a phrase from political philosopher Wilson Carey McWilliams, linked the interests of immigrants to something larger than themselves. The civic educator of today's immigrants, by contrast, has been a centralized, rights-based regime that teaches little about obligations and the value of participation.

Scholarly debates concerning alien admissions and rights have generally oscillated between national and global perspectives, either challenging or vindicating the sovereign right of nation-states to control their borders. On the one hand, political theorists Joseph Carens and Judith Lichtenberg and other proponents of an internationalist view have stressed that the equal moral worth of individuals discards distinctions between aliens and citizens. This perspective reminds us that new migratory pressures are produced by a vast disparity in wealth between First and Third World peoples. On the other hand, political philosophers Michael Walzer, Bruce Ackerman, and Mark Gibney argue that open borders would render communal

life meaningless and sacrifice essential bonds and duties between national citizens. In both arguments the voices of local communities expressing their distinct needs and concerns are often neglected.

Recent immigration reform reflects this neglect and thus exposes an American political community with remarkably weak ties and obligations among citizens. Fragmentation of national institutions accentuated divisions between policymakers, producing contradictions and cross-purposes in the legislation. The failure to engage citizens and localities in policymaking may result in a strong political backlash against recent expansions in alien admissions and rights. By insulating meaningful policymaking from local communities and public deliberation, national decisionmakers have unintentionally provided a window of opportunity for irresponsible politicians to translate xenophobic appeals into votes. The new volatility of American immigration politics has increased the likelihood of dramatic policy changes as political pressure for new restrictions builds in the next few years.

Engaging citizens and local communities in deliberation over immigration policy involves considerable risk for expansionists. Public opinion polls have usually found Americans generally opposed to large-scale immigration and refugee admissions. Yet the alternatives to public education and informed dialogue on this issue are hardly appealing. Centralized and insulated policymaking in the 1980s often ignored important trade-offs as well as the reasonable concerns of local communities. One residual effect of this process is that certain cities and states have unfairly been asked to absorb a disproportionate share of the initial costs of new immigration. In turn, the populist restrictionism of recent immigration politics has invited irresponsible politicians to perpetuate anti-immigrant stereotypes even as they pay no attention to the potential economic, social, and moral costs of their knee-jerk policies.

Requiring immigration policymakers to be attentive to the concerns of citizens and local communities might bring important costs and trade-offs to the surface, providing an opportunity for public officials and citizens to educate one another. It may also give aliens greater incentive to pursue cultural and political membership so that they may participate in a meaningful deliberative process. Finally, it

may enable American political communities to respond to the needs of citizens and newcomers of diverse ethnic and racial groups without diffusing the special commitments and obligations that foster attachments among members.

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A Place for Safe Housing in the Fourth Amendment

STEVEN YAROSH

In the summer of 1988 on the west side of Chicago, a decaying 13-story public housing project turned into a war zone as rival street gangs battled for control of the high-rise. As the fighting escalated, maintenance workers abandoned the 138-unit building. Fear and panic spread among the residents. Many resorted to sleeping in their bathtubs in an effort to avoid stray gunfire. Some sought refuge in closets. Others simply gave up and moved out.

Meanwhile, on Capitol Hill, Congress issued a strongly worded report condemning the Department of Housing and Urban Development (HUD) for its “woefully inadequate” response to the drug crisis in public housing, and its failure to provide public housing agencies with the resources desperately needed to win the war on drugs. With its residents under siege from within and receiving little outside guidance or assistance from HUD, the Chicago Housing Authority (CHA) decided it was time to respond.

On 20 September 1988, in a scene best described as “controlled pandemonium,” 60 Chicago police officers and dozens of CHA employees staged a surprise assault on one of the CHA’s ravaged buildings. Immediately upon arrival, the police sealed off all building entrances and exits. Then, the CHA employees and police conducted systematic, door-to-door searches of every apartment in the building, looking for drugs, weapons, and illegal residents. The searches were conducted without warrant and without prior notification.

These warrantless home searches, dubbed by the CHA as “Operation Clean Sweep,” were the first of their kind to be used by any

public housing agency in the country. The warrantless, nonconsensual manner in which the searches took place triggered immediate and outspoken community protest. Nevertheless, CHA Director Vince Lane vowed to make such sweeps “an ongoing operation until we have made public housing safe for our residents.”

Almost immediately after the CHA began implementing Operation Clean Sweep, the American Civil Liberties Union (ACLU) filed a class-action suit, on behalf of the estimated 150,000 residents living in CHA projects. The complaint alleged that the warrantless and indiscriminate nature of the searches violated the Fourth Amendment’s constitutional guarantee against unreasonable search and seizure. The ACLU sought relief in the form of an injunction against warrantless housing sweeps in the future as well as an award of actual and punitive damages.

In answer to the complaint, the CHA argued that the warrantless searches did not violate the Fourth Amendment, since they occurred under emergency circumstances, and therefore qualified as an exception to the warrant requirement. According to the CHA’s answer, the emergency inspections were reasonable measures necessary to ensure the safety and security of the tenants: “An emergency situation existed which threatened the CHA’s ability to provide its tenants with decent, safe, and sanitary housing, and which required immediate corrective and preventive action which could only be achieved through emergency inspections....”

Out of a mutual desire to avoid protracted and costly litigation, the parties reached a compromise and entered a court-approved consent decree prior to discovery. Under the terms of the decree, the CHA no longer may inspect the person or personal effects of any individual (tenant or guest). Contents of property such as closets, dresser drawers, medicine cabinets, boxes, or other containers likewise are not to be searched. Additionally, police officers may no longer act as an investigating party. Instead, the police simply will accompany the CHA staff members that conduct the door-to-door inspections.

Despite these concessions, however, the sweeps remained otherwise unchanged. Under the consent decree, searches still took place without either warrants or tenants’ consent. The power to order an

emergency sweep continued to be vested solely in the discretion of the director of the CHA. If the director believed an immediate threat to the safety and welfare of the tenants of a building existed, then he or she could order a sweep of that building.

Indeed, since entering into the consent decree, the CHA has aggressively pursued a program of warrantless, nonconsensual searches. Moreover, many of the warrantless post-decree searches have been conducted in derogation of the limits established by the consent decree. That is, rather than confining their apartment searches to “plain view,” CHA staff members continued to search through tenants’ personal belongings.

In an effort to enforce the terms of the consent decree, a group of CHA residents filed an action (*Pratt v. CHA*) to enjoin the CHA from conducting sweeps in any manner inconsistent with the decree. In April 1994, the court issued a preliminary injunction in which the CHA was ordered to limit its searches to the terms established by the consent decree unless clear and present dangers existed or the safety of law enforcement officers was at stake. Because the consent decree itself permits warrantless, nonconsensual searches, however, the court’s ruling does little to answer the principal question of whether the housing sweeps are constitutionally permissible.

ADMINISTRATIVE SEARCHES AND THE WARRANT REQUIREMENT

An administrative search is an investigation or inspection conducted pursuant to some specific statutory or regulatory scheme or conducted within the context of a particular supervisory relationship. Typical examples of such investigative plans include government inspections of automobile junkyards as a regular method of discovering stolen vehicles, and periodic home inspections by municipal health inspectors seeking to ensure compliance with local codes.

Unlike criminal searches, administrative searches do not focus upon criminal activity. Administrative searches can, however, directly bear on matters that subsequently fall within the criminal arena. For example, if one inadvertently uncovers evidence of criminal activity during an administrative inspection, the inspection nev-

ertheless remains administrative in nature, even though the state may use the same evidence to prosecute.

Until recently, the Supreme Court did not recognize the applicability of the Fourth Amendment to administrative inspections. Under the Court's earlier view, Fourth Amendment protections applied only to criminal investigations and not to administrative searches. But in the landmark 1967 case of *Camara v. Municipal Court*, the Court discarded its earlier position and expressly extended Fourth Amendment protections to administrative inspections. In doing so, it held that the standard of protection for administrative searches was far less demanding than that applied to criminal searches.

According to the Court, where an administrative search is conducted on an area-wide basis pursuant to statutory authority, the Fourth Amendment only requires that the search conform to a flexible balancing test of reasonableness. Specifically, the test for whether a warrant is required for an administrative search depends upon the balance between the government's need to conduct the search, and the degree of invasion caused by the search.

In assessing whether the government was justified in conducting a warrantless search, the *Camara* Court considered whether the search was conducted pursuant to a legitimate public interest and whether the burden of obtaining a warrant was likely to frustrate that purpose. Against this "governmental need," the Court examined whether the government's actions fell within a "traditionally recognized" supervisory capacity with a long history of public acceptance, and whether the inspection posed significant risks of criminal prosecution for the person being inspected.

After establishing this balancing test for "reasonableness," the *Camara* Court carefully pointed out that nothing in its holding "is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations...." The Court continued:

On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's

requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is satisfactory reason for securing immediate entry.

An examination of Operation Clean Sweep under *Camara* suggests that an administrative search warrant is probably required. The purpose of the search certainly falls within the bounds of a legitimate state interest—stemming a widespread outbreak of gangs, drugs, and crimes in public housing. Additionally, the CHA conducts the searches on an area-wide basis, pursuant to statutory authority. An Illinois statute authorizes the CHA to investigate the living and housing conditions of tenants, and it grants the CHA the power to enter any building or property in order to conduct the investigation. The focus of the inspection, however, including gangs, drugs, weapons, and unauthorized activities, places tenants at risk of criminal penalty. Under *Camara*, risk of criminal penalty indicates a high degree of individual intrusion and weighs heavily in favor of a warrant requirement. Moreover, the CHA has neither indicated nor argued that the burden of obtaining a warrant would frustrate the purpose of the search. Thus, unless the CHA can position its housing inspections under one of *Camara*'s "traditional exceptions" to the warrant requirement, the warrantless searches would appear to fail *Camara*'s balancing test for reasonableness.

Certainly, the CHA could avoid the warrant requirement altogether if it were to obtain free and voluntary consent from each tenant it wished to search. This, however, is a highly improbable scenario. At present, the CHA manages 155 high-rise buildings containing a total of 46,000 residential units. It is extremely unlikely that every tenant would voluntarily consent to a warrantless search of his or her premises.

Under the exigency exception, however, a different situation unfolds. In an apparent attempt to fall within *Camara*'s emergency exception to the warrant requirement, the CHA has described these searches as "emergency housing inspections" necessary to protect the immediate safety and welfare of tenants. However, two problems exist when invoking the exigency exception for a housing sweep.

First, the CHA's stated purposes for conducting the inspections—identification and removal of unauthorized occupants, and

the inspection of the physical condition of the unit—are insufficient to justify a claim of exigency. These are strictly administrative purposes that would not be significantly frustrated by a warrant requirement.

Second, even assuming that some degree of urgency does exist regarding the need to conduct these searches, the CHA housing sweeps nevertheless fail to qualify for an exigency exception to the warrant requirement. Unlike other instances in which the Court has granted exigency exceptions, the CHA housing sweeps are imposed in a subjective and discretionary manner. The searches are not conducted in response to specific, articulable emergencies. Instead, the consent decree leaves the determination of exigent circumstances to the discretionary judgment of the CHA director. As *Camara* makes clear, the use of the exigency exception is confined to a narrow range of “carefully defined classes of cases.” Thus, it is unlikely that the housing sweeps would be upheld under the exigency exception.

THE SPECIAL NEEDS DOCTRINE

In stark contrast to the narrow range of circumstances that permit an exigency exception, a newly emerging and broad-ranging third exception to the warrant requirement has recently been embraced by the Supreme Court. Labeled “special government needs,” this exception to the warrant requirement has been acknowledged and implemented by the Court only within the past seven years.

The Court first invoked the special needs doctrine in the 1985 case *New Jersey v. T.L.O.*, to uphold a warrantless search of a student by a school official. *T.L.O.* involved a high school teacher who discovered a student smoking cigarettes in a school restroom. The student was escorted to the vice principal’s office whereupon her purse was searched for cigarettes. A marijuana pipe was found, along with a small amount of marijuana.

Maintaining that the warrantless search did not violate the Fourth Amendment, the Court pointed to “the difficulty of maintaining discipline in the public schools” and the prevalence of “drug use and violent crime in the schools.” The educational context in which the search transpired weighed heavily in this balance, as did the need to maintain a supervisory relationship between the school and the

student. Ultimately, the Court embraced “the dictates of reason and common sense” to hold that the “special needs” of the school outweighed the student’s expectations of privacy.

In reaching this conclusion, the Court found that the special governmental interests in preserving order in the schools “require some easing of the restrictions to which searches by public authorities are ordinarily subject.” Significantly, the Court added that individualized suspicion is unnecessary in order for a warrantless “special needs” search to remain “reasonable,” stating, “the Fourth Amendment imposes no irreducible requirement of such suspicion.”

SPECIAL GOVERNMENT NEEDS AND THE HOME

Only two years after *T.L.O.*, the Court used the special needs doctrine to uphold a warrantless search of a probationer’s home by state parole officers. Citing *T.L.O.* as precedent, the Court declared in *Griffin v. Wisconsin* that the state’s special need to maintain an effective probation system “may justify departures from the usual warrant and probable cause requirements.” As in *T.L.O.*, the Court again suggested that individualized suspicion was not necessary to justify a warrantless administrative search. The Court stated: “It is irrelevant whether the probation authorities relied upon any peculiar knowledge which they possessed of the petitioner in deciding to conduct the present search.” Ultimately, the Court determined that the state’s probationary system presented “special needs beyond normal law enforcement” that made the warrant requirement both impracticable and detrimental.

Griffin marks a significant extension of the special needs doctrine. Fourth Amendment protections traditionally have reached their zenith in the context of the home. *Camara* referred to administrative searches of the home as “significant intrusions upon the interests protected by the Fourth Amendment,” adding that every citizen possesses “a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority.” *Griffin* appears to ignore *Camara*’s declarations of heightened Fourth Amendment protections in the home, and in doing so, marks the first time the Court has upheld as “reasonable” the warrantless entry and search of a home without probable cause.

EFFECTIVENESS AND THE SPECIAL NEEDS DOCTRINE

In one of the most recent invocations of the special needs doctrine, the Court applied its flexible test of reasonableness to uphold the warrantless search and seizure of automobiles pursuant to a state highway sobriety checkpoint program. In 1990, in *Michigan Department of State Police v. Sitz*, after balancing the competing interests at stake, the Court determined that the sobriety checkpoint program represented a special need of the government beyond that of normal law enforcement, and was therefore exempt from the warrant requirement. Unlike the earlier special needs balancing tests of *T.L.O.* and *Griffin*, however, the *Sitz* Court considered an additional factor: the effectiveness of the inspection program.

Defining effectiveness as “the degree to which the seizure advances the public interest,” the Court deferred to empirical data that showed that 1.5 percent of all drivers that passed through the sobriety checkpoints were alcohol impaired. According to the Court, these figures were sufficiently compelling to warrant the conclusion that the sobriety checkpoints were “effective” and thus constitutional.

An analysis of the CHA housing sweeps under the special needs doctrine indicates that the warrantless searches should withstand judicial scrutiny. Under *Griffin* and *T.L.O.*, the CHA need only establish that a special need exists beyond that of normal law enforcement. The overwhelming problems of gangs, drugs, and crime in public housing buildings should suffice to establish this special need. The Court already has acknowledged a special governmental need to preserve order in the schools, to maintain effective probationary programs, and to establish safety on the highways. It is equally likely that the Court would consider the maintenance of a safe and drug-free public housing environment to constitute a special governmental need.

Once the government shelters itself beneath the special needs exception, it need only adhere to standards which in retrospect could be judged reasonable under the circumstances. *Griffin* indicates that the Court is prepared to uphold warrantless intrusions into the home pursuant to a special government need. In *T.L.O.* and *Sitz*, the Court did not require the government to justify its special needs searches with individualized suspicions of wrongdoing. Thus, under the

special needs doctrine, the CHA would not be required to justify its searches with a showing of probable cause regarding individual tenants.

Although *Sitz* emphasizes that the special needs doctrine requires an empirical showing of effectiveness regarding the means used to achieve the special governmental needs, this requirement should pose little problem for the CHA. In *Sitz* the Court applied a very lenient test for effectiveness. Though less than two out of every one hundred drivers stopped at the checkpoints were found to be alcohol impaired, the Court held that these figures were sufficient evidence of the effectiveness of the checkpoint program. Then-HUD secretary Jack Kemp cited figures indicating that the CHA housing sweeps reduced overall crime at one CHA building by 32 percent.

T.L.O., *Griffin*, and *Sitz* theoretically may be distinguished on the basis that all three cases involved situations in which the government acted in a supervisory capacity. In contrast, the sweeps of public housing might be viewed as existing within the pre-established context of a landlord-tenant relationship. To view the government's role in public housing as merely that of a landlord, however, is distortive. The CHA operates under the legislative mandates of the State of Illinois. Its responsibilities and duties are statutorily prescribed, and they include overall administration and supervision of the public housing system for the City of Chicago. Moreover, the CHA is statutorily charged with maintaining and supervising a decent, safe, and sanitary public housing environment. The housing sweeps undertaken by the CHA would thus appear to fall within a supervisory capacity of the government similar to that which existed in *T.L.O.*, *Griffin*, and *Sitz*.

SANCTITY OF THE HOME

Although Supreme Court precedent under the special needs doctrine supports an argument in favor of the constitutionality of warrantless public housing sweeps, an appealing counterargument nevertheless exists. The Supreme Court in *Griffin v. Wisconsin*, *Payton v. New York*, and *Silverman v. United States* has recognized on multiple occasions that expectations of privacy are greatest within an individual's own home. The special needs exception and its flexible

reasonableness test would thus seem particularly inappropriate in the context of administrative home searches.

In light of this “sanctity of the home” issue, the Court’s approval in *Griffin* of a warrantless home search under the special needs exception might be explained through a narrow factual interpretation. Because Griffin himself was a probationer, he arguably was entitled to a lesser degree of Fourth Amendment protection. And indeed, the Court noted that the “conditional” nature of a probationer’s liberty depended on proper adherence to special regulations. At no point, however, did the Court find a probationer’s legitimate expectations of privacy to be any less than that of a nonprobationer. Rather, the Court expressly stated: “A probationer’s home, *like anyone else’s*, is protected by the Fourth Amendment’s requirement that searches be ‘reasonable.’” The Court’s decision to uphold the warrantless search of Griffin’s home was thus not based on any theory of diminished expectations of privacy. Instead, it was founded on the “special need” of the state to operate an effective probationary system. With this understanding of *Griffin*, an analogy between the Court’s approval of warrantless administrative searches of probationer’s homes and the warrantless searches conducted by the CHA is not a strained one. In each case, the state acts in a supervisory capacity, pursuant to legitimate governmental interest and specified statutory guidelines. One might even argue that in light of burgeoning crime and violence in CHA housing projects, the warrantless searches conducted under sweeps are even easier to justify than that in *Griffin*.

SOCIAL POLICY CONSIDERATIONS

The policy arguments over public housing sweeps are powerful and multidimensional. Constitutional scholars contend that such measures are part of a gradual erosion of civil liberties and constitutional principles. Fourth Amendment commentator M. Tracy Maclin has stated:

Though many may not have noticed, the Fourth Amendment is under siege. The Supreme Court is undermining this cherished liberty by its narrow interpretation of the provision. Recognizing the mood of the Court, and under political pressure to do something about rising drug and crime statis-

tics, some police officials have followed the Court's lead by undertaking measures that disregard Fourth Amendment freedoms.

Communitarian drug policy scholar Mark Kleiman observes that "American citizens have clearly given up very substantial rights in the context of illicit drug dealing and law enforcement." University of Michigan constitutional scholar Yale Kamisar contends that the government is "doing a better job winning the war against the Fourth Amendment than winning the war against drugs." Some civil libertarians have even likened the crisis atmosphere surrounding public housing sweeps to the Nuremberg Codes of 1935 or the apartheid laws of South Africa.

In defense of housing sweeps, CHA Director Vince Lane asserts: "We are not infringing on rights; we are restoring rights. We are restoring our residents' rights to a safe and decent environment." Lane told the *L.A. Times* of the strong support he has received from CHA tenants who favor continued use of public housing sweeps: "I have received requests for sweeps from every development in the city. The people want it." Indeed, the tenant support for sweeps has been extremely strong, with only a few dissenters among the residents. One resident of a swept public housing building offered this description to *New York Newsday* of life before and after the CHA searches: "There used to be hundreds of people standing around the lobby, asking me if I wanted to buy drugs....All night, there was no peace. I was afraid to let my children go downstairs....Now it's quieter, there's less shooting, and less people are getting murdered."

One aspect of the CHA housing sweeps has become increasingly apparent to those on both sides of this issue: buildings that have been swept by the CHA are safer places to live. Chicago Police Superintendent LeRoy Martin has stated that buildings which have been swept by the CHA have shown reductions in violent crime by as great as 50 percent. Police statistics show that the sweeps have had a profound effect on crime. Typically, following the sweep of a high-rise building, incidents of violent crime within that structure will fall by 50 percent or more. One building swept by the CHA experienced a 61 percent drop in violent crime in the year following the sweep. Another CHA building experienced a 32 percent drop in crime the year following its initial sweep. Public housing sweeps appear to be a capable means of

meeting the special needs of the CHA—needs which were beyond the capability of normal law enforcement.

RIGHTS VERSUS SAFETY?

It is not surprising that a majority of CHA tenants have embraced the CHA's warrantless searches as a necessary measure of ensuring the safety of their buildings. Polls demonstrate that a majority of Americans are willing to sacrifice some of their constitutional rights in exchange for reductions in drugs and related crime. Sixty-two percent of the respondents in a 1989 *Washington Post-ABC News* poll stated that they would be "willing to give up 'a few of the freedoms we have in this country' to significantly reduce illegal drug use."

Professor Laurence H. Tribe explained this phenomenon by stating: "Whole communities in public housing, because they see themselves as victims of drug violence, willingly invite the police to cut procedural corners...." Professor Gary Orfield, a public policy specialist at the University of Chicago, pointed to "the social decay" and "the frustration of tenants" as explanation for heavy tenant endorsement of the warrantless searches. "It's a lot better than doing nothing," he added.

Former HUD secretary Jack Kemp offered the following story as typical of the strong tenant support for the CHA housing sweeps:

On my tour of Rockwell Gardens, I asked one of the tenant leaders if she thought her rights had been violated by the Chicago Housing Authority resolve. She indicated that she never had any rights prior to the sweep, as the elderly and single-parent mothers in the building lived in a state of perpetual fear and were forced to pay gangs "for protection" when they used the elevators. Only since Operation Clean Sweep could the residents enjoy their rights to life and the pursuit of happiness in a drug-free community.

Civil libertarian commentators view such attitudes as disturbing, arguing that the war on drugs need not be waged at the expense of our constitutional rights. Loren Seigel, national director for the ACLU's public education program on drugs and civil liberties, stated that,

[M]artial law has been declared in our cities, with police raids, curfews, and warrantless searches being the order of the day. At the same time, almost nothing is being done to

ameliorate the grinding poverty and despair that are the causes of much of the drug abuse that the government claims it wants to end.

Samuel Dash and Sharon Goretsky, in an article in *Criminal Justice Quarterly*, stress that, "It behooves us...to educate our fellow citizens so they can 'fight the war' without having our constitutionally protected rights become a casualty of the battle."

But in response to criticisms that drug enforcement measures are trampling on citizens' rights, former drug czar William Bennett points to what he perceives as a double standard, stating that "if [widespread, drug-related crime] were going on in the suburbs, residents would raise holy hell and say, 'Call in the police!' But if we're talking about the inner city, people are saying, 'Well, this sounds repressive.'" Federal District Judge Robert Bonner of the Central District of California similarly maintains that fears over rampant police intrusions are greatly distorted. Jeffrey Eisenach, then a visiting fellow on drug policy at the Heritage Foundation, told the *Washington Times* that "libertarians are throwing up a lot of straw men, saying they imagine police coming to our doors....Despite the hysterical talk, I don't see any substantive way in which we've infringed on civil rights."

CONCLUSION

The district court's preliminary injunction order in *Pratt v. CHA* does little to dispel this conclusion. Though the court stated *in dictum* that CHA sweeps appeared to conflict with a traditional view of the Fourth Amendment, it did not go so far as to hold sweeps unconstitutional. Rather, the court ruled that the CHA was required to conduct its warrantless, nonconsensual searches according to the terms of its own consent decree. Moreover, all of the court's preliminary conclusions regarding sweeps were based on an extremely narrow analysis of Fourth Amendment law. Indeed, the court's opinion fails to acknowledge the existence of the special needs doctrine and does not cite a single Supreme Court case in which that doctrine has been applied. *Pratt v. CHA* is thus of limited use in assessing the constitutionality of housing sweeps under a "special needs" analysis. That decision still rests with the Supreme Court.

Majorities Not Overwhelming Enough

While 61 percent of Americans, according to a recent survey comparing attitudes towards money and sex, would turn down an offer of \$1 million from a stranger in exchange for sex with the respondent's spouse, as many as 16 percent claim they would seriously consider the offer. Ten percent even say they would definitely accept it.

Source: *Worth*

Drawing by Morin; © 1994 Philadelphia Inquirer

THE LOSS OF PUBLIC SPACE

FRED SIEGEL

We have come to the end of our national romance with cities and the public spaces that define them. At their best our cities were engines of innovation, their streets the setting for the creative disorder that inspired our artists and economists. But the same streets that once inspired our largely urban common culture now too often induce fear as even the most innocent experiences become fraught with potential danger. It was surely a milestone of decline when some cities had to give up their long-standing campaigns to teach children to “Cross at the green, not in between,” because the corners were dominated by drug dealers. “Cities,” says Mayor Michael White of Cleveland, “are becoming a code name for a lot of things:...for crumbling neighborhoods, for crime, for everything that America has moved away from.”

What unnerves most city dwellers, however, is not crime per se but rather the sense of menace and disorder that pervades day-to-day life: the gang of toughs on the corner exacting their daily tribute in the coin of humiliation, the “street tax” paid to drunk and drug-ridden panhandlers, the “squeegee” men shaking down motorists waiting for a light, the threats and hostile gestures from the mentally ill who live in the parks, the provocations of pushers and prostitutes plying their “trade” with impunity, and the swirling masses of garbage left by pedlars and panhandlers and open-air drug bazaars on uncleaned streets. These are the visible signs of cities out of control, cities that can’t protect either their spaces or their citizens. “When you take your child to a public playground and find a mental patient has been using the sandbox as a toilet,” writes liberal columnist Lars-Erik Nelson, “it’s normal to say, ‘Enough, I’m leaving.’”

Nelson is by no means alone. Recent polls show that 43 percent of Boston, 48 percent of Los Angeles, and 60 percent of New York would like to leave the city. A 1989 Gallup poll found that only 19 percent of the country wanted to live in cities.

Fearing the return of nineteenth-century urban conditions, those who can afford to flee do so, sorting themselves into suburbs and leaving the cities to the poor. They move into areas organized by homeowners' associations, private governments that stand beyond the reach of cities and their experiments in civil liberties. Thirty million Americans belong to such community associations, 80 percent of which administer territory as well as buildings. In return for the bastion such communities erect against the pathologies of the metropolis, residents agree to a "covenanted conformity" that dictates everything from the size of their mailboxes to the type and number of visitors permitted. These shadow cities generally establish "one-dollar-one-vote governments" that recreate the preindustrial dictum of "all power to the property holders."

Even those who remain in the cities migrate away from the problems they associate with disordered public space. Oscar Newman's "defensible space principles," which William H. Whyte has decried as "the fortressing of America," are now so fundamental to design that they are sometimes written into zoning regulations. Cities that revitalize their downtowns are creating controlled spaces deliberately separated from the street. The Motion Picture Corporation of America (MCA), for example, built City Walk, a 100 million-square foot shopping and entertainment center in the ethnically mixed, middle-class San Fernando Valley. Billed as a "an exact replica of Venice Beach and Sunset Boulevard" minus the menace, graffiti, and homelessness, the mall tries to recreate the variety and unexpected pleasure of street life before "the fall."

From Los Angeles to Chicago to Miami, communities are trying to achieve some small measure of the security that even poor neighborhoods once took for granted and that now comes only with "private police" and "covenanted communities." Those who can't or won't leave are increasingly turning public space into a potent political issue.

Recent elections in San Francisco and Los Angeles revolved around public space and safety. San Francisco Mayor Art Agnos was

defeated in 1991 by a relatively unknown challenger named Frank Jordan, who campaigned against the growth of graffiti, trash, and aggressive panhandling. Jordan, a former police chief, criticized Agnos for allowing homeless encampments in the parks, and he proposed that the homeless be put to work cleaning off graffiti.

The 1993 Los Angeles mayoral race cut to the underlying assumptions behind the politics of public space. In a race without an incumbent, maverick Republican Richard Riordan campaigned against disorder, using a mailer with an unflattering picture of a homeless man on the front and proposals on panhandling and graffiti within. Democratic candidate Michael Woo responded that the urge for order was a disguised call for conformity:

my goal has never been to turn Hollywood Boulevard into an antiseptic, artificially sanitized area....Hollywood Boulevard will be an exciting, diverse and exotic place. Homeowners will see kids with ghetto blasters....I don't want to drive out the eccentric and interesting people, who are no harm to anyone else. I want to encourage real street life on Hollywood Boulevard.

Though Los Angeles is overwhelmingly Democratic, twice as many voters thought graffiti should be a new mayor's first priority as thought health care or the environment should, and Woo thus lost by seven points to Riordan. People prefer not to choose between the antiseptic and the antisocial but our contemporary cities often force them to.

How can we explain the unparalleled social breakdown of public space during a period of both peace and prosperity? Poverty per se is not a good answer. New York, as Senator Moynihan points out, was a far poorer but far more tranquil city fifty years ago. The breakdown has proceeded apace regardless of the phase of the business cycle. Nor is it primarily a matter of Reagan-Bush policies. New York, for instance, boomed in the 1980s, and minority income grew apace even as the breakdown continued unabated. In his justly acclaimed article for the *American Scholar*, "Defining Deviance Down," Senator Moynihan uses Durkheimian functionalism to describe the mechanisms of accommodation to growing levels of violence and pathology. We can as a society, he argues, accept only so much deviance. The excess gets defined away until the pathological is routinely accepted

as unavoidable—at least for those who can't or don't flee. But except for a reference to family disintegration, important as that is, he doesn't explain the source of the breakdown in public conduct.

We have, over the past quarter-century carried out a great experiment in what Herbert Marcuse understood as radical desublimation. In that experiment zealous reformers of various stripes tried to eliminate the tension between individual desire and communal conscience solely in favor of desire, on the grounds that the release of tension would move us “beyond all known standards...to a species with a new name, that shall not dare define itself as man.” In that new and higher state there would be no need for either self-control or social coordination since, much in the manner of the free market for goods and services, the free market in morals was to produce growth, albeit of the personal and self-expressive kind.

But since there is no such thing as a self-regulating market in morals, instead of an equilibrium we have a downward spiral. An unparalleled set of utopian policies has produced the unprecedented dystopia of day-to-day city life. Particularly damaging were those policies concerning the concept of victimless crime, the deinstitutionalization of the mentally ill, the decriminalization of public drinking, and the de facto decriminalization of drugs.

VICTIMLESS CRIME

Jane Jacobs, whose 1961 book *The Death and Life of Great American Cities* set the terms of how public space has been discussed ever since, argued that “lowly, unpurposeful and random as they may appear, sidewalk contacts are the small change from which a city's wealth of public life may grow.” She further claimed that “The tolerance, the room for great differences among neighbors...are possible and normal only when the streets of great cities have built-in equipment allowing strangers to dwell in peace together on civilized but essentially dignified and reserved terms.”

In the late 1960s and early 1970s, some of the “built-in equipment” was systematically dismantled. The movement to decriminalize what were known as victimless crimes—crimes in which none of the consenting adults directly involved has either cause or desire to press for legal action—was caught up in the new Vietnam-era version of the

old argument that “you can’t legislate morality.” The moral authority of American institutions and the force of conventional norms were shattered by the cultural conflicts which broke out over Vietnam and racial injustice. Traditional authority and conventional morality were equated with authoritarianism or worse.

The need for a modicum of order, for instance, became entangled with the need to redress racial wrongs. Too often the discretionary authority to police public drunkenness or loitering had been used to harass racial minorities and gays and lesbians. In *Coates v. Cincinnati*, for instance, the Supreme Court struck down a loitering statute of long-standing provenance typical of other cities. The court argued that it was unconstitutional to outlaw “loiterers” who by congregating might “annoy” others, because enforcement “may entirely depend on whether or not a policeman is annoyed.” The statute, they concluded, was an “invitation to [racially] discriminatory enforcement.”

The argument for “victimless crimes” had a venerable pedigree. Jeremy Bentham, one of the founding fathers of modern liberalism, had in the early nineteenth century described drunkenness and fornication as “imaginary offenses,” “acts which produce no real evil but which prejudice, mistake, or the aesthetic principle have caused to be regarded as offenses....” The more immediate motivation came from reformers like anthropologist Ruth Benedict who had an enormous influence on post-World War Two liberalism. “Abnormals,” she wrote, “are those who are not supported by the institutions of their civilization....” A wiser and more mature society, she argued, would incorporate the widest range of personality types possible by becoming less judgmental, less willing to treat different types of behavior as deviant or shameful. Benedict’s call was taken up by “Situationists,” social scientists who argued that invidious distinctions were often made based on a misunderstanding of how marginalized people, often racial minorities, were forced by their circumstances into less-than-admirable actions. Going a step further, others used labeling theory to assume that “criminal laws by definition create criminals.”

Edwin Schur, the leading proponent of decriminalizing “victimless crimes,” spoke for many of his fellow sociologists, then at the

peak of their since-shattered self-confidence, when he argued that social science research demanded reform. "As empirical data and realistic analysis replace misinformation and stereotyped thinking," he wrote, "neither the long-standing existence of a criminal statute nor a majority adherence to the norms and values it seeks to uphold is likely to be accepted as sufficient justification for maintaining it." Moreover, he insisted, past support for these laws rested on hypocritical moralizing, "misinformation...and...unsubstantiated assertions of the 'horrible consequences' likely to follow from decriminalization...."

Then, in an argument parallel to that of the anti-anticommunists, Schur turned the tables on the proponents of "traditional morality," by arguing that the cure was worse than the disease. "Proscribed behaviors [don't] necessarily constitute social problems," he argued. "Social problems are simply conditions about which influential segments of the society"—the uptight white middle class—believe "something ought to be done." The problem lay in the constricted morality of the white "squares" who attempted to impose their values on others through police action.

The intellectual bullets forged by anthropologists and sociologists were fired by police chiefs and legal reformers. These law enforcement professionals argued with considerable evidence that policing vice was inherently corrupting and that maintaining civility by arresting drunks and crazies conflated "real police work" with social work. If vice and other minor offenses to civility were decriminalized, the police chiefs and lawyers argued, the police could concentrate on major crime. The 1967 Task Force Report of the President's Commission on Law Enforcement and Administration of Justice captures what shortly became the conventional wisdom of numerous books, articles and reports: "Only when the load of law enforcement has been lightened by stripping away those responsibilities for which it is not suited will we begin to make the criminal law a more effective instrument of social protection."

What went wrong? First off, the reformers, in straining to be "hip," often trivialized the collateral consequences of the behavior they sought to decriminalize. "That prostitution tends to encourage derivative kinds of criminal activity can hardly be denied," wrote

sociologist Gilbert Geis, “any more than it can be denied that kissing may lead to illegitimate births.” The reformers’ ideological equation had only two variables in simple inverse relation: individual rights versus state power. It was as if an economist wrote about commercial interactions of a chemical company without considering such externalities as pollution.

In New York City, where decriminalization was carried the furthest, not even running a red light remained a crime. Even though three percent of the people hit by cars in New York are already lying in the road, traffic tickets were “defined downward” in an effort to unclog the courts. Even serious traffic violations became merely civil offenses so that no warrants were issued. Fully one quarter of citations are now ignored; this invites, says Detective Chief Mario Selvaggi, “contempt for the law.”

In practice “victimless” disorders can soon flood a neighborhood with serious, “victimizing crime.” There is, as the New York Transit police learned under Chief William Bratton, a “seamless web” between low-level disorders and violent crime. Roughly 2 of 13 fare beaters, Bratton points out, have outstanding warrants, often for felonies. The decriminalizers got it exactly backwards: by failing to police small disorders we didn’t free up the cops, rather we freed up would-be criminals at great cost to the vitality of our streets and cities.

DEINSTITUTIONALIZATION

When New York Governor Mario Cuomo was asked recently about the problems of violent mental patients on the streets of New York City his answer, in the words of Lars-Erik Nelson, was that “it’s not true...or if it is true, it’s not his fault, he’s powerless.” Or in Cuomo’s own words: “The Constitution says you cannot lock up a person just because he’s a nuisance, urinating in the street.” How about changing the law? “Suppose you had a law you could lock up anyone who is endangering his health,” Cuomo objects. “I could come to you and say you’re drinking, you’re smoking, I’ve got to lock you up.” In what he defines as a zero-sum game between individual rights and state power, Cuomo argues that the patient’s liberty interest must be paramount.

This conclusion is the essential claim of the deinstitutionalization movement, on which sociologist Erving Goffman exercised enormous influence. Goffman argued that mental hospitals were responsible for most of the symptoms of their patients. He argued further that he knew of no supposedly psychotic misconduct that had no precise analogue in the everyday conduct of psychologically healthy people.

In the “Billy Boggs” affair, when a homeless schizophrenic fought for her right to live and defecate on the streets, the American Civil Liberties Union (ACLU) played the Goffmanesque game. Did Billy Boggs urinate on the sidewalk? So did cabdrivers. Did she tear up or burn the money she had begged? This was a symbolic gesture similar to the burning of draft cards during Vietnam. And on it went. Billy Boggs, whose real name was Joyce Brown and who had grown up in a loving family and received social security checks she never bothered to cash, was described by her NYCLU attorneys as a “political prisoner,” a victim of social indifference and Reagan’s housing policies. And the NYCLU successfully sued to keep Boggs on the streets.

Freed from the clutches of New York City hospitals, wined, dined, and reclothed at Bloomingdales, Boggs was hustled on to talk shows and the Ivy League lecture circuit. But when the spotlight faded she was within weeks back on the streets, screaming, defecating, and destroying herself. In a series of publicized incidents, she was arrested for fighting, harassing passersby, and drug offenses. As former civil rights hero Charles Morgan put it, the ACLUers had become “ideologues frozen in time.”

The fight for deinstitutionalization initially aimed to free those people who, made passive by many years of often unjust and unnecessary incarceration, posed little threat to society. Following this victory, however, the newly established community care system failed to continue providing calming psychotropic drugs and other types of assistance, and many mental patients moved from the back wards to the back alleys and eventually to the main streets.

For civil libertarians devoted to the abstract concept of freedom, this was not the problem with the new system. Paul Friedman, an early director of the NYCLU Mental Health Law Project, worried, on

the contrary, that “because the deprivation of liberty is less in community-based treatment than in total institutionalization...the resistance against state intrusion will be less and the lives of many more people may be ultimately interfered with...”

The well-being of the patients didn't worry the civil libertarians. Said project founder Bruce Ennis, “I'm simply a civil libertarian, and in my view you don't lock people up because they've got a problem....” He added, “It's never been very important to me if there is or is not mental illness. My response would be the same.” ACLU lawyers, he candidly admitted, “are doing what they think is right in terms of civil rights, whether it's good for the patients or not.”

The full meaning of this mix of principled ignorance and militant anticonsequentialism manifested itself in the Larry Hogue case. In and out of mental institutions and generously provided with a \$3,000 monthly Veteran's Administration (VA) check, Hogue in the mid-1980s began terrorizing parts of Manhattan's Upper West Side. Arrested more than 40 times, Hogue has never been convicted of a felony. He has, however, chased people down the street with a club threatening to murder them, set numerous fires (including fires under cars), repeatedly strewn garbage all over sidewalks, defecated in the back seat of a car after first threatening to kill its owner and then breaking into the auto by smashing part of a marble bench into the auto's window, masturbated in front of children, lunged at terrified women with a knife, and run about screaming with burning newspapers.

Though local community groups made a concerted effort to see Hogue incarcerated or institutionalized, people like Hogue can only be institutionalized under current New York State law if they present an immediate threat to themselves or to others. The staff at Manhattan State Hospital told community leaders that “Hogue is more violent than you think,” but that they were “unable to hold him because of his rights.” The official story of Hogue is that while he behaves wildly while on the crack he buys with his VA check, he's perfectly fine when off drugs, and mental health authorities thus have no choice but to release him. Researcher Heather MacDonald, however, has discovered the real reason Hogue is so quickly released: mental health authorities can't control him and want to get rid of him

as quickly as possible. According to Dr. Michael Pawel, a psychiatrist who has treated Hogue, no one wants to deal with an unruly patient who isn't going to get better. Said Martin Begun of the New York City Department of Mental Health, Mental Retardation, and Alcoholism Services, "We are operating with a mental health system created in the 1960s and 1970s on the basis of assumptions that are no longer applicable in the 1990s."

WHAT CAN BE DONE?

Several steps can be taken to counteract the excesses of past urban policies and reclaim public spaces for urban citizens:

Limited Institutionalization

Upon learning that Larry Hogue was about to be released once again, a New York panhandler who had been intimidated by him responded, "We'd all be better off if he were committed." He's right. Society should institutionalize the most dangerous of our mentally ill, who are also often drug dependent and homeless. Taking away someone's liberty is a very serious matter that should be done only with extreme reluctance. But there are some cases where both the patient and the society would benefit. For the most seriously sick, notes psychiatrist E. Fuller Torrey, the right to be psychotic "is an illusory freedom, a cruel hoax perpetrated on those who cannot think clearly by those who will not think clearly."

Carefully Tailored Anti-Begging Ordinances

Municipalities can pass laws designed not to ban panhandling, which the courts have tended to regard as protected speech, but to restrict its time, manner, and place. Carefully crafted laws restricting aggressive panhandling, where the action overwhelms the words, are on the books in 11 cities, and are likely to withstand legal challenge. Passed because aggressive panhandlers were driving people from the downtown streets, Seattle's law prohibits "intimidation" and "obstruction." Similarly, restrictions of begging in front of ATM machines and in confined spaces like subways and buses have also been upheld. Modern anti-begging laws, writes Robert Teir of the American Alliance for Rights and Responsibilities (AARR), are aimed at specific harmful conducts, not at an individual's status.

BIDs and Decentralized Public Space Management

Business Improvement Districts (BIDs) are localized, self-assessing tax districts designed to reclaim public space from the sense of menace that drives shoppers and eventually store owners and citizens to the suburban malls. BIDs sweep the streets, augment police patrols, upgrade transportation, and generally promote downtowns. Thirty-eight states have passed enabling legislation and there are about 1,000 BIDs around the country.

A nongovernmental variant of public space management is offered by consulting firms for “sick spaces,” like The Project for Public Space. Traditionally, architects have approached the design of plazas aesthetically. The Project associates, instead, approach the problem anthropologically, with an eye toward making the space hospitable. For example, movable chairs in public areas facilitate conversation and cordiality in a way that fixed park benches do not. The Project’s microscopic methods have succeeded in reviving a number of “dead” or drug-ridden spaces, such as Bryant Park in midtown Manhattan.

Community Cops, Courts, and Prosecutors

Community policing is now so popular and widespread as to require little comment. Less well accepted are the attempts to supplement community policing with community courts and community prosecution teams, both of which are aimed at giving neighborhoods some say in their own law enforcement. At some point this kind of localism may prove threatening to civil liberties. For now, it is forcing police departments and judges to set their priorities more responsibly. Community organizations in the Bronx, for example, pressured the police and judges to look upon the prostitution that was destroying their neighborhood as something more than a “victimless crime.”

CONCLUSION

There is, it is true, no going back to an older concept of community that was too often racially exclusive, but there is growing support for a reassertion of common standards of public behavior. And “unlike previous calls for public order,” writes Robert Teir of the AARR, which often came from racially homogeneous upper classes, current

demands for public civility “come from people of all races wanting to walk streets or ride buses without feeling under constant siege by others asserting their ‘right to be offensive.’” Teir’s point is sustained by Antonio Pagan, a Puerto Rican city councilman representing the Lower East Side of Manhattan. “The people asking for the laws to be enforced,” he says, “are the minorities themselves.” Pagan is disdainful of the constant attempts to “cheapen the discussion” by past references to racially discriminatory enforcement. Civil libertarians, he argues, “try to turn it into a black-white issue to avoid the issue” of the social breakdown afflicting our neighborhoods.

The transformation Pagan represents is encapsulated in the story of an African-American tenant activist: Mrs. Jones (a pseudonym) has lived in Red Hook Houses, the biggest single public housing project in New York, for 36 years. She and her husband raised six kids there. When they first arrived there were five-dollar fines for small violations of project rules. Minor vandalism, littering, loitering, keeping dogs in apartments, playing on the growing grass all brought fines. The absence of due process gave management enormous discretionary authority that it sometimes abused. Like many tenants, she resented the arbitrary manner in which these fines were sometimes imposed by the white manager.

As a tenant leader she fought to strip the manager of his authority to levy fines, something she now regrets. Those small rules, she says, once set the civil tone for housing projects now overwhelmed by crime and violence. Much else has happened to drive the breakdown, but Mrs. Jones argues that the revival has to begin by restoring the standards of behavior she and her neighbors once shared. She now mourns the loss of legitimate authority. She says she never wanted to undermine authority in general, just its racially arbitrary forms.

Her conclusions, I would suggest, are shared by an overwhelming majority of urbanites who recognize that the very heterogeneity of city life imposes “a premium on moral reliability” and a longing to see a new ideal of urbanity emerge.

The Renewal of Democracy and the Communitarian Prospect

R. BRUCE DOUGLASS

Communitarians tend to be strong democrats, by which I mean they believe in self-government by an engaged citizenry. This is one of the defining elements of communitarian thinking, one that distinguishes it clearly from the conservatism with which it is sometimes confused. Unlike conservatives, communitarians do not typically endorse uncritically institutions and practices we have inherited from the past. In particular, they have no interest in preserving ways of thinking and acting that have shown themselves to be discriminatory or otherwise unjust in their effects.

Conflating communitarian and conservative thinking misses one of the most important and controversial claims communitarians advance. Unlike conservatives, communitarians are aware that the days when the issues we face as a society could be settled on the basis of the beliefs of a privileged segment of the population have long since passed. They know that a vacuum has been created by the demise of the old, familiar means of giving expression to the voice of society, and the communitarian project exists precisely to address this vacuum. Communitarians are convinced that the fate of community—understood as a sense of shared responsibility for one another and for a way of life held in common—is something we need to be concerned about precisely because it can no longer be taken for granted.

The thing in particular, moreover, that distinguishes communitarian thinking is the confidence that this problem can be successfully solved on terms consistent with current visions of democracy. To be sure, they concede the impossibility and undesirability

of having solutions for social problems selected on the basis of sectarian views that one group or another imposes on the public at large. But at the same time, communitarians insist it is within our power to develop an alternative that does justice to our diversity. And this need not be some thin, least-common-denominator gruel either. We are quite capable of arriving at a set of shared purposes that reflects the best our several traditions have to offer. We can do it, that is, provided we are willing to learn anew how to talk with (not at) one another about the things that really matter.

The reason communitarians value strong democracy as they do is that they see in the engagement with one another's lives mandated by popular, participatory democracy the promise of such learning taking place. Like other strong democrats, they view participation in and of itself as making a real difference in determining how people think and act. The "genuine dialogue" they associate with the democratic idea is distinctly reminiscent of Alexis de Tocqueville or John Stuart Mill, an image of people acquiring, through what Mary Ann Glendon calls "broad-based, free-ranging, reasoned processes of deliberation," the qualities needed to make society work. So whether self-restraint, open-mindedness, or civility is called for, the assumption is that the dispositions necessary to make public debate effective will arise naturally if only given a chance.

THE COMMUNITARIAN PARADOX

The problem, however, is that this assumption presupposes some of the very things communitarians themselves say are now in short supply. Above all, of course, it presupposes the availability of people willing and able to devote themselves to active involvement in the affairs of the wider society. But it also presupposes a number of other conditions necessary if engagement among citizens is to stand a chance of having a constructive effect. It requires, for example, that people will find it possible to interact on a "humanly intelligible" scale and that their efforts will not be subject to systematic distortion. It assumes also that they will have it in their power to settle (or at least have a real say in the disposition of) issues that matter to them. But hardly any of this can be taken for granted any more. This, after all, is precisely what communitarians themselves claim has been obliterated.

ated in the movement away from the *gemeinschaft* setting in which the majority of Americans used to live their lives. Moreover, in its absence, one has to wonder just how relevant appeals to such an ideal really are.

One wonders especially given what the real-world effects of participation so often turn out to be—just the opposite of what communitarians suppose. Instead of bringing people with opposed views into dialogue and better understanding, participation becomes an occasion for ideological combat, so that citizens wind up even more estranged from one another. Attracting as it often does those people already predisposed towards doctrinaire politics, the opportunity for participation actually makes them more extreme. The result is that policymakers find it *harder* to arrive at the accommodations needed for the issues at stake to be intelligently handled. And in the process, of course, more moderate views—and those espousing them—tend to be crowded out.

Add to this the evidence that suggests that participation is a class-biased activity heavily weighted in favor of the interests of the very elements doing the crowding. It becomes easy to see why informed students of the subject frequently respond to arguments of the kind now being made by communitarians by saying that more participation is actually the last thing we need. Politics of this sort is no longer just a theory, they say. Ever since the 1960s-era War on Poverty this country has been experimenting with citizen participation in one form or another, and the results do not look anything like the picture painted by participatory citizenship's devotees.

THE REALITY OF PARTICIPATION

In reality, communitarians respond, the situation we face is not nearly so simple—or stark—as this reading would suggest. True, Americans are displaying a worrisome tendency to avoid taking any sort of active responsibility for the affairs of the wider society, but this is hardly the whole story. America may have its share of privatism, but it also has other, competing tendencies.

And those who choose to resist the pull in the direction of self-absorption aren't just ideological zealots either. Though much of the

more celebrated political conflict of our time is indeed an outgrowth of ideological passions, true believers are hardly the only ones attracted to public life. There continue to be people—scores of them all across the nation—who involve themselves in the affairs of their communities with motives much less narrowly partisan. One finds them active in everything from the PTA to the United Way, and they are surely not active simply to wage culture wars of the sort that get so much press attention these days.

Just the opposite, in fact. Even though these people have diverse backgrounds, they discover in such organizations that they can work together and get things done. And the more they do so, the more they find they have in common. Instead of being at one another's throats, they end up trusting, respecting, and even learning from each other. And it is precisely the engagement that comes from participation that makes this possible. The dialogue it fosters breaks down walls that would otherwise make citizens into strangers (or worse) to one another, and it prepares the way for a meeting of minds.

What makes this communitarian argument more than just an exercise in nostalgia, moreover, is its proponents' insistence that what they have in mind has not disappeared from American life. They are, however, quite prepared to acknowledge that this vision of citizenship is threatened. Indeed, their whole point is to warn of that threat and to alert us that if appropriate measures are not taken to relieve it, the success this nation has enjoyed to date in employing participation as an instrument of popular empowerment could become a thing of the past. But even today, when so much of our public life is given over to conduct that divides and alienates us, there is strong evidence of the kind of public-spirited collaboration among ordinary citizens that has made democracy more than a slogan in America. The conditions that have made it possible are part of a "moral ecology" that will have to be preserved and protected every bit as much as the air we breathe.

EMPIRICAL COMMUNITARIANS

It is one thing to make this claim and quite another to show it to be true. In the absence of careful documentation, this sort of claim can be all too easily dismissed as wishful thinking. Until now, however,

proving this point has not been a task to which communitarians have devoted much attention. Even the social scientists have tended to absorb themselves in the theoretical issues raised by their project and have shown little interest in making their case empirically. Aside from anecdotal evidence marshalled by “interpretive sociologists,” communitarians have produced little data to substantiate their claims.

But this is starting to change, as demonstrated by *The Rebirth of Urban Democracy*, a recent book by Jeffrey Berry, Kent Portney, and Ken Thomson. What *Rebirth* demonstrates, and what becomes clearer as more works of this type appear, is that reliable evidence is available for a good many of the principle communitarian claims. *Rebirth* may not support everything communitarians say, but it goes a long way toward discrediting the skepticism about the value of strong democracy that now exists in many quarters.

The book is the product of a carefully designed piece of survey research done in the 1980s in 15 American cities (five as the focus of the study and the rest for comparisons) selected specifically as illustrations of successful citywide efforts to achieve a more participatory politics. It shows that under the right circumstances, a dedicated effort to enhance the participatory character of public life can indeed have much the sort of effect that communitarians say it can. Not only does it empower ordinary citizens and position them better to defend their neighborhoods against organized special interests, but it brings them together as well. Through ongoing face-to-face collaboration they are unified as well as empowered. And the more accustomed they become to acting this way, the more impact they tend to have on the handling of civic affairs. Public officials become accustomed to citizen involvement in public life, the result being that government becomes more responsive on an ongoing basis to community concerns. Power ends up being redistributed, and the more the effects of this are felt, the more motivation ordinary citizens have to believe in the responsiveness of government.

The circumstances that make this kind of thing possible are, to be sure, rather special ones, and the authors make a point of showing just how distinctive the experiences of the five cities they feature really are. Unlike other places where participatory politics have largely failed, Birmingham, Dayton, Portland, St. Paul, and San Antonio all

have had firm commitments since the 1960s from most of the relevant actors to giving participation a fighting chance. City officials and politically active citizens alike have actively embraced it, and they have made it their business to institutionalize it. The neighborhood associations through which it operates have been established citywide, and they have been adequately endowed with the staff, offices, and funds necessary to function as more than mere “talking shops.” They have also been given a clear mandate to involve themselves actively in the governing process, and they have done so.

Moreover, the cities in question, the authors stress, are not set apart from the mainstream experience of American urban life by any unique demographic or economic properties. If anything, when taken as a group, they represent a real cross section of that experience. In income distribution, for example, they range from one end of the spectrum of U.S. cities to the other. The same is true with both education and ethnic makeup. Nor have these cities escaped the economic dislocations so many American cities have suffered lately. Three of them—Birmingham, Dayton, and Portland—actually offer textbook illustrations of troubled economies.

There are many questions, to be sure, the book doesn't take up that very much need to be addressed. One wonders, for example, just what it was about the histories of the cities in question that enabled them to achieve such participatory politics when other comparable municipalities did not. Was it simply a matter of will? If not, what other factors were there? One would also like to know a lot more about the psychological complexity of the deliberative processes *Rebirth* discusses and what they imply for the dynamics of strong democracy. Even though reference is made to the fact that face-to-face interaction need not have benign effects, the authors don't delve at all into the complications this introduces into the argument for strong democracy. They also tend to be insensitive to philosophical nuances, leaving another area for further investigation. When they talk about the emergence of “shared values” through participation, do they really mean to suggest that values are literally shared by *everyone* involved or only some of the participants? And if the latter (which seems more likely), what justification is there for depicting these values as though they were held in common?

There is no mistaking the relevance of such work to communitarian thinking, and the care with which the authors present their study enhances that relevance. Not at all given to claiming more than the available data will allow, for example, they do not pretend that the creation of more effective instruments of self-government transforms the public's will to participate. In fact, they make a point of showing how even when such instruments become available, only a minority (around 15 percent) ends up taking advantage of them. They are equally candid about the limits of the power participation yields. All it really does, after all, is furnish interested citizens with a weapon with which to protect themselves more effectively against actions taken by other forces. And even as a weapon, they recognize, it is only modestly effective. If the "imperatives" of economic growth are felt keenly enough by those in a position to act on them, for example, neighborhood councils have a way of being routinely overridden.

CONCLUSION

Given this, the obvious question to anyone who is at all familiar with the claims communitarians make about the promise of participation is whether anything more is possible. One has to wonder in particular what chance local initiatives can possibly have of influencing the larger forces at work on our lives. For by the communitarians' own account, most of the responsibility for the drift away from community we have been experiencing in this society lies with forces that operate at a level quite distant from the municipality, let alone from the neighborhood. Moreover, especially in their economic form, these forces seem to grow ever more remote—and ever more powerful—all the time. Even nation-states are now having difficulty handling them. And when neighborhood associations find even local economic forces difficult to control, one cannot help but wonder whether it makes any sense at all to think of these trends as reversible through a revival of participation. If they're not, then the most that can be expected from breathing fresh life back into the practice of citizenship in this country is cosmetic change. Fundamentally, the forces governing our lives will not be affected at all.

Even if, therefore, the potential exists for the democratic revival suggested by *The Rebirth of Urban Democracy*, it will take a lot more

argument to show that it can translate into anything like the sort of popular empowerment communitarians have in mind. And it will need to be argument of a different kind than communitarians are used to making. A big challenge lies here, and skepticism that it can be met successfully is altogether in order. But the attempt must be made if the communitarian cause is ever to amount to anything more than an academic fashion. Communitarians can proceed only so far relying on philosophy and sociology; sooner or later, they will have to tackle political economy as well.

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Routine Organ Donation: A Communitarian Organ Procurement Policy

JAMES LINDEMANN NELSON

In a 1993 interview in the *Medical Ethics Advisor*, Thomas Peters, a Florida physician who directs the Jacksonville Transplant Center, noted that last year 2,500 people died while on the waiting list for organ transplantation. During this same period, 4,000 families turned down the option of donating the organs of a deceased loved one. “All those organs were buried for one reason only: The next of kin said, ‘no,’” he said. “That’s the real ethical dilemma we face today.”

Dr. Peters suggests a solution to this ethical dilemma: money. Writing in the *Journal of the American Medical Association* in 1991, he opined that a “death benefit” of \$1000 paid through organ procurement agencies would favorably incline many of these families toward donation, without actually coercing anyone.

Here I want to propose a different solution. As long as certain important conditions are satisfied, organ donation should be regarded as a social duty, not as a matter of individual altruism or self-interest. We should not transform the deathbed into a market in organs. Instead, we should transfer the venue of decision making from traumatized individuals and sorrowing families to ourselves, in a cool hour, and as a community. We should ask ourselves: Does routinely providing organs to those who need them once we have no further use for them fall within our shared vision of a compassionate and civil society?

I believe that, on reflection, we will conclude that it does. Accordingly, we will be inclined to accept the following outline for a new organ procurement policy: Relevant law regarding “anatomical gifts” should be revised to allow organs to be routinely removed from all

adults who die in circumstances that allow for transplantation. Those who are unpersuaded that providing organs to others is a duty would be excused, and families would be allowed to dissent on behalf of their dead relatives.

ORGAN RETRIEVAL AS “EASY RESCUE”

The basic motivation for the policy of “routine retrieval” is that our organs are not solely our own, either to give, to withhold, or even to sell freely when we no longer need them. Put simply, we owe our organs to needy others when we’re done with them, and you can’t keep or sell what you already owe.

Imagine that you’re running through the park one warm, sunny morning. There’s a small pond not far from the jogging path, and as you draw near, you notice that a little girl is having a great time splashing around in it. You keep your eye on the child to distract yourself from the stitch developing in your side, so you notice when the girl slips, hits her head on a rock, and slides under the water. A second later, you’re at the side of the pond. A pause, a bend, a quick pull, and disaster is averted. The cost to you is a few minutes of time, and maybe getting your running shoes wet.

The point is that none of us is really free simply to jog on past. Neither are we free to attach conditions—a fee, for example—to our altruism. We would richly deserve the severest moral criticism for our callous cruelty if we didn’t stop to help this child.

This story suggests a general question: is any of us really free to refuse giving to others something they may desperately need that costs us little or nothing to give? A society that regards with opprobrium the jogger who runs past the drowning girl or vends his rescue services, that considers, in other words, the jogger obligated to rescue this child, should conclude similarly in the case of organ donation. We too—or at least most of us—are obligated to provide organs to others when we no longer have any use for them.

I say “most of us” because some people may find themselves in situations that differ from the jogger’s. They may have philosophical or religious scruples about the removal of parts of human bodies after death; they may fear for the feelings of their loved ones. Or, they may simply themselves feel revulsion at the idea of organ donation.

These convictions, concerns, and responses ought to be respected. Those who wish to be excused from the duty of “easy rescue” as it manifests itself in organ donation should be. For them, after all, the rescue really isn’t easy at all. For the majority of us who can’t claim such scruples or sensibilities, however, the rescue *is* easy, and the duty seems clear.

SOME EXPERIENCES WITH “OBJECTING OUT” SYSTEMS

The idea that society should remove organs in the absence of objections left by the deceased or made by family members is widely accepted in many other parts of the world. Several European countries—France and Austria, for example—already have laws allowing routine organ donation. Even in the U.S., laws allowing the removal of certain body parts—typically corneas—without the explicit consent of the deceased or family members are in place and have survived court challenges.

But have these laws actually increased the organ supply? The answer is mixed. Much of the European experience has been disappointing, largely because many European physicians cannot quite bring themselves to remove organs without explicit family permission. In effect, they adopt the system in place in the U.S., and it’s therefore hardly surprising that they do no better at procuring organs. Where a real presumption of “easy rescue” has been tried, the results have been much better. Singapore, for example, has had a presumed consent law for kidney transplantation since 1987, and has witnessed a sharp increase in the number of kidneys available for transplant. And in the state of Georgia, which made removing corneas under specified circumstances a routine matter in 1978, there has been a striking rise in the availability of this vital tissue. About 25 cornea transplants were performed annually in the state before the effective date of the law, while in 1984 alone, 1,000 transplanted corneas gave people new or substantially enhanced sight.

REPLIES TO OBJECTIONS

So there seems strong reason to regard making our organs available to others when they are no longer useful to us as a moral

duty—at least for most people. Furthermore, we have good grounds to suppose that taking such a duty seriously by putting it into place with respected and enforced laws would ease the organ shortage. But even someone who agreed that we have the duty of “easy rescue” might insist that there was a fair-sized gap between recognizing a moral duty and codifying that duty in our laws. Indeed, the rather spotty compliance with those laws in Europe suggests that they face some fairly powerful opposition, and it is clearly important to try to understand and respond to these intellectual impediments.

An oft-heard objection stems from our suspicion of “big government.” Many people simply don’t want the government enforcing morality, and even with an opt-out clause, the idea that removal of organs without express permission would be legally sanctioned suggests to some the alarming image of government “ownership” of our bodies.

The specter of an already-too-big-and-intrusive government assuming new powers to infringe upon individual autonomy is frightening, perhaps—but only in the dark. A good way of shedding some light on the matter is to compare routine organ procurement with other, more familiar ways in which we allow the government to determine what we do.

Consider jury duty. The state can compel its adult citizens to serve on juries, a responsibility that can be intrusive on daily life and employment for weeks or even months, and can force citizens into making very difficult and painful decisions. Getting excused from such duty is possible, but a dismissal isn’t yours for the asking. Typically, you have to convince a judge to let you off, and some judges take a good deal of convincing. Still, we don’t speak of the government as “owning” our lives just because it can tell us what we have to do with a very small part of them. I suggest, at least for those of us not hampered by special scruples or sensibilities, that having organs removed from our lifeless bodies so that they can save or enhance the life of someone else is certainly no more intrusive than mandatory jury duty.

Furthermore, I suggest that the kind of good attained by expanded organ transplantation is also worthy of mention in the same breath as the goods achieved by our current system of jury duty. Some

people assume, mistakenly, that our jury system is somehow the only one compatible with a democratic nation. But there's no good reason to believe that. We don't have a system that coerces people to serve on juries because there's no other way to do it compatibly with a free society; we do it because we think it is the best way to secure fair trial, and we are willing to put up with the considerable limitations on liberty that this policy entails. Likewise, it is reasonable to decide as a society that greater organ availability is a good that we agree is worth sacrificing for.

Another concern worth discussing is the possibility of mistakes. People who would have wished to opt out of the system, for example, could undergo organ retrieval after their deaths because their objections were not expressed, or because the expression had been lost. This is a serious concern, but to be fairly assessed as an objection to a system of routine retrieval, it has to be considered against the realistic policy alternatives. Mistakes, after all, happen under every system. Under the present dispensation, for example, there are many people who would have wanted to give their organs to enrich the lives of other people, but whose organs are in fact left to decay. Perhaps their donor card gets lost, or their own desires get overridden by their families' reluctance to authorize donation. While in theory a properly executed indication of willingness to donate on the part of the deceased should suffice, the dead, unlike the living, can't raise a fuss if their desires are not honored. In light of the fact that errors can go both ways, one needs to ask whether the errors associated with the routine retrieval system are as grave as the errors associated with the system of express voluntarism. At least in the routine retrieval system, the error does not cost anyone a chance at an extended or enhanced life.

But we can do more than simply balance the potential errors of one system against the potential errors of another. We can take steps to decrease the chances that routine retrieval will inappropriately remove organs. Paul Menzel, a philosopher from Pacific Lutheran University, suggests that we do not harvest organs from anyone for whom there is no clear evidence of the opportunity to dissent. For example, if dissent is registered on driver's licenses, a body without a driver's license would not be subject to routine retrieval.

Another problem results from our concerns regarding family reactions to organ donation. Our current insistence on strict voluntarism is, at least in part, a matter of defending the sensibilities and interests of the living, not the dead. Most of those who die in circumstances appropriate for transplantation die traumatically and thus unexpectedly, and the removal of organs may further lacerate the family's feelings.

To prevent this, some proponents of routine retrieval suggest that families be allowed to dissent from the policy on behalf of the donor. They recommend that families be informed that, as a matter of routine, usable tissues and organs will be removed from their loved one unless they object. Simply withholding objection is psychologically easier than actively granting permission. Such a policy will enhance the organ supply, while still safeguarding the feelings of families who harbor particular objections to donation.

CONCLUSION

The precise form of a routine retrieval system could be amended as time and experience indicate. As suggested above, we can also anticipate the most troubling possible consequences and head them off. Of course, some of the strategies for heading them off will actually blunt the potential efficiency of the routine retrieval system. But it should also be kept in mind that while increasing the efficiency of organ retrieval is the moral hub of this proposal, it is not its only point. By coming together and accepting that we have a duty to share our organs (once we no longer need them) with those in need, we affirm our solidarity with each other in the face of the many forces that separate us. And, in the long run, this affirmation may be as significant a feature of a communitarian organ retrieval policy as are the extra organs it saves from moldering away.

Liberalism, Nationalism, and Community

Yael Tamir: *Liberal Nationalism*

Princeton: Princeton University Press, 1993, 194 pp.

Reviewed by Daniel Philpott

How can it be that 200 years after the Enlightenment, near the close of a century that has taught us, if nothing else, the fallacy of intemperate passion for the nation, at the end of a Cold War thought to be the last gasp of ideological conflict, in this best of all possible worlds, at the end of history, atop the peak of rationalism, secularism, reason, and tolerance—how can it now be that in both East and West, in states both rich and poor, that nationalism—mystical, instinctual nationalism—has returned? For liberal philosophers this is a troubling question. Until a decade ago, they had thought that their own values, their impartiality and universalism, their emphasis on individual dignity and a common human nature, had refuted and outlived nationalism or any doctrine espousing the organic or the particular, the priority of the community, or the mystical bonds of history.

But alas, nationalism rages, on battlefields in Yugoslavia and in parliaments in Canada. Even more brashly, it has penetrated political philosophy, where, as readers of this journal are no doubt aware, liberals have been challenged by communitarians, who insist that one's nation, like one's family and religion, is a worthy and enduring feature of the modern moral psyche, a shared passport to meaning and identity.

The renewed longevity of national and communal ideals, however, should not necessarily humiliate liberals. In fact, some of history's great liberals befriended the nation. These were not the relentless bounty hunters who aimed to arrest once and for all the

nationalist outlaw, but ones who were less possessive, willing to see the importance of communal claims. Mill and Mazzini, Wilson and Rousseau, were all sympathetic.

Yael Tamir revives this tradition in her recent *Liberal Nationalism*, boldly—and largely successfully—seeking to reconcile liberalism and nationalism. In fact, her reach is even wider than nationalism: she shows generally how and when liberals may favor culture and community, thus continuing an important project begun by other philosophers—Michael Walzer, Will Kymlicka, Allen Buchanan, and Amy Gutmann. A former activist for the Israeli group Peace Now and a graduate of Oxford’s philosophy department, Tamir is a qualified mediator of peoples and philosophies.

Hers is a moral argument: she asks not how nationalism arises or what it has wrought, as numerous sociological and historical analyses have already done, but how it might be justified. She does this first by taking national claims seriously. Community and culture, language, religion, traditions, and what Johann Herder calls “folkways” that we inherit upon birth, that constitute who we are—all are essential to a good life. They provide an intelligible context, a realm of significance, that makes life worthwhile.

But these communitarian truths do not erase a human feature dear to liberals: choice. Our moral nature makes us reflective, autonomous, and choosing. We decide our ends and communal loyalties, and can distance ourselves from any of them. This does not make us “free to detach ourselves from all our communal and moral attachments at once, and reflect on them from some Archimedean point”; full assimilation or acceptance into another culture is rarely possible. Liberal nationalism says only that we always have some choice; plausible alternatives are always available (just ask the immigrant or the convert). Tamir’s synthesis, then, is that we value our culture and nation because we choose them as our way of finding meaning, of living well.

These conclusions point to several political principles. One is cultural pluralism, which allows people to learn from or assimilate into other cultures and better reflect upon their own, making choice more real. It requires both legal allowances for particular cultures—giving *prima facie* assent to Israeli Palestinians’ right to have a

Palestinian university or the American Jewish air force officer's right to wear a skull cap—and enforcing tolerance, ensuring that individuals do not interfere with each other's rights to live out their cultures.

Another principle is “the morality of community”: a state is not bound solely by cosmopolitan principles, but may, in its policies on immigration and wealth distribution, justly favor its members over outsiders. Consistent with liberalism, this principle is qualified: some global duties, as well as impartiality to different cultures within a state, are required.

Tamir also supports national self-determination, which allows nations to govern themselves. She justifies it not as a way of promoting mere self-rule or political rights, but as a means for a nation to realize fully its culture. Again, liberalism qualifies: in order for nations to coexist and for minorities to be respected, nations are not necessarily entitled to states, but only to a federal or other institutional setup that enhances their political autonomy.

To be truly liberal, Tamir insists, each of these principles must at times befriend the illiberal. True cultural pluralism means that we respect those who “join Opus Dei or Hare Krishna, or dedicate themselves to what one might think of as a meaningless project” (p. 32); and national self-determination means allowing even illiberal nations autonomy. But there are limits: she also requires that nations respect both the autonomy of other nations and of individuals within their midst. She thus endorses a Canadian Indian woman's claim to equal treatment in property law, contrary to her community's traditions.

To the traditional nationalist, to whom culture is not the object of choice or consent, but demands grateful, unquestioned loyalty, to whom a proliferation of pluralistic cultural “options” is an acid that corrodes traditional community, this liberal solution will be repugnant. Tamir is aware of this, arguing that her liberal nationalism differs from unreflective, parochial nationalism. And when the two conflict, when nationalist principles deny autonomy, she consistently opts for the liberal alternative. To impose one “authentic” interpretation of culture on dissenting individuals “could serve as an instrument of conservatism and social oppression.”

If this liberal solution would destroy or rule unjust such radically illiberal cultures as the American South or the Germany of nineteenth-century romantics, it would not bother most liberal democrats, even those with communitarian sympathies. But the really hard cases are those within liberal democracies in which a culture claims that in order to survive, it must constrain individuals in certain ways. To Pueblo Indians who consider Protestantism an enemy, to Quebecois for whom the English language is a destroyer, to scores of other cultures that constrain women, minority religions, and others in scores of ways, unrestricted liberal tolerance would end their ways of life. In other cases, minority individuals claim to need special exemptions from law in order to live out their culture—Native Americans eat peyote; some religions cannot serve in the military or salute the flag.

What kinds of constraints are justified? To what degree can we protect nations and cultures before we unacceptably distance ourselves from liberalism? As multiculturalism grows within the United States and nationalism burgeons without, these questions become more critical and more baffling. Yet here, Tamir disappointingly asserts that common sense is our guide—a solution perfectly obscure to bitter partisans of cultural conflict.

This shortcoming, in the end, is not debilitating to Tamir's work—it is a matter that needs more theory and further distinctions. Her contribution is her general moral approach, which creatively and rigorously integrates liberalism and nationalism, combining their insights and leaving behind their strident extremes. And as nationalism, often cruel nationalism, makes its comeback, such a vision is sorely needed.

Big Brother is Helping You

Marc Freedman: *The Kindness of Strangers*

San Francisco: Jossey-Bass, 1993, 162 pp.

Reviewed by Charles Derber

Alexis de Tocqueville wrote that because an American is neither master nor slave of his fellow citizen, “his heart readily leans to the side of kindness.” This faith in American generosity of spirit, and the notion that it can solve some of our most pressing social problems, has animated generations of believers in volunteerism, most recently President Bush with his call for a “thousand points of light” and President Clinton with his passionate commitment to national service. Marc Freedman has written a book that adds historical perspective, reasoned evidence, and tempered moral inspiration to the emerging “service movements” of the 1990s, even if he persuades partly by underscoring what the kindness of strangers cannot accomplish.

Freedman focuses on “mentoring,” one of the fastest-growing forms of service, which matches adult volunteers, usually middle-class, to young people in dire need, typically African-American or Hispanic inner-city teenagers living in poverty. Organizations like Mentoring, Inc. in Washington DC, Project Raise in Baltimore, and National Public Radio’s One Plus One have arranged thousands of these liaisons, such as the one between John Hogan, a Washington DC physician, and Sean Varner, a student at McKinley High School. In one of eight extended vignettes, Freedman lets Hogan describe his mentoring experience in his own words, starting with his initial shock on calling Sean’s number and getting a homeless shelter—Sean’s home. Sean, a bright kid on the verge of dropout, proves to be one of mentoring’s success stories; he is ready to accept the friendship Hogan offers, he soaks up Hogan’s concern and guidance, and turns into an ‘A’ student with the top PSAT scores in his school. But Freedman offers plenty of more sober testimonials, including that of Hogan’s wife, also an African-American physician, who finds it hard to strike up a relationship with her teenage charge, Robin; she never develops the easy rapport that John has with Sean, and settles for the

satisfaction of a cautious friendship which helps keep Robin in school and resist the overwhelming peer pressure to get pregnant. Such modest results among the 50,000 to 70,000 young people reached by mentors nationally are far more common, Freedman emphasizes, than the miracle of Sean.

Freedman describes the “Friendly Visitors” campaigns which brought middle-class volunteers to immigrant slums in the late nineteenth century, and the Big Brothers/Big Sisters movement, founded in 1904 by Ernest K. Coulter, a New York journalist, who told his audiences that “there is only one way to save” the young indigent destined for a life of poverty and crime, and that “is to have some earnest, true man volunteer to be his big brother...make the little chap feel that there is at least one human being in this great city who takes a personal interest in him, who cares whether he lives or dies.” Both of these early incarnations of the mentoring movement, Freedman shows, foundered on the moral fervor of their partisans, who could never deliver on the great expectations of salvation which they helped evoke. The new obstacles to mentoring’s success—including the frightening urban violence which makes many suburban mentors afraid even to make contact with their charges, and the new mix of drugs and gangs which terrifies and seduces today’s youthful poor—argue, says Freedman, for even less utopianism. But it is precisely these new conditions of unprecedented social ungluing which also speak compellingly to the need for the mentoring movement.

At the core of the mentoring vision is belief in the power of the one-to-one caring relationship, linked to a new recognition that such contemporary problems as poverty are, at their heart, crises of community. Drawing on William Julius Wilson, Elijah Anderson and other scholars, Freedman argues that social isolation from adults with the time and resources to care is the bedrock reality experienced by the inner-city young. The decline of the “old heads” described by Anderson—the old-time residents, whether coaches, preachers or savvy street people whom kids could once rely on—has created a desperate vacuum of nurturance and what James Coleman calls “social capital,” the connections and moral guidance needed to succeed in mainstream society. This helps explain the research literature Freedman summarizes showing that the most effective policy interventions among the youthful poor all create a meaningful one-to-

one relationship with an adult. Freedman makes clear that youth isolation is also related to the breakdown of bonds of obligation between comfortable suburbanites (both white and black) and urban poor; what he makes less explicit is that the community crisis of the inner city is, in many ways, replicated in the suburbs, helping explain the hunger for connection animating many of the mentors themselves.

Freedman makes a powerful case that instead of creating heroic expectations for formal mentoring programs, we need to diffuse the mentoring principle throughout the schools, social programs, and neighborhood culture of the inner cities. Since so many kids need a form of “supplemental parenting,” they deserve a “mentor-rich” environment which offers them nurturance, skill development, and moral guidance from multiple adults. A fully developed mentoring movement, he suggests, will build community by activating “new heads,” including teachers, youth workers, and responsible adults on the street, who are not formal mentors but who come in contact with kids in their daily routines and learn to nurture and guide them. Freedman argues that a new generation of community youth workers, often originally from the community themselves, are turning the bureaucracy that was community service into an extended family, that “attachment teachers” are emerging who bring a sense of family to the school, and that the inner city may be beginning the transition toward the culture of connections that is the true aim of the mentoring movement.

Freedman has put flesh on the bones of vague concepts like Bush’s “thousand points of light,” offering a grounded and rich communitarian vision of the potential of new service movements. What he does not offer is a satisfying account of the place of such movements in the larger politics that is required to solve inner-city poverty and heal our larger crisis of community. The massive bleeding of jobs from the inner city, by any account a central ingredient of the crisis confronted by inner-city kids, receives no analysis at all, and it is hard to see how even the most successful mentoring projects can make a difference for kids who are unable to find gainful employment. The closing down of the structures of opportunity is so catastrophic that, as one of the mentors herself laments, it is hard to see how mentoring can ever be more than “a drop in the bucket.”

If mentoring moves beyond individual care-giving toward community-building, it can help animate the larger political movement that we require. By showing that the most effective mentoring arises organically from the community, and must collectively engage adults who work for or live in the community, Freedman hints at the essential relation between volunteerism and community empowerment. But he fails to discuss many of the indigenous community movements, such as the Nation of Islam, which have reached the most dispossessed members of the inner city. These movements, as Malcolm X's rehabilitation in prison demonstrated, make great use of mentoring, but do so in the context of a far-reaching politics of community self-reliance, emphasizing economic and political independence.

This does not imply that mentoring in the inner city needs to be linked to radical politics, nor indeed to any social or political agenda beyond that which enhances the capacity of the community to help shape its own destiny. The danger, however, is that service movements such as mentoring will be cast in a purely individualistic mold by conservative forces fearing collective stirrings among the dispossessed. The most artful practitioners of inner-city mentoring will find ways to preserve the communitarian essence of their practice, deterred neither by those who fear the mobilization of the inner city nor those who want to exploit it for their own political ends. That delicate balance will also determine the ultimate fate and success of Clinton's National Service program and the larger service movements that draw on the generosity of the American spirit.

Employer Notification: A Weapon Against Crime or a Violation of Constitutional Rights?

GAYTON PATRICIA GOMEZ

Edward Charles Davis III, a photographer for the *Louisville Courier-Journal* and *Times*, was arrested on a charge of shoplifting. Six months later, Louisville police circulated a flyer containing the names and photographs of “active” shoplifters, including Davis, to 800 local merchants. The flyer came to the attention of Davis’s employer, who informed Davis that he would not be fired this time, but he “had best not find himself in a similar situation” in the future.

The shoplifting charges against Davis were dismissed shortly after the flyer was circulated, but Davis had already been punished. Without ever having been convicted of a crime, he was treated as an offender in the eyes of his community and his employer.

By alerting merchants to possible shoplifters, the police hoped to cut back on crime. As Davis’s case illustrates, however, innocent people may suffer embarrassment or even loss of employment as a result of such a policy. Nonetheless, the Supreme Court, in *Paul v. Davis* (1975), ruled that distributing such flyers is constitutional and does not violate any right to enjoyment of reputation.

What if, however, the police had sent a notification letter directly to Davis’s employer informing him of the arrest? Would such a notification help reduce crime? Would it be constitutional?

The Responsive Community publishes case studies as material for dialogue. Cases illuminate both sides of an issue without taking a position.

An employer notification ordinance did exist temporarily in Miami Beach. In 1991 the city accounted for 40 percent of Dade County drug arrests. In an attempt to reduce drug traffic and encourage drug treatment, the City Council passed an ordinance mandating that police notify an employer with a form letter following drug arrests. The letter began with the explanation that the notification was being made “in the interest of protecting the public and to encourage assistance for those who may require counseling or other assistance related to drug offenses.” It was “not intended to comment on [the] guilt or innocence” of the employee, but it urged the employer “to encourage the employee to seek counseling, rehabilitation or assistance.” The letter cautioned that the notification “should not be a basis for termination or any other punitive action,” explaining that this might violate the employee’s rights. Enclosed with the notice was a list of drug treatment facilities.

The ordinance was in effect from 14 February to 18 December 1991. It was never used, however, and the city council repealed it after the Florida chapter of the American Civil Liberties Union (ACLU) argued that the ordinance amounted to punishment without due process of law and was therefore unconstitutional. Because the ordinance was never tested either in practice or in court, both the constitutionality of employer notification and its desirability as public policy remain open questions.

PRO: AN EFFECTIVE WEAPON AGAINST CRIME

Employer notification, according to its proponents, is an effective method of curbing drug traffic, getting drug addicts and other offenders with problems into treatment, and reducing crime. As Miami Beach Police Chief Phillip Huber commented, “people [aren’t] afraid of going to jail for drug offenses [but are] afraid of their employers’ finding out they use drugs and [of] losing their employment.”

Employers have an investment in the productivity of their employees, and the ordinance thus gives employers an incentive to provide treatment in order to ensure their employees’ future productivity. Likewise, employees have an investment in keeping their jobs,

so the ordinance would be an incentive for them to stay in treatment. This, in turn, will reduce petty crimes and violence.

Not only could employer notification reduce crime, but it is also a practical alternative to traditional punishments. Because of overcrowding in court dockets and prisons, many offenders, especially those involved in petty crimes, go unprosecuted even though clearly guilty. Many offenders therefore have little incentive to change their behavior. Employer notification, however, would provide these offenders with such an incentive.

Moreover, the deterrent effect would be more equitable than that provided by traditional law enforcement. More affluent offenders are likely to secure better legal representation, and therefore are more likely to have the charges against them dropped or to win acquittal. Employer notification, on the other hand, would apply equally to all socioeconomic groups. In fact, since those with higher-paying jobs are likely to be more afraid of losing them, employer notification may weigh more heavily on the affluent and thus may even out some of the inequities of the criminal justice system.

Finally, employer notification ordinances would enjoy large public support. For example, according to a 1989 poll by the Roper Center for Public Opinion Research, 71 percent of those polled were in favor of having the police inform employers of their employees' casual drug use.

Proponents argue that the main goal of employer notification is not punishment but treatment, and that ordinances are therefore constitutional. Advocates maintain that employer notification does not conform to the standard of punishment laid out by the Supreme Court in *Bell v. Wolfish* (1978). Because it is reasonably related to a legitimate nonpunitive governmental objective (the treatment of drug abusers), the policy does not amount to punishment and thus does not violate due process rights. Notification policies don't by themselves impose any disability (such as preventing the arrestee from working), and the adversity experienced by the arrestees (such as embarrassment, and perhaps occasionally the loss of a job) would not be excessive in relation to the positive societal goals of reducing crime and drug use that the notification policies would advance. Under current Supreme Court precedent, according to proponents,

employer notification does not appear to be punitive action that amounts to a deprivation of liberty under the due process clause. The Constitution offers no right to employment, to continued employment, or to the high regard of one's supervisor.

Moreover, the right to privacy does not prohibit disclosure of arrest records. Arrest records are ordinarily public and are routinely disseminated by the mass media long before juries actually determine guilt. In addition, courts have repeatedly allowed arrest records to be disseminated by sources other than the mass media. For example, in *Paul v. Davis*, the case which began this article, the Court held that it was constitutional for police to distribute photos and names of shoplifting arrestees to local businesses. The Court held that Davis had no cause of action as a result of the damage to his reputation and that he was not deprived of any "liberty" or "property" rights secured by the due process clause of the Fourteenth Amendment. Disclosure of official acts like arrests does not restrict an individual's freedom of action in a private sphere, and therefore does not violate the right to privacy.

Proponents further say that employees can even be required, under some circumstances, to disclose their own arrests to employers. In a 1993 Court of Appeals case, *National Federation of Federal Employees v. Greenberg*, a Department of Defense questionnaire asking employees holding "secret" clearances to disclose, among other things, prior arrests, was held not to violate the right to privacy. The court relied on the Supreme Court holding in *Paul v. Davis* that the disclosure of an official act like an arrest violates no constitutional right of privacy.

Furthermore, properly implemented, such ordinances would lose much of their punitive sting. Huber pointed out, with regard to the Miami Beach ordinance, that people arrested for the first or second time would be able to prevent the letter from being sent to their employers if they immediately agree to enter a publicly financed drug treatment program run by the county court system and remain in it for one year. Similar exemptions could be implemented in all employer notification ordinances. Even if a notification letter is sent, it will not say that the employee is guilty, but, on the contrary, will encourage independent employer evaluation to determine whether

there is a genuine drug problem. Notice could be sent to the employer on final verdicts of acquittal, thus clearing the names of falsely charged employees.

To the extent that the purpose of employment notification is therapeutic, argue proponents, it is constitutional, and the societal benefits of such an ordinance would outweigh the potential for occasional harm.

CON: A VIOLATION OF CONSTITUTIONAL RIGHTS

Opponents of such ordinances argue that they would not accomplish their stated goals of reducing drug dependency and crime rates. First, they are targeted specifically at those who are employed, in other words those unlikely to have major drug abuse problems.

The shortage of treatment facilities presents a serious problem as well. Proponents of employer notification statutes argue that those arrested can avoid having their employers notified by enrolling in a publicly financed drug treatment program and remaining enrolled in it for a year. But there are simply not enough treatment centers to handle all the arrestees. Should mere willingness to enter treatment be enough to prevent employer notification? If so, such ordinances become empty symbols. If not, an equal protection issue arises: Why should some first-time arrestees, willing to enter a treatment program, be penalized simply because the state has not provided the necessary facilities?

Finally, as Miami Beach Mayor Alex Daoud and the ACLU point out, regardless of what the notification letter says, employers are likely to find some excuse to fire the arrested individual. While some employers may have a lot invested in some employees, they may consider retaining an employee with a potential drug problem a much more expensive and dangerous investment than training a new individual who does not have such a problem. If the employee does not have a job that requires a special skill or extensive training, the employer probably will not have much invested in that employee.

The Florida ACLU was ready to bring a test case against the Miami Beach ordinance, and had calculated the model plaintiff to highlight the problems associated with the ordinance. First, the

plaintiff would neither work nor live in Miami Beach, emphasizing the equal protection difficulties regarding enforcement of the law for tourists. Could police notify employers of Miami Beach residents and not those of Tampa residents? Second, the plaintiff would be a female member of a minority group and would be earning minimum wage, to demonstrate the potential impact of such a policy on minorities with low earning power. Also, she would be arrested without a warrant and without probable cause, to demonstrate the potential for error and unfairness in sending out notification before conviction. The ordinance was repealed before the ACLU found such a plaintiff.

Civil libertarians argue that employer notification statutes would weaken the concept of innocent until proven guilty. Robyn Blumner, executive director of the American Civil Liberties Union (ACLU) of Florida said that “[t]o send a letter to one’s employer regarding an arrest is effectively a punishment, and it’s a punishment prior to any due process or adjudication.” While the arrest is a public record, an employer would have to look actively for such a record in order to find it. There is considerable difference between a public record stacked among millions of others and a letter sent directly to an employer.

Even if the employer does not fire the employee, opponents of the ordinances argue that the notice is likely to create an atmosphere that will make the employee feel, to say the least, uncomfortable. The employer is likely to regard him with suspicion even if he is later acquitted. Those opposed to the ordinances point to evidence that many employers regard any kind of record, no matter what the offense, no matter what the outcome of the case, as a powerful mark against a job applicant. In the 1970s, two sociologists, Richard D. Schwartz and Jerome H. Skolnick, attempted to measure this bias in an experiment in which they showed employers the application forms of men who were seeking menial jobs. Only 24 percent of the employers said that they would hire the men who had not only been acquitted but who also had a letter from the judge explaining that the acquittal meant that they were innocent. For this reason, several states prohibit potential employers from asking applicants about arrests that did not result in conviction, and most states limit the use of such information.

While comfort is not a constitutionally protected right, an employer notification statute, say the civil libertarians, would also violate employee rights the Constitution does protect. While some courts have found that defamation is insufficient to trigger due process requirements, many other courts have come to the reverse conclusion.

Central to the opponents of such ordinances is the 1971 case, *Wisconsin v. Constantineau*, in which the Supreme Court struck down as unconstitutional a statute making it a misdemeanor to sell or give alcoholic beverages to persons who were hazards to themselves, to their family, or to the community by reason of their “excessive drinking.” The Court stated that “where a person’s good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” Justice Frankfurter’s concurring opinion in another Supreme Court case, *Anti-Fascist Committee v. McGrath*, also expressed this idea: “[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”

Paul v. Davis, which allowed flyers of shoplifting arrestees to be distributed, seems to go directly against these earlier cases. The Court distinguished *Wisconsin v. Constantineau* as follows: “We think...‘because of what the government is doing to him’ referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry.” Therefore, the action “significantly altered her status as a matter of state law....The ‘stigma’ resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any ‘liberty’ protected by the procedural guarantees of the Fourteenth Amendment.”

The touchstone distinction, therefore, that separates damage to reputation that does violate a person’s constitutional rights from that which does not violate those rights is whether it alters rights one holds in common with the rest of the community. If not being allowed

alcohol puts a person's "good name, reputation, honor or integrity" at stake, and mandates an opportunity to be heard, surely an employer's loss of confidence is a "grievous loss" that mandates such an opportunity. If losing the right to "purchase or obtain liquor in common with the rest of the citizenry" significantly alters a person's status as a matter of state law, surely a program that forces him to undergo treatment and puts him in imminent danger of losing his employment alters his status in comparison with the rest of the citizenry.

Also, even if a court determines that there are insufficient grounds for a constitutional complaint, there still may be grounds for suit. *Paul v. Davis*, for example, does not state that the petitioner had no grounds for suit. Davis's complaint asserted that the active shoplifter designation would "inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair future employment opportunities." While the Court held that these were insufficient grounds to allege a due process violation, the "complaint would appear to state a classical claim for defamation actionable in the courts of virtually every state. Imputing criminal behavior to an individual is generally considered defamatory per se, and actionable without proof of special damages."

CONCLUSION

Employer notification statutes would increase participation in treatment programs, and thus would benefit the community by reducing crime and drug addiction. On the other hand, because the notification is made prior to conviction, such ordinances risk causing embarrassment, and possibly even loss of employment, to innocent people. Given the extent of urban problems in the United States today, it is clear that new weapons are needed in the war against drugs and crime. The time is ripe for courts, legislatures, and communities to decide whether, and under what conditions, employer notification is such a weapon or whether such policies violate constitutional rights.

Benjamin Wittes

From the Libertarian Side

UNHOLY MARRIAGE

The New York State Libertarian party has nominated outrageous radio host Howard Stern as its candidate for governor. “I’m going to win,” Stern told his 3 million listeners when he announced his candidacy. “I’m going to be the next governor of New York.” Stern is running on a three-part platform. He wants to reinstate New York’s death penalty, allow road construction only at night, and stagger toll booths along crowded highways. He promises to resign the governorship as soon as he accomplishes these goals and turn over power to running mate Stan Dworkin.

Stern’s candidacy is a bonanza for the Libertarians. It guarantees them media attention and could easily bring them more than 50,000 votes. Such a showing would secure the Libertarians an automatic line on the New York ballot for the next four years. “This is the most exciting thing that’s happened in all my years in the Libertarian Party,” party chairman Ludvig Vogel told the *New York Times*. A month before the 23 April convention, Vogel appeared on Stern’s show to hype the party, encouraging Stern to pack the convention with his supporters. Stern responded by encouraging listeners to pay \$15 to join the party, and at the convention, he rolled over the five-person field, taking 287 out of 381 votes cast.

A serious Libertarian-Stern candidacy, however, would be a disaster for Republicans, who will need every pro-death-penalty vote in the state to take on current Democratic governor, Mario Cuomo. “He’s much more serious than at least nine out of the ten Republican candidates, and maybe all ten,” said Democratic political

consultant Hank Morris. "It is a real wild card....Who knows what can happen."

One trouble Stern might face is a Federal Communications Commission rule that requires radio stations to provide equal time to different candidates. Depending on how this ruling is interpreted, it could force stations carrying Stern's show either to cancel it or provide hours of response time to Cuomo and the Republican nominee. "There's got to be a loophole," said Stern. "I am for loopholes."

Associated Press, 23 March 1994
New York Times, 3 April 1994, 24 April 1994

STROSSEN SPEAKS

In a recent interview, ACLU head Nadine Strossen spoke out about pornography, upholding not only the right to read and distribute it but its intellectual merit:

You know, what you see in a particular image is so subjective. Take the kind of image that feminists might find objectionable—an image that might convey a woman being raped....If you read Nancy Friday's books of sexual fantasies reported by thousands of women, she says a significant theme is women being turned on by images of rape—not real rapes, of course....

There's something intellectually stimulating about pornography. In hotels, they sometimes now have soft-core porn. At night, when I'm done giving a speech, I don't mind turning on the Playboy Channel or the *Red Shoe Diaries*. I mean, what's the alternative? My husband isn't there. I do a lot of traveling, and I'm glad the hotels have this stuff.

She also talked about her early childhood as a civil libertarian activist:

I'm not exaggerating when I say that my earliest memories are of having feelings about a sense of privacy, justice, and freedom of speech. I was constantly arguing with parents and teachers when I felt they were intruding on my rights or the rights of others. I was always deeply upset when I saw animals in kids' books being treated unfairly.

Progressive, March 1994

From the Authoritarian Side

SPEAKING IN TONGUES

New Jersey children whose native language is not English can be forced into bilingual education classes. Even if parents prefer that their children be taught in regular classes, New Jersey law mandates that any community with 20 or more students who speak the same language and have less-than-fluent English *must* place those students in bilingual classes. The law does require that the school notify parents, so at least they know that their children have been removed from normal school life.

Many states have anachronistic but unenforced laws on their books, but the New Jersey law apparently carries real weight. The Princeton school system has actually placed children in bilingual programs against the express wishes of their parents and, in one case, left them in bilingual classes for two years.

Forcing segregation on children, even if under the rubric of a “culturally sensitive” program, impinges on the ability of parents to integrate quickly into American life. Even those who accept the premises of bilingual education ought to regard it humbly—as an educational option, not a fiat. If children wish to challenge themselves rigorously in schools by taking classes that aren’t in their native languages, they should be commended. They certainly should not be told they’re not up to it.

Wall Street Journal, *5 April 1994*

IRAN OR AMERICA?

The Satmar Hasidic sect of Kiryas Joel, New York has asked the Supreme Court to uphold the constitutionality of a school district created specially by the New York State legislature to serve the sect’s special education students. A public school district in their purely Hasidic village, say the Satmars, does not violate the First Amendment’s ban on state support of religion, because Kiryas Joel, while highly religious, has secular political institutions that are administratively distinct from the sect’s religious institutions. More-

over, argue the Satmars, the town is open to people of all religions, so there is nothing exclusive about the newly created school district. By supporting the town, in other words, the state does not necessarily support its residents' religious activity.

Putting aside the constitutional issues behind the controversy, Kiryas Joel's supposedly democratic institutions appear to be mere arms of the Satmar leadership. Candidates run for Kiryas Joel public office only with the approval of the Satmar Rebbe, and the few who have tried running without the leadership's blessing are shunned. Joe Waldman, who ran unsanctioned for the school board, was banned from the synagogue, his house was stoned by a student mob, his tires slashed, his supporters beaten, and his children expelled from their school. What's more, it is reported that housing policy requires would-be buyers or renters to get permission from the congregation before their transactions are allowed, and they have to fork over a \$10,000 donation to the religious schools for each housing unit. In speeches in 1989, Grand Rebbe Moses Teitelbaum called for the expulsion from the community of specific families and a policy of rigorous exclusion of outsiders.

But while the Supreme Court allowed attorneys for Kiryas Joel to use the town's municipal code as evidence of the city's secularism, it refused to hear evidence (including Waldman's) challenging just how secular those codes really are. Citing the limited nature of the case before the Court, Justice Ruth Bader Ginsburg cut short arguments about the concentration of secular power in the hands of religious officials. "I felt," said Waldman, "like she had prevented America from knowing what is really going on in this Khomeini-like shtetl."

Village Voice, 12 April 1994

THE RETURN OF THE FASCISTS

An election that brought groups like Italy's Northern Leagues and neo-fascists into government, in any Western democracy but Italy, would trigger genuine international consternation. With Italy's history of weak and unstable central governments as background, however, the 27 March voting quickly faded from the front pages of American papers, some of which never seemed overly worried about the vote to begin with.

Fascism has returned to power in Europe. To be sure, it hasn't returned to exclusive power, nor is it the pure, unrefined fascism of the 1930s. Still, support for the Northern Leagues doubled and support for the neo-fascists tripled. Moreover, it has been a long time since government supporters in Europe saluted their leaders with straight arms or chanted "Duce!" And it has been a long time since a member of the Italian ruling coalition called Mussolini "the greatest statesman of the century," as neo-fascist leader Gianfranco Fini did in a post-election interview.

It remains to be seen whether the neo-fascists and the Northern Leagues can sit in the same government with one another. The neo-fascists call for a strong central government, while the Leagues call for a federalist Italy with a large measure of northern autonomy. It's also not clear that the rise in the extremist vote is principally the result of a wave of right-wing radicalism among Italians. The major parties, after all, were severely tarnished by massive corruption scandals and all but disappeared. The credible choice was between extremists of the right and extremists of the left.

All that said, however, Italy's flirtation with fascism has been regarded with indifference compared to the consternation a strong *Republikaner* showing in Germany or a National Front triumph in France would generate. Italian politics are no longer a joke.

Press Reports

From the Community at Large

COMMUNITARIAN PROPHECY

This issue's Communitarian Prophecy Award goes to Senator Daniel Patrick Moynihan for his insight 30 years ago into modern social problems. Writing about the danger of single-parent families, he warned that "a community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any set of rational expectations about the future—that community

asks for and gets chaos. Crime, violence, unrest, disorder—most particularly the furious, unrestrained lashing out at the whole social structure—that is not only to be expected; it is very near to inevitable. And it is richly deserved.”

Thirty years from now, the same award might have to be awarded to Jesse Jackson, who has courageously begun talking about black intracommunal violence as the nation’s foremost civil rights issue. “More young black men die each year from gunshots than the total who have died from lynchings in the entire history of the United States,” Jackson now claims. “We have become our own worst enemy.” Breaking a long-standing taboo against airing dirty laundry in public, Jackson now discusses violence not as a component of white oppression of blacks but as a systemic problem within the black community itself. Black-on-black crime, Jackson now says, “robs our movement of its moral authority.”

America, 18 September 1965
New Republic, 21 March 1994

A COMMUNITARIAN CHALLENGE

In an ironic twist of communitarian fate, neighborhood organizations are mobilizing against church social service organizations. Fearing crime and falling property values, community organizers are fighting church homeless shelters and soup kitchens, drug addiction programs, sometimes even churches themselves. “Churches are no longer seen as assets to the community,” says Maryland Reverend Thomas Starnes. “Now it’s “There goes the neighborhood.”

Residents of Washington’s Foggy Bottom neighborhood recently rallied against a church soup kitchen intended to feed 200 people each day. The residents used city zoning restrictions to stop the program. The community of Rancho San Diego allowed a Presbyterian church to build only after the congregation agreed to a building that looked just like any two-story residence—a small cross is permitted above the front door. A Methodist church in Dallas that had been processing amnesty applications for illegal aliens was ordered to stop by the local zoning board. Elsewhere, community zoning boards have simply excluded church organizations from local communities.

Neither the communities nor the churches lack compelling arguments. The concerns of the communities are legitimate. Church social service programs can bring the pathologies of the inner cities into tranquil neighborhoods. And churches cause parking problems and sometimes noise. The efforts churches make on behalf of inner cities, however, are also legitimate and profoundly in the service of society at large. How the communities' legitimate needs and the churches' social service can operate in harmony with one another is a major communitarian challenge.

New York Times, *27 March 1994*

Drawing by Summers; © 1993 Washington Post Writers Group

LOBBIES WATCH

Is This Restraint?

Senators could not have asked for a better public reaction than that which they received following their 11 May passage of strict new rules governing congressmen's financial relations with lobbyists and interest groups. The legislation forbids members of Congress from accepting nearly all gifts, meals, trips, and entertainment not merely from lobbyists, but even from ordinary constituents. The bill passed with 95 supporting votes and, according to chief Senate sponsor Carl Levin (D-MI), "should help restore confidence in Congress and demonstrate that we're not too cozy with lobbyists."

Levin seems to be right, at least judging by the reform-minded hotshots now lining up to praise the Senate action. Most notably, Common Cause president Fred Wertheimer told CNN that the new rules would "fundamentally change the way business is done in Washington and on Capitol Hill."

Here is what the legislation doesn't address: While the bill will prevent Senators and special-interest advocates from meeting for a \$100 lunch, it will do nothing to stop those same special-interest advocates from spending many thousands of dollars to support or oppose that same candidate. Advocacy organizations can contribute to congressional campaigns, and they can spend unlimited amounts of money distributing agitprop on behalf of candidates. "Are these members really going to be bought for a free lunch or a trip, tennis tournament, [or] something like that?" columnist Paul Gigot wondered on the *MacNeil-Lehrer News Hour*. Gigot called the bill one of the Senate's "great moments in trivia."

"The real test is on campaign finance," added columnist Mark Shields. "Congressmen are treated by us as the only individuals in our society who are supposed to accept...\$1,000 or \$5,000 from total strangers and then be totally indifferent to the contribution. We don't ask that of anybody else."

Thoughts on Multiculturalism

While there is no denying the moral and political validity of the grievances that animate aspects of the multicultural movement, Jean Bethke Elshtain is right to point out the confusion which currently reigns in the debate over difference. She is also correct that this confusion distracts public attention from confronting the full complexity and difficulty of the nation's historic commitment to both pluralism and democracy. Elshtain calls attention to the lack of clarity about the goals and even the meaning of multiculturalism as the rhetoric of difference has gained currency in educational circles.

It is worth noting, however, that this debate is taking place in the wake of the Cold War, as cultural particularism and nationalism are on the rise worldwide. Compared to the violent "multicultural" conflicts of much of the world, the American debate is remarkably civil, suggesting that the common bonds of democratic responsibility remain stronger than many participants in the debate recognize. As its focus on education suggests, the American discussion is also led not by the have-nots but by relatively privileged intellectuals, often academics. Why then its strident tone and its lack of concreteness in program and purpose?

Part of the answer is that the demand for recognition of difference is driven by two distinct tendencies. Some multicultural advocates are concerned primarily to preserve or strengthen loyalties to community, memory, and tradition threatened by such dynamics of modernity as occupational mobility, intergroup marriage, and global culture. But other voices call for a "place at the table" for differences not previously given positive public standing—gender and sexual orientation, for example. Multiculturalism sometimes means the preservation or revitalization of traditional identities, but it can also mean the political construction of new identities. The second type of identity often runs directly counter to aspects of traditional identity.

This polarity reveals the historical roots of the multicultural aspiration in the American ideal of pluralism. First enunciated during the great period of immigration during the early decades of the century, pluralism articulated an alternative to the melting pot: universal inclusion without sacrifice of cultural meaning. This returns the discussion to Elshtain's central tenet: the overriding importance of the skills of democratic citizenship.

If we accept our historic commitment to constructing a more just and inclusive pluralist democracy, we must then ask how best to promote the breadth of knowledge and the skills of dialogue needed for responsible participation. If because of ideological confusion or moral cowardice, education fails to take this civic responsibility seriously, the United States will miss its opportunity to work out solutions to one of the great historic tasks of humanity: turning our diversity and interdependence to the mutual advantage of all parties involved.

William Sullivan

Welfare Rights and Plutocracy

I applaud Mary Ann Glendon's attention to international and foreign human rights thought as a way of sharpening American awareness of its own treatment of rights. As Glendon points out, U.S. human rights law often seems truncated and short of the emerging international consensus on human rights as elaborated in many United Nations and regional instruments.

We need to break away from the brittle constructions in public conversation about socioeconomic rights. We could do better without the tyranny of such words as "liberalism," "conservatism," "individualism," "socialism," "welfare," and even "rights." We talk too much about some rights and consider them in absolute and legal terms, without a mutualist perception of responsibilities and community. Avoiding the above words might encourage a more empirical description of the regime, the infrastructure of values and interests

that dictate the status of “welfare rights” in debate and implemented law.

What matters most in the American regime? The United States is a plutocracy, a regime for the wealthy and the economically comfortable majority. The processes of the regime are well controlled by what may be the world’s most intricate legal system. The priesthood of lawyers and the designers of the nation’s media imagery serve the plutocrats well under majoritarian democracy.

In part because related rights are attached to wants and not needs, the system fails to devote proportionate national resources to assure satisfaction of basic socioeconomic needs—food, clothing, shelter, health care, parental and community nurturing of children, equal education at a nationally affordable level, and elderly care. The regime plays down or denies socioeconomic rights as appropriately legal human rights, or even puts related needs in opposition to other human rights with civil liberties rhetoric.

It is understandable that the United States does not ratify relevant international human rights instruments and ranks among the less developed countries in meeting the socioeconomic needs of its citizens. Perhaps the most telling symbol of the civilizational inadequacy of American plutocracy is the failure of our child-raising. The data on one- to three-year-olds and other categories are devastating. This failure would be even more stark were it not for the monumental contributions of unpaid local volunteers in church and community organizations, who meet some socioeconomic needs but nevertheless retain a fierce loyalty to the plutocracy. Because of the poverty of plutocracy, the sale is more sacred than the individual human, the freedom to advertise is a legal right, and minimum humane standards of living are not.

Lawrence W. Beer

CONTRIBUTORS

LAWRENCE W. BEER is professor of political science at Lafayette College.

CHARLES DERBER is professor of sociology at Boston College.

R. BRUCE DOUGLASS is associate professor of government at Georgetown University.

AMITAI ETZIONI is author of *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda*.

GAYTON PATRICIA GOMEZ is a student at the Yale Law School.

SHELDON HACKNEY is chairman of the National Endowment for the Humanities and a former president of the University of Pennsylvania.

NETTIE MAYERSOHN is a member of the New York State Assembly, representing the 27th Assembly District.

JAMES LINDEMANN NELSON is associate for ethical studies at the Hastings Center in Briarcliff Manor, New York. He consults with the ethics committee of the Stamford Hospital in Stamford, Connecticut.

DANIEL PHILPOTT is a graduate student associate at the Center for International Affairs at Harvard University.

FRED SIEGEL is professor of history at the Cooper Union, a senior fellow at the Progressive Policy Institute, and a former editor of the *City Journal*.

WILLIAM SULLIVAN is professor of philosophy at LaSalle University.

DANIEL J. TICHENOR is a research fellow in the governmental studies program at the Brookings Institution and a graduate student in political science at Brandeis University.

STEVEN YAROSH is an attorney with the law firm of Kane, Obbish, Propes, and Garippo and a mediator for the Center for Conflict Resolution in Chicago, Illinois. His article is adapted by special permission of the Northwestern University School of Law from Volume 86, Issue 4 of the *Northwestern University Law Review*, pp. 1103–1129.